

CHIEF COURT OF THE PUNJAB

CIRCULAR MEMO

No 14 2549 G—*Dated Lahore the 1st June 1894*

**TO—ALL SESSIONS JUDGES DISTRICT MAGISTRATES CANTONMENT
MAGISTRATES AND OFFICERS EXERCISING MAGISTERIAL POWERS IN MILITARY
STATIONS**

Irregularities
in procedure
in the trial
of offences by
officers exer-
cising magis-
terial powers
in military
stations

The Judges have observed that officers exercising magisterial powers in military stations do not always follow the provisions of the Code of Criminal Procedure in dealing with cases coming before them in a judicial capacity. Even in the larger cantonments to which a trained Cantonment Magistrate is usually attached, it has been found that breaches of cantonment rules, offences under section 34 of the Police Act, and similar cases are not always dealt with according to law, while in smaller military stations, where an untrained military officer is usually invested with the powers of a Magistrate of the third class, it frequently happens that no proper record of evidence and of the proceedings is maintained and that, very generally, all that is done is to enter the name of the person tried the offence committed and the nature of the punishment awarded in a book kept for the purpose, but not authorized by law. Several instances have come to notice in which Cantonment Magistrates exercising summary powers have failed to comply with the requirements of the Code as to the manner in which summary trials shall be conducted.

Ordinary
rules of pro-
cedure must
be observed
Sessions Jud-
ges and Dis-
trict Magis-
trates to
afford good
and efficient
supervision.

2 In cases in which an untrained and inexperienced officer is invested with magisterial powers for the purpose of dealing with petty breaches of sanitary and other similar rules, the same knowledge of the law cannot perhaps be expected as may well be required from officers permanently holding the office of Cantonment Magistrate after undergoing the usual examinations in law and procedure, but the Judges must insist on the ordinary rules of procedure being observed by all officers exercising criminal jurisdiction under their superintendence and control, and look to Sessions Judges and District Magistrates to exercise proper supervision over the way in which such officers discharge their magisterial duties and to afford guidance to those

[Procedure—Criminal.]

who need it. The general rules governing the trial of criminal cases are not difficult to master and any officer who undertakes magisterial duties must make himself acquainted with them.

3 A wide distinction must be made between the administrative and judicial functions of military officers invested with authority under the law applicable to military stations. Fines imposed on the members of sanitary and other establishments for neglect of duty, &c., are so imposed under administrative authority, and with such matters the Chief Court has no concern. But when any person is charged with an offence against the criminal law (whether such offence falls under the Indian Penal Code, the Cantonments Act and Rules made thereunder, the Police Act, or any other local or special law or rule made thereunder in force in a military station), he is entitled to be tried before a competent court in accordance with the procedure prescribed for conducting criminal trials.

4 Criminal proceedings may be initiated in one of three ways, described in section 191* of the Code of Criminal Procedure, viz., (a) on complaint (b) on a police report, or (c) on information received from any person other than a Police Officer, or in the Magistrate's own knowledge or suspicion. By Punjab Government Notification No. 99, dated the 3rd February 1883 all Magistrates are empowered to take cognizance of offences under clause (a) or clause (b) and all Magistrates of the first or second class may take cognizance of offences under clause (c).

5 The first step in initiating proceedings upon complaint is to examine the complainant (section 200 of the Code) on oath or affirmation, and to reduce the substance of the examination to writing. The Magistrate should consult the second schedule of the Code to satisfy himself as to his power to take cognizance of the offence. If the complaint has been made in writing and the Magistrate is not competent to take cognizance of the case, he will proceed as directed in section 201.

6 Section 202 empowers Magistrates of the first and second class to make, or cause to be made, further inquiry before issuing process. Directions on this subject are given in Judicial Circular No. L (3rd edition of Judicial Circulars).

7 If the Magistrate considers that there is no sufficient ground for proceeding he may dismiss the complaint under section 203.

* Now Section 190 Code Act V of 1854.

Distinction to be drawn between administrative and judicial functions

Initiation of criminal proceedings

Examination of complainant

Inquiry under section 202, Code of Criminal Procedure

Dismissal of complaint under section 203

Procedure—Criminal]

Issue of process

8 If he considers that there is sufficient ground for calling upon the accused to answer the complaint he will issue a summons or a warrant as laid down in section 204

Procedure in inquiry into cases triable by Court of Session or High Court

9 When the accused appears or is brought before the Magistrate the latter must first consider whether he has power to try the case himself or whether the case is triable only by the Court of Session or High Court In the latter event he must proceed (provided he is competent to commit for trial) in the manner described in Chapter XVIII of the Code

Three modes of procedure in cases triable by Magistrates

10 If the case is triable by the Magistrate himself he must proceed in one of the following ways —

- (a) In the manner prescribed in Chapter XX of the Code if the case is a summons case as defined in section 4 (f)
- (b) In the manner prescribed in Chapter XXI if the case is a warrant case
- (c) In the manner prescribed in Chapter XXII if the case is one which may be tried summarily and the Magistrate is empowered to try offences summarily In this connection it may be observed that under section 530 of the Code if any Magistrate not being empowered by law in this behalf tries an offender summarily his proceedings are void

Procedure in summary trial

11 It is important to notice that for summary trials two modes of procedure are prescribed one to be followed in cases where there is no appeal (section 263) and the other to be followed in appealable cases (section 264) In appealable cases a formal judgment must be recorded, in non appealable cases the particulars required by section 263 must be recorded in a special register of summary trials and even in the latter class of cases the Magistrate should record the brief statement of the reasons for conviction (clause h) in such manner that this court on revision may be able to judge whether there are sufficient materials to support the conviction The register above mentioned must be used only for trials conducted under Chapter XXII of the Code

Procedure—Criminal.]

Forms of Registers

No. 1.—(CRIMINAL MAGISTERIAL COURTS)

Court of the

of

Register of Cases.

Accused.			Name of complainant.	
Number.	Name, with particulars, race, sex, age, and caste.	Age.	5	6
Offence of which complaint was made			7	8
Date.			11	12
Offence found applicable by Magistrate, with section			13	14
Discharged			15	16
On withdrawal from prosecution.			17	18
Otherwise.			19	20
Convicted.			21	22
Committed.			23	24
Referred.			25	26
Died, escaped, or transferred			27	28
Total.			29	30
Abstract of order disposing of the case.			31	32
Abstract of order of Appellate Court, if any			33	34
Abstract of order of Superior Court in referred cases			35	36
Number of papers on the record			37	38
Signature of record keeper on receipt of record and date.			39	40
REMARKS.			41	42

Procedure--Criminal]

Forms of Registers

Serial No	Date of institution.	Law and section under which proceedings initiated	Police Station.	Description of initiatory paper, with name of petitioner or person making report	Abstract of initiatory paper	PERSONS AGAINST WHOM PROCEEDINGS TAKEN		Intermediate orders	Abstract of final order, with date	NUMBER OF PERSONS		Number of papers on the record	Signature of Record keeper on receipt of record and date	REMARKS.	
						Number	Name, parentage, caste, residence and age			Discharged	Convicted.				
1						7	8	9	10	11	12	13	14	15	

[Procedure—Criminal

Forms of Registers

No. 4—(CRIMINAL—SESSIONS COURT)

Register of Committed Cases

1	Serial Number	
2	Name of committing officer	
3	Offence charged, with Section	
4	Number	
5	Name, with parentage, residence and caste.	
6	Age	
7	Date of commitment	
8	Date of receipt of record from office or	
9	Released by	
10	On with	
11	from pro	
12	drawal	
13	in custody	
14	Not having been detained in	
15	in custody	
16	After having been detained in	
17	custody	
18	Not having been detained in	
19	custody	
20	Other	
21	while	
22	detained in	
23	Total	
24	Abstract of order of High Court in re	
25	ferred cases	
26	Names of Jurors.	
27	Approved of verdict	
28	Wholly	
29	Partially	
30	Dis	
31	approved	
32	of	
33	verdict	
34	submitted case to High Court	
35	under Section 107	
36	Names of Assessors	
37	Agreed with all Assessors	
38	One Assessor	
39	Two Assessors	
40	All Assessors	
41	Diffired from	
42	Whether Ju	
43	go	
44	Assessors	
45	Is trial was with	
46	Assessors	
47	Number of papers on the record	
48	Signature of Record kept on receipt of	
49	record, and date	
50	Remarks	

Forms of Registers

Register of punishment inflicted

YEAR	PERSONS SENTENCED TO		DETAILS OF PUNISHMENT						REMARKS																																																																																										
	Fine	Find or else	Fifteen days and under	Six months and under	Two years and under	Seven years and under	Above seven years	Whipping																																																																																											
1									2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92

Procedure—Criminal]

Forms of Registers

No 7—(CRIMINAL—COURTS OF SESSIONS AND DISTRICT MAGISTRATE)

Court of the
of
Register of Appeals

Serial No	1	2	3	4	5	6	7	8	NUMBER OF PERSONS								17	18	REMARKS
		Date of institution of appeal	Date of receipt of receipt	Abstract of sentence or order if passed against and date	Name of officer whose sentence or order is appealed against	Names of appellants	Date of disposal of appeal	Number of days appeal lasted	Died, escaped, or transferred	Appeal rejected	Sentenced or order confirmed	Sentence reduced or order otherwise altered.	Reversed	Proceedings quashed	New trial or further enquiry ordered	Referred to the High Court	Number of papers on the record	Signature of Record keeper on receipt of record, original and in appeal, and date	

COURT OF THE

OR

Register of *Litigation Cases*

Serial No.	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
	Date of application or calling for record (where no application was presented)	Date of receipt of record	Abstract of order in which is subject of revision and date	Name of officer whose order is with respect			Date of disposal of case	Number of days case lasted	Died, escaped, or transferred	Application rejected	Order confirmed	Order modified or altered	Order annulled	Committal, new trial, or further enquiry ordered	Referred to the High Court	Number of papers on the record	Signature of recorder keeper on receipt of record, original, and in revision, and date	Remarks

[Procedure—Criminal.]

Forms of Registers

Procedure—Criminal.]

Forms of Registers

No. 9.—(CRIMINAL—ALL COURTS.)

Register of witnesses attending the Criminal Court

Serial No.	Date of arrival.	Name and residence of witnesses	Names of parties	Charge	Date of examination	Date of discharge	NUMBER OF DAYS DETAINED									Remarks		
							One day	Two days	Three days	11	12	13	14	15	16		17	
1						7	8	9	10	11	12	13	14	15	16	17	18	

No 10 (CRIMINAL—ALL COURTS)

Registers of fines, penalties of forfeited bonds, etc., for the Court of

Serial No. and year of series.	Number of case.	Names of parties.	Date of order	Amount of fine or penalty	Name of person by whom payable	Amount of fine (if any) awarded as compensation or reward	Amount (if any) remitted and by what authority	Date of warrant for levy	REALIZATIONS			COMPENSATION OR REWARD PAID		FINES OR PENALTIES FORWARDED		WHITTEN OFF AS INTEREST PAID		REMARKS	
									Date	For credit to Government	For credit to Local or Municipal Fund	Date	Amount	Date	Amount	Date	Amount		
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	

NOTE.—At the end of every six months, the presiding officer of each Court will certify in the register that he has taken proceedings in the case of all outstanding fines and penalties that seem capable of realization. All fines, penalties, etc., outstanding at the close of the half year will be brought forward and totalled in the register in red ink at the foot of the certificate recorded as above directed as the opening entries of the next half year.

[Procedure—Criminal.

Forms of Registers.

Procedure—Criminal

Forms of Registers

No. 11—(CRIMINAL—ALL CRIMINAL COURTS)

REPORTER OF LAPSES OF COMPLAINTS AND WITNESSES

Printed by the Chief Commissioner of Aynore Vernam in his Notification No 1001 L2, dated the 1st April 1959

1	2	3	4	5	6	7	8	9	10	11	12	13	14
Criminal No.	Number of cases.	Complainants	Witnesses	Date, that is (a), (b) or (c), paragraph 2 of Chief Commissioner's Notification No 504 127, dated the 20th July 1956	Residence	Number of days allowed for journey to and from Court	For how many days detained at Court	Total of columns 7 and 8	Diet allowance	Travelling expenses	Total of columns 10 and 11	Initials of officer whom paid	Remarks

[Procedure—Miscellaneous

Destruction of useless Records

[1] No 605 359 —*Abu the 3rd June 1889*

The following rules framed under Section 5 of Act III of 1879 for destruction of useless Judicial Records and Registers in Courts subordinate to the Judicial Commissioner Ajmere have been sanctioned by the Governor-General in Council and are published for general information

GENERAL

RULE I

All judicial records and registers which by the lapse of a year, have become liable to destruction under the following Rules shall be destroyed during the months of *August and September*

RULE II

The destruction of such records and registers shall be carried out —

(a) In the District Record Office under the supervision of one of the District Officers

(b) In the Small Cause Court Ajmere, under the supervision of the Clerk of the Court

(c) In the Small Cause Courts at Nasirabad and Beawar, under the supervision of the Judges of those Courts

RULE III

The destruction shall be effected by tearing with the exception of the court fee stamps which shall be burnt in the presence of the supervising officer. The paper shall then be sold by Public Auction, and the proceeds shall be credited to the Record Office Fund

RECORDS

RULE IV

All Civil records required by these Rules to be preserved in perpetuity shall be arranged in three separate Files A, B and C

RULE V

All other Civil and all Criminal records shall be arranged in Files A and B only

Procedure—Miscellaneous.]

Destruction of useless Records

RULE VI

In the case of Civil records referred to in Rule IV File A shall contain the following papers —

(A) In all original cases —

- 1 The index of papers
- 2 The order sheet
- 3 The plaint together with any schedule annexed thereto, and all documents, whether original or copies, filed with the plaint

NOTE.—In miscellaneous cases, the petition or written application of the party setting the Court in motion will take the place of the plaint

- 4 The written statements and pleadings of the parties
- 5 Applications of parties who are strangers to the suit, with the Court's orders thereon
- 6 The memorandum of issues, with amended or additional issues, if any.
- 7 All depositions of witnesses
- 8 All documents received by the Court during the trial as evidence between the parties
- 9 Report of Commissioners
- 10 Reports furnished by the Record Department
- 11 Award or other final return of Arbitrators and documents submitted therewith
- 12 Deeds of withdrawal, compromise, or confession of judgment
- 13 Orders of arrest, or attachment before judgment, with all documents relating thereto
- 14 The judgment or other final order
- 15 The decree
- 16 All notes in the handwriting of the Judge
- 17 Applications for review of judgment with the Court's orders thereon.
- 18 Judgments and decrees of Appellate Courts, if any
- 19 All orders passed in execution proceedings, with all applications, objections and receipts and acknowledgments filed in execution proceedings
- 20 Plan of locality

[Procedure—Miscellaneous.

Destruction of useless Records

(B) In Appeal cases —

- ✓ 1 The index of papers
- 2 The order sheet
- 3 The petition of appeal
- 4 Copies of judgments and decrees of Lower Courts
- 5 Any cross objection filed by the respondent under section 561 of the Code of Civil Procedure
- 6 Finding on issues referred to Lower Court for trial
- 7 Reports of Commissioners
- 8 Any additional evidence, oral or documentary, admitted by the Appellate Court under section 568 of the Civil Procedure Code
- 9 Award or other final return of arbitrators
- 10 Deeds of withdrawal, compromise, or confession of judgment
- 11 The judgment or other final order
- 12 The decree of the Appellate Court
- 13 All notes in the handwriting of the Judge
- 14 Applications for review of judgment with the Court's orders thereon
- 15 Any judgment and decree of a superior Court of Appeal

File B shall contain the following papers —

(a) In Original cases —

- 1 Commissions and proceedings held thereunder
- 2 Application to refer to arbitration and references to arbitration, with the proceedings, and any application to set aside the award
- 3 Writs in execution proceedings of which service has been effected, notices reports and returns relating thereto

(b) In Appeal cases —

- 1 Issues referred for trial by the Appellate Court with the evidence taken thereon
- 2 Commissions and proceedings held thereunder
- 3 Applications to the Appellate Court to refer to arbitration references with the proceedings, deposition submitted with the award and any applications to set aside the award, with the Court's orders thereon

File C shall consist of all papers not included in Files A and B

Procedure—Miscellaneous]

Destruction of useless Records

RULE VII

In the case of Civil records referred to in Rule V, File A shall contain the following papers —

(a) In original cases heard by any Court other than a Court of Small Causes —

Papers Nos 1 to 20 of File A and 1 to 3 (a) of File B referred to in Rule VI

(b) In Appeal cases —

Papers Nos 1 to 15 (File A) and 1 to 3 (File B) in paragraph B of Rule VI

(c) In cases heard by a Court of Small Causes File A shall contain —

1 The index of papers

2 The plaint with the papers annexed thereto

3 Any cross claim set up by the defendant by way of set off

4 All documents received by the Court during the trial as evidence between the parties

5 Any award of arbitrators or deed of withdrawal compromise or confession of judgment

6 The judgment or other final order

7 The decree

8 All notes in the handwriting of the Judge

9 Any application for review of judgment or for a new trial under Section 21 of Act XI of 1865 with the Court's order thereon

10 Any order passed by the High Court North Western Provinces as a Court of reference or by the Judicial Commissioner of Ajmere as a Court of revision

11 Summonses issued to defendants in cases heard *ex parte*

12 All orders passed in execution proceedings with all applications writs of which service has been effected notices reports and returns relating thereto receipts and acknowledgments filed in execution proceedings

File B shall consist of all papers not included in File A

{Procedure—Miscellaneous

Destruction of useless Records

RULE VIII

In the case of criminal records File A shall contain the papers noted below —

(a) In original cases tried by a Court of Sessions —

- 1 The index of papers
- 2 The order sheet
- 3 The charge original and as amended by the Sessions Judge
- 4 All depositions of witnesses and statements of accused persons, including depositions and statements transferred from the file of the Committing Magistrate
- 5 All documentary evidence
- 6 The final order
- 7 The finding of the assessors or verdict of the jury
- 8 All notes in the handwriting of the Judge
- 9 The judgment of the Appellate Court, if any
- 10 Any order passed by the Judicial Commissioner of Ajmere as a Court of reference or revision
- 11 Warrants returned after execution of sentence
- 12 All proceedings relating to the realization of fines

(b) In Magisterial inquiries and trials —

- 1 The index of papers.
- 2 The order sheet
- 3 The final police report (chalan) or petition of complaint
- 4 All depositions of witnesses and statements of accused persons
- 5 All documentary evidence
- 6 The charge, where a formal charge is drawn up
- 7 The final order of the Court
- 8 All notes in the handwriting of the Magistrate
- 9 The order of the Sessions Judge in cases referred for confirmation under section 34 [a] of the Criminal Procedure Code

[a] Under the present law (Act V of 1893) sentences passed by District Magistrates empowered under section 30 no longer require confirmation by the Session Judge, such sentences being appealable to the Court of Sessions and High Court according to the nature of sentence. See section 45 of the Act.



Procedure—Miscellaneous]

Destruction of useless Records

- 10 The judgment of the Appellate Court if any
- 11 The judgment of the Judicial Commissioner in revision or appeal if any
- 12 Warrants returned after execution of sentence
- 13 All proceedings relating to the realization of fines
- 14 Bonds for good behaviour taken under section 110 of the Code of Criminal Procedure

(c) In Appeal cases —

- 1 The index of papers
- 2 The order sheet
- 3 The petition of appeal
- 4 Copy of the judgment of the Lower Court
- 5 Any additional evidence taken under section 423 of the Criminal Procedure Code
- 6 The final order of the Court
- 7 All notes in the handwriting of the judge

File B shall consist of all papers not included in File A

RULE IX

The following records shall be preserved in perpetuity —

- 1 File A of all suits and appeals involving the title to immovable property as defined in section 2, clause 5 of Act I of 1868

NOTE —In suits for arrears of rent or for a share in the produce when the right is not disputed and only the amount contested clause 1 of Rule VIII will apply

- 2 File A of all suits and appeals relating to the succession to an office or to establish or set aside an adoption or otherwise determine the status of an individual and of all suits and appeals relating to trusts or religious endowments.

- 3 Records of attachment sale and delivery of immovable property in execution of decrees including all objections proceedings and orders thereon

- 4 File A of suits relating to the redemption or foreclosure of mortgages of immovable property under sections 7 and 8 of Regulation XVII of 1806 and the Transfer of Property Act

5. File A of proceedings under Acts XIV of 1841, XXV and XL of 1855 XXVII of 1850 IX of 1861 X of 1865, and of all cases connected with custody and disposal of immovable property.

6. File A of proceedings under the Indian Divorce Act IV of 1869.

7. Records relating to the disposal of immovable property forfeited to Government under section 62 of the Indian Penal Code.

8. Correspondence with other offices on matters connected with the administration of justice, including annual reports and the statements appended thereto provided that heads of offices may, with the previous sanction of the Commissioner of the Division, order the destruction, after three years, of any correspondence of a merely formal or ephemeral character, after personally satisfying themselves in regard to each paper ordered to be destroyed, that its retention is no longer necessary.

NOTE.—A list of all papers which it is proposed to destroy under this clause must be prepared and in the case of a subordinate office, be submitted to the Commissioner for sanction. This list will be preserved in perpetuity.

RULE X

The following records shall be preserved for 50 years and then be destroyed —

1. File A of cases relating to any of the offences specified in section 44 of the Criminal Procedure Code, as offences of which all persons are bound to give information, in which any of the suspected persons have escaped apprehension provided that whenever it is known that the offender or offenders on whose account such records are kept are dead, the records may be destroyed.

2. File A of criminal cases in which the offence is punishable with death, and it is not known who the offender is.

NOTE.—The records specified in clauses 2 and 3 when the time comes when under ordinary circumstances they would be liable to destruction shall be removed to a separate bundle of cases of absconding and unknown offenders.

3. File A of criminal cases in which a lunatic is concerned, unless the lunatic shall have been subsequently tried or have died.

Procedure Miscellaneous]

Destruction of useless Records

RULE XI

The following records shall be preserved for 20 years and shall then be destroyed unless their preservation is necessary on any of the special grounds noted below —

1 File A of Sessions cases provided that if the sentence has not been fully executed the record shall be preserved until the return of the warrant and then destroyed

2 The charge finding and sentence in cases in which conviction has been had of an offence for which enhanced punishment is provided on a second or subsequent conviction

3 File A of cases in which any public servant has been tried what ever may have been the result of the case

RULE XII

The following records shall be preserved for 12 years and shall then be destroyed —

1 File A of cases under Chapter XXIV of the Criminal Procedure Code in which maintenance is awarded

2 Insolvency proceedings under Chapter XX of the Civil Procedure Code

3 File A of cases regarding compensation for robberies

4 File B of cases referred to in Rule IV

RULE XIII

The following records shall be preserved for six years and shall then be destroyed unless their preservation is necessary on any of the special grounds noted below —

1 File A of all civil suits and appeals other than suits and appeals falling under Rule IX provided that if the decree has not been fully executed or become incapable of further execution File A must be preserved until such time as the decree has been fully executed or become incapable of further execution

NOTE — A note of all cases destroyed under this clause shall be made at the time of destruction in the list of cases put up with the village bundle



[Procedure—Miscellaneous.]

Destruction of useless Records

2 File A of cases tried by the Magistrate of the District under section 34 of the Criminal Procedure Code in which he has inflicted a heavier punishment than might have been inflicted by a Magistrate of the first class provided that if the sentence has not been fully executed the records shall be preserved until the return of the warrant and then destroyed

3 Records relating to the realization of fines of Criminal Courts

RULE XIV

The following records shall be preserved for three years and shall then be destroyed

1 File of criminal cases enquired into and tried by Magistrates and not otherwise provided for in these Rules

2 File A of appeals from orders passed by Magistrates.

3 All correspondence between the Assistant Commissioner and his subordinates and other records periodical statements reports proceedings, applications &c not expressly provided for in these Rules provided that in respect of records falling under this clause heads of offices must exercise their discretion in preserving reports returns and proceedings likely to be useful in the future as containing the result of inquiries or other information or the opinions of experienced officers on matters connected with the general administration of justice

RULE XV

The following records shall be preserved for one year and shall then be destroyed

(a) 1 File B of all civil and criminal cases and appeals except those referred to in Rule IV

(b) File C of cases referred to in Rule IV

NOTE.—A note should be made on the index of papers in File A opposite each paper destroyed under this clause

2 Proceedings of other Courts and offices forwarding notices proclamations calling for record &c.

Procedure—Miscellaneous]

Destruction of useless Records

RULE XVI

The periods prescribed above shall except in the cases noted below, be taken to run from the date of the final order of the Court of first instance or, in the event of an appeal from that of decision of the appeal

In cases under Chapter XXXVI of the Code of Criminal Procedure in which maintenance is awarded the period shall be taken to run from the date of the last order passed for the enforcement of the award In insolvency proceedings the period shall be taken to run from the order of the Court declaring the insolvent discharged from further liability

RULE XVII

A note of every record destroyed under the above Rules shall be made at time of destruction in the Register in which the case is entered, under the signature of a responsible officer A note of all cases completely destroyed shall be made at the time of destruction in the list of cases put up with the Village bundle

RULE XVIII

Before destroying File A of any judicial proceedings care must be taken to separate and remove from the file all documents belonging to private persons or to Government as a party to the proceeding which have not been superseded by the decree or impounded in the case in which they were produced These documents shall be preserved and tied up in a separate parcel, and notice shall whenever practicable be given to the persons who produced them a Court requiring them to take them back into their own keeping within six months from the date of the notice, and warning them that they will be kept at their risk and that the Court declines all responsibility for them

REGISTERS

RULE XIX

The following judicial registers shall be preserved for 12 years from the date of the last entry and shall then be destroyed —

Civil Register No IV

Ditto No XII



[Proceduro—Miscellaneous

Destruction of useless Records

Criminal Register No I.

Do do No III

Do do No IV

Do do No V

Do do No XV.

RULE XX

The following judicial registers shall be preserved for six years from the date of the last entry and shall then be destroyed —

Civil Register No XIV.

Ditto No XVI

Ditto No XVII

Criminal Register No XIV.

Ditto No XVI

Civil and Criminal Register O

Ditto do D

RULE XXI

The following judicial registers shall be preserved for three years from the date of the latest entry, and shall then be destroyed —

Civil Register No V

Ditto No VI

Ditto No VII.

Ditto No X.

Ditto No XV.

Ditto No XX

Ditto No XXI

Ditto No XXII

Criminal Register No XI

Ditto No XII

Ditto No XIII

Ditto No XVII

Civil and Criminal Register, E.

Ditto do F

Ditto do G

Ditto do H

RULE XXII

No judicial registers shall be destroyed, except as directed above



Procedure—Miscellaneous]

Rules for grant of copies

RULES FOR GRANT OF COPIES TO SUITORS AND OTHER PERSONS IN THE COURTS AND OFFICES IN AJMERE MERWARA, SANCTIONED BY THE CHIEF COMMISSIONER IN HIS LETTER NO 570 22A DATED 19TH MAY 1887

CHAPTER I

Appointment of Section writers

Copies of documents filed in the Courts and Offices of Ajmere Merwara will be made by Section writers appointed for each Court with the previous sanction of the Commissioner and District Judge

Provided that in Courts and Offices where the copying work is not sufficiently remunerative for the employment of a Section writer the duty of preparing copies may with the sanction of the Commissioner and District Judge, be delegated to a member of the Court or office establishment

2 So far as practicable such Section writers only should be appointed as are qualified under the standing orders of Government for employment in Government service

3 The presiding Officer of each Court or Office shall exercise the necessary supervision with a view to ensure the correct and prompt preparation of copies their delivery to the applicants, and the due accounting and adjustment of the fees realized from them

4 In the Courts and Offices of the Commissioner the Assistant Commissioners the Judicial Assistant Commissioner the Cantonment Magistrate, Nasirabad and the Extra Assistant Commissioner the Section writers shall perform their work under the immediate supervision of the Head Clerk Clerk of Court or the Reader as the presiding Officer may think fit

5 The fees shall be collected in cash by the officer to whom applications for copies are presented and shall be received by the particular Sectioner by whom they are earned but nothing herein contained shall prevent the distribution of fees among the several Sectioners employed in a Court or Office in such manner as may be determined by the presiding Officer with the concurrence of the Commissioner and District Judge



[Procedure—Miscellaneous

Rules for grant of copies

CHAPTER II

Persons who are entitled to copies

6 A plaintiff or a defendant is entitled at any stage of the suit to obtain copies of the record of the suit including exhibits which have been put in as evidence and memoranda of depositions of witnesses provided that a party who has been ordered to file a written statement is not entitled to inspect or take a copy of a written statement filed by another party until he has filed his own

7 A stranger to the suit may after decree obtain, as of right, copies of the plaint written statements, affidavits and petitions filed in the suit and may for sufficient reason shown to the satisfaction of the Court, obtain copies of any such documents before decree

8 A stranger to the suit may also obtain, as of right, copies of judgments decrees or orders at any time after they have been passed or made

9 For sufficient reason shown to its satisfaction, a Court may grant to a stranger to the suit copies of exhibits put in evidence not being of the nature referred to in section 130 of the Indian Evidence Act, 1872

10 An accused person or a person affected by a judgment or order of a Criminal Court, is entitled to a copy of the judgment or order or any other proceeding

Explanation — A complainant is within the meaning of this rule

11 The Magistrate of the District and the District Superintendent of Police are entitled to copies of judgments of the Court of Session

12 A commanding Officer or the Head of a Department is entitled to copies of judgments of the Court of Session in cases where a soldier or a public officer subordinate to him is convicted of an offence

13 Government law officers are entitled to copies of decrees in pauper suits and appeals

14 Government law officers and any person specially authorized in this behalf by the Magistrate of the District are entitled to copies of the whole or

Procedure—Miscellaneous.]

Rules for grant of copies

part of any record when required for the purpose of conducting any trial or investigation or appeal on the part of Government in any Criminal Court

15 Copies of official correspondence and reports should not, as a rule, be granted Should any one apply for a copy of a letter received from superior authority, he should be referred to the officer from whose office the letter issued

CHAPTER III

Collection of copying charges and computation of stamps on copies

16 For the preparation of copies other than those granted free of charge under these rules a uniform charge, which will be levied in cash, will be made at the rate of four annas for the first folio and two annas for each subsequent folio Each folio shall be ruled and shall contain twenty five lines, each line to contain no more nor less than six English or twelve Vernacular words

17 The Court fee payable under the Court Fees Act, 1870, will be levied by affixing the proper stamp to the first folio of the copy

18 When a copy is chargeable with stamp duty under article 22 of Schedule I of the Indian Stamp Act, 1879, the heading of the copy, or, if there is no heading to be copied then the first line of the copy will be written along the middle of the face of the sheet, bearing the impressed stamp which represents the stamp duty chargeable on the copy

19 Under article 1 (a) Schedule II of the Court Fees Act, 1870, every application for a copy must bear a court fee stamp of one anna, unless it be made by, or on behalf of, a prisoner or other person in duress or under restraint of any Court or its officers, or be of the nature described in Rule 29

20 For the purposes of these rules copies chargeable under the Court Fees Act, 1870, are copies of (i) judgments or orders not being, or having the force of decrees, (ii) decrees or orders having the force of decrees, (iii) documents liable to stamp duty under the Indian Stamp Act, 1879, when left by parties to suits or proceedings in place of originals withdrawn under Section 144 of the Code of Civil Procedure, (iv) any judicial proceeding not otherwise provided for by the Court Fees Act, 1870, and (v) any accounts, statements reports or the like, taken out of any Civil or Criminal Court or Office



[Procedure—Miscellaneous

Rules for grant of copies

21 The fees leviable are set forth in articles 6, 7, 8 and 9 of Schedule I of the Court Fees Act, 1870 —

Number	Document	Proper Fee
6 Copy or translation of a judgment or order not being or having the force of a decree	When such judgment or order is passed by any Civil Court other than a High Court, or by the presiding officer of any Revenue Court or Office or by any other Judicial or Executive Authority— (a)—If the amount or value of the subject matter is fifty or less than fifty rupees (b)—If such amount or value exceeds fifty rupees When such judgment or order is passed by a High Court	Four annas Eight annas One rupee
7 Copy of a decree or order having the force of a decree	When such decree or order is made by any Civil Court other than a High Court or by any revenue Court— (a)—If the amount or value of the subject matter of the suit wherein such decree or order is made is fifty or less than fifty rupees (b)—If such amount or value exceeds fifty rupees When such decree or order is made by a High Court	Eight annas One rupee Four rupees
8 Copy of any document liable to stamp duty under the General Stamp Act, 1879, when left by any party to a suit or proceeding in place of the original withdrawn	(a)—When the stamp duty chargeable on the original does not exceed eight annas (b)—In any other case	The amount of the duty chargeable on the original Eight annas
9. Copy of any revenue or judicial proceeding or order not otherwise provided for by this Act, or dred and of three	Eight annas.
with the executive administration of a Division		

Procedure—Miscellaneous.]

Rules for grant of copies

22 Copies or extracts certified to be true copies or extracts by, or by order of any public officer and not chargeable under the Court Fees Act, 1870, are, unless exempted under article 9 of Schedule II of the Indian Stamp Act 1879, chargeable with stamp duty under article 22 of Schedule I of the latter Act, the terms of which are as follows —

- (a)—If the original was not chargeable with duty or if the duty with which it was chargeable does not exceed one rupee—eight annas
- (b)—In any other case—one rupee

23 Court fees are remitted on the following documents, namely —

- (1) Copy of a charge framed under Section 210 of the Code of Criminal Procedure, 1882, or of a translation thereof, when the copy is given to an accused person
- (2) Copy of the evidence of supplementary witnesses after commitment when the copy is given under Section 219 of the said Code to an accused person
- (3) Copy or translation of a judgment in a case other than a summons case, and copy of the heads of the Judges charge to the jury, when the copy or translation is given under Section 371 of the said Code to an accused person
- (4) Copy or translation of a judgment in a summons case, when the accused person to whom the copy or translation is given under Section 371 of the said Code is in jail
- (5) Copy of an order of maintenance when the copy is given under Section 490 of the said Code to the person in whose favour the order is made or to his guardian if any, or to the person to whom the allowance is to be paid
- (6) Copy furnished to any person affected by a judgment or order passed by a Criminal Court of the Judges charge to the jury, or of any order, deposition, or other part of the record, when the copy is not a copy which may be granted under any preceding clause of this Notification without the payment of a Court-fee, but is a copy which on its being applied for under Section 548 of the said Code, the Judge or Magistrate, for some special reason to be recorded by him on the copy, thinks fit to furnish without such payment

- (7) Copies of all documents furnished under the orders of any Court or Magistrate to any Government Advocate or pleader or other person specially empowered in that behalf for the purpose of conducting any trial or investigation on the part of the Government before any Criminal Court
- (8) Copies of all documents which any such advocate pleader or other person is required to take in connection with any such trial or investigation for the use of any Court or Magistrate or may consider necessary for the purpose of advising the Government in connection with any criminal proceedings
- (9) Copies of judgments or depositions required by officers of the Police Department in the course of their duties

(Vile Notification of the Government of India No 310 dated the 21st January 1886 published at Page 40 of the Gazette of India Part I)

24 Court fees payable under articles 6 7 and 9 of Schedule I of the Court Fees Act 1870 have also been remitted by the Notification of the Government of India Department of Finance and Commerce No 1361 dated the 24th June 1881 on copies furnished by Civil and Criminal Courts for the private use of persons applying for them The effect of this Notification is that any copy chargeable under article 6 7 or 9 of Schedule I of the Court Fees Act 1870 may be furnished by a Civil or Criminal Court on payment of copying charges only and without payment of any Court fee If however the applicant to whom a copy has been granted without payment of any Court fee wish afterwards to have it filed exhibited or recorded in any Court or received by any public officer he must unless the copy be one on which Court fees have been remitted stamp it under article 6 7 or 9 as the case may be before it is presented to such Court or public officer Court fees are not payable on copies of awards made under the Land Acquisition Act 1870 when the copies are issued to persons claiming under such awards Court fees are not payable on copies issued to proper plaintiffs or appellants of judgments and decrees in proper suits or appeals

25 A copy of any paper which a public officer is expressly required by law to make or furnish for record in any public office or for any public purpose is exempted from stamp duty by article 9 Schedule II of the Indian Stamp Act 1872

under s 156, and direct the police to submit a charge sheet. That means a Magistrate cannot proceed under Chapter XIV after acting under Chapter XVI.⁵ When a complaint is referred under this section by the Magistrate for investigation, the police need do no more than make a report.⁶ But this does not debar them from exercising their ordinary powers of arrest and investigation and from sending up the accused for trial under a charge sheet.⁷ The Bombay High Court⁸ and the Sind Judicial Commissioner's Court⁹ have, however, held that where an investigation by the police has been ordered under this section, the police have no power to send up the accused for trial under a charge sheet.

- (3) *Where the accused is a police officer* — If the accused is himself a police officer, it is not proper nor is it contemplated that the Magistrate should call for a report from the police officer, who is himself the accused¹⁰ or from a superior or other police officer.¹¹ In such cases the Magistrate himself should hold the inquiry¹² or direct a local inquiry by a subordinate Magistrate.¹³ Complaints against police-officers should be handled with the greatest care. In such cases, the complainant should be given every facility to prove his allegations.¹⁴

It is not desirable that a complaint against a person who is alleged to have acted in collusion with the police should be handed over to the police for investigation.¹⁵ It has, however, been held in the undermentioned case¹⁶ that it is not illegal to send a complaint, in which the *bona fides* of the police are impugned, for inquiry or investigation by a police officer.

Also see S 156 Note 5

(18) 2 Cal L R 514 (S/b) *Deputoolah v Nazim Sherah*

Also see S 156 Note 5

8 (29) 16 AIR 1929 Bom 72 (73, 74) 53 Bom 339 30 Cri L Jour 781, *Nur Mahomed Faymahomed v Emperor*

9 (38) 25 AIR 1938 Sind 113 (116) ILR (1939) Kar 85 39 Cri L Jour 681 (FB), *Emperor v Bilha Moti* (AIR 1933 Sind 136 27 Sind L R 67 34 Cri L Jour 703, overruled, AIR 1934 Sind 20 35 Cri L Jour 891 is no longer good law after this Full Bench decision — Police are not prevented from arresting the accused under S 54)

(20) 7 AIR 1920 All 125 (125) 21 Cri L Jour 416, *Mewa Lal v Emperor* (Another case)

Sahai.

(05) 2 Cri L Jour 51 (53) 9 Cal W N 199 (Cal) *Haladar Bhums v Sahai* of Police (District

ahar v Narayana

Also see Section 203, Note 9

15 (33) 20 AIR 1933 Sind 339 (340) 27 Sind L R 387 35 Cri L Jour 24, *Mahliomal Dansing v Gianchand Saramatras*

16 (40) 27 AIR 1910 Lah 208 (209) 41 Cri L Jour 618, *Kanya Ram v Chanan Mal*

(4) *Report* — The report called for under this section should form part of the record and as such a copy thereof can be given to the accused¹⁷ The report should be submitted to the same Magistrate who had ordered the investigation and not to another Magistrate¹⁸ Such a report is absolutely privileged¹⁹

19 “Such other person” — The Magistrate may direct an investigation by such other person as he thinks fit Such other person under this section includes a panchayat within the meaning of the U P Village Panchayat Act¹ A master is not a fit person to be directed to investigate and make a report in a case of complaint against his servant²

It is illegal for a Magistrate to call upon the accused himself to make a report and act upon it³

20 *Examination of the complainant* — *Proviso* — The proviso to sub s (1) makes it obligatory on the Magistrate to examine the complainant on oath before directing an inquiry or investigation under this section save in the case where the complaint is by a Court Under this section before it was amended in 1973 such an examination was a pre requisite whether the Magistrate intended to make a personal inquiry himself or whether he intended to give a direction for an inquiry or investigation The present proviso requires such examination to be made only where a direction for inquiry is to be made and not where the Magistrate intends to make a personal inquiry himself The intention of the Legislature in enacting this proviso seems to be that the Magistrate should thoroughly understand the case before he decides to postpone the issue of process and embarks upon the unusual procedure of getting the matter investigated by some other agency⁴

A complaint therefore cannot be sent for inquiry or investigation unless the complainant has been examined on oath⁵ and if any report of such an enquiry or investi

47 (42) 29 AIR 1942 Rang 51 (51) 1941 Rang L R 590 *Maing Shein v The King* (Accused is entitled to inspect or get copy of police report as well as statements of persons examined by police)

(87) 14 Cal 141 (144) *Baidyanath Singh v Muspratt*

(31) 18 AIR 1931 Mad 429 (499) 37 Cri L Jour 689 *Muthu Kumara Pillai v Emperor*

Also see Sect on 548 Note 4

18 (18) 5 AIR 1918 Lah 123 (124) 19 Cri L Jour 436 *Thakar Singh v Karpal*

19 (37) 24 AIR 1937 All 90 (94 96) 1 L R (1937) All 390 *Venka Madho Prasad v M Wajid Ali*

Note 19

1 See Sect on 72 (1) (a) U P Village Panchayat Act (U P Act 6 [VI] of 1920)

[See also (26) 13 AIR 1926 All 193 (193) 27 Cri L Jour 276 *Kadhori v Emperor*]

2 (15) 2 AIR 1915 Cal 733 (734) 16 Cri L Jour 320 28 Ind Cas 658 (656) *Emperor v Rabbis*

(05) 10 Cal W N xxxvi (xxxix) *Neckel and v Emperor*

in *Halwai v Kariman*

Note 20

1 (49) 29 AIR 1942 Pesh 61 (62) 43 Cri L Jour 803 202 Ind Cas 210 *Jit Singh v Ayub Khan*

2 (42) 29 AIR 1942 Pesh 61 (62) 43 Cri L Jour 803 202 Ind Cas 210 *Jit Singh v Ayub Khan*

v Emperor

gation is called for without such examination, and is made, it is without jurisdiction and cannot form the basis of any further action and a complainant, who was not examined, cannot be prosecuted with regard to his complaint, dismissed on such a report³ Nor can the complaint be dismissed under S 203 merely on the basis of such report without examining the complainant on oath⁴ But the Magistrate can take cognizance of an offence on the basis of a report by a police officer submitted under this section and in such a case, cognizance will be taken under clause (b) and not clause (c) of S 190⁵ As to whether non-compliance with the proviso is curable under section 537, see Note 23.

21. Powers of the inquiring or investigating officer.

- (1) A Magistrate inquiring into a case can exercise all the powers of a Magistrate, including the power of taking evidence of witnesses on oath. But he has not the powers of a police officer to keep an accused in custody for the purpose of an inquiry¹
- (2) A police officer making an investigation under this section has all the powers conferred on him under Chapter XIV. He can make a full inquiry from the complainant and his witnesses and the defendant and his witnesses²
- (3) Any other person directed to make an investigation has all the powers of an officer in charge of the police station except the power of arrest without warrant,³ i.e., the powers conferred under ss 53, 56, 94, 127, 128, 153, 156 and 157, the power to arrest without warrant remains with the Magistrate and a police officer⁴

22 Police in the towns of Calcutta and Bombay — Sub-section (3) — See Notes on Section 1

23 Revision — When a Magistrate does not act as he should under this section, the aggrieved party is entitled to apply in revision and the High Court has jurisdiction to interfere if necessary in the interests of justice¹ If any irregularity in procedure under this

(01) 28 Cal 552 (661) 5 Cal W N 457 (FB) *Dwarkanath v. Beni Madhab*

v Emperor

(21) 8 AIR 1921 Sind 84 (84) 15 Sind L R 200 23 Cri L Jour 243, *Mulchand Pamanmal v. Kessomal Ramchand*

3 (11) 12 Cri L Jour 539 (541) 12 Ind Cas 515 1912 Pca Re No 2 Cr, *Ali Mohamad v. Emperor*. (1900) 27 Cal 921 (924), *Mahadeo v. Queen Empress*

(03) 30 Cal 923 (925-926) 7 Cal W N 525 *Lokenath v. Sanyasi*

Note 21

1. (30) 17 AIR 1930 All 259 (259, 260) 52 All 457 31 Cri L Jour 936, *Anand Behar, Lal v. Emperor*

Also see S 167, Note 3

Note 23

1 (39) 25 AIR 1939 Mad 879 (879) 39 Cri L Jour 984, *In re Venkatasubba Pillai*

section has not resulted in a miscarriage of justice the High Court will not make any order in revision, which can result only in harassment to the parties and the waste of public time.² The following are instances of such irregularities where the High Court will not interfere unless there is a failure of justice —

- (1) the omission of the Magistrate to record reasons for postponing issue of process³
- (2) requiring the accused to attend at the inquiry or his examination thereat and allowing of cross-examination and arguments *inter partes*⁴
- (3) omission to examine the complainant under the proviso⁵
- (4) mere inadequacy of the inquiry the High Court will not interfere with the details of an inquiry or investigation⁶
- (5) where the Magistrate has exercised his discretion under this section to postpone the issue of process⁷ or where the Magistrate does not record the statements of witnesses examined before him but relies on the statements made before the police⁸

Where however, in a case, where the inquiry is made by the police in a perfunctory manner and the report is considered by the Magistrate also in a perfunctory manner, the High Court will interfere and insist on the provisions of the section being strictly complied with, though where the inquiry has been carefully made and considered, it will refuse to interfere.⁹

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- 2 (16) 5 AIR 1919 Pat 350 (351) 19 Cri L Jour 263 *Sheonandan Mahlon v Emperor*
 3 (17) 4 AIR 1917 All 91 (92) 18 Cri L Jour 765 (795 796), *Madhogir v Rashid Ahmad*
 (91) 19 AIR 1931 Bom 524 (525) 55 Bom 770 33 Cri L Jour 72 *Emperor v Finan*
 (29) 16 AIR 1929 Cal 176 (177) 80 Cri L Jour 705 *Ajoy Krishna v S G Bose*
 (01) 2 Weir 244 (245) *Venkatesulu Naidu v Durvasa Rangayen*
 (02) 25 Mad 546 (548) 2 Weir 245 *Emperor v Alogiriswami*
 (09) 10 Cri L Jour 117 (118) 2 Ind Cas 618 (Mad) *Rangammal v Krishnasachari*
 (11) 12 Cri L Jour 463 (464) 11 Ind Cas 999 (Mad) *In re Arula Kotiah*
 (18) 5 AIR 1918 Pat 652 (653) 19 Cri L Jour 527, *Mushari Ram v Raj Kishore Lal*
 (26) 13 AIR 1926 Pat 34 (35) 26 Cri L Jour 1394 *Ramsaran v Md Jan Khan*
 (31) 18 AIR 1931 Sind 113 (118 114) 32 Cri L Jour 929, *Dharamdas Lila Ram v Pilcher*
 4 (41) 29 AIR 1941 Pat 419 (420, 421) 42 Cri L Jour 332 192 Ind Cas 636, *Junilal Mandal v Chandraseo Prasad* (Practice of examining accused and his witnesses and letting prosecution witnesses to be cross-examined by him in inquiry under S 202 though unfair, is not illegal)
 (28) 15 AIR 1928 Lah 97 (97) 29 Cri L Jour 39 *Motilal v Emperor*
 (18) 5 AIR 1918 Pat 652 (653) 19 Cri L Jour 527, *Mushari Ram v Raj Kishore Lal*
 (31) 18 AIR 1931 Pat 302 (303 304) 32 Cri L Jour 1023 *Mahabir v Emperor*
 (26) 13 AIR 1926 Pat 34 (35) 26 Cri L Jour 1394, *Ram Saran v Md Jan Khan*
 (26) 13 AIR 1926 Sind 188 (189) 20 Sind L R 43 27 Cri L Jour 494 *Atmaram v Topandas*
 5 (45) 32 AIR 1945 Oudh 102 (103) 46 Cri L Jour 587 219 Ind Cas 304 *Dulan Dayal Singh v Emperor*
 (35) 22 AIR 1935 All 893 (884) 36 Cri L Jour 1035, *Ram Gir v Ravi Saran Singh*
 (14) 1 AIR 1914 Sind 159 (159) 8 Sind L R 21 15 Cri L Jour 669 *Emperor v Nathu Mehar*
 (29) 16 AIR 1929 Pat 473 (475, 476) 9 Pat 707 30 Cri L Jour 1066 (FB), *Bharat Kishore v Judhistr*

referred to in the Full Bench decision cited above holding that it is an illegal ty]]

- 6 (30) 17 AIR 1930 Pat 30 (32) 30 Cri L Jour 554 *Parmanand Brahmachari v Emperor*
 7. (23) 10 AIR 1923 Lah 663 (664) 26 Cri L Jour 167 *Waryam Singh v Crown*
 8 (25) 12 AIR 1925 Pat 584 (584) 29 Cri L Jour 1345 *Talakhari Singh v Mera Singh*
 9 (18) 5 AIR 1918 Pat 350 (351) 19 Cri L Jour 263, *Sheonandan Mahlon v Emperor*

203.* The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, ^{Dismissal of} ^{complaint} ^{complainant} ^{and the result of} ^{the investigation} or inquiry ^[(if any)] under section 202,] there is in his judgment no sufficient ground for proceeding. In such cases he shall briefly record his reasons for so doing

- a These words were substituted for the words 'after examining the complainant and considering the result of the investigation (if any) made under Section 202 by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1923
- b The words 'the investigation' were substituted for the words 'any investigation' by the Code of Criminal Procedure (Amendment) Act, 2 [II] of 1926
- c The words and brackets '(if any)' were inserted, *ibid*

Synopsis

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|---|---|
| 1 Scope of the section | 8 Dismissal without examining complainant |
| 2 "May dismiss the complaint | 9 "And the result of the investigation or inquiry (if any) under Section 202" |
| 3 Magistrate | 10 "Shall record his reasons for so doing" |
| 4 Orders on complaint not to be delayed | 11 Second complaint |
| 5 'Sufficient ground for proceeding' | 12 Further inquiry |
| 6 Who can dismiss a complaint | 13 Abatement See Note 6 on Section 247 |
| 7 Effect of dismissal | 14 Appeal |

NOTE to the Synopsis See the Notes indicated for the following topics.

- Competency of Courts to dismiss complaints See Note 6
- Duty of Magistrate before dismissing the complaint See Notes 8 and 5
- Examination of the complainant See Note 8
- Power to rehear the same or fresh complaint See Section 403

1 Scope of the section — This section gives large powers to a Magistrate to dismiss a complaint without issuing a process¹ It does not apply where process has been issued the proceedings in such cases fall under the next chapter² Nor does it apply where the proceeding is not one which is initiated on a complaint³ e.g., proceeding under s 107,⁴

* Code of 1898, original S 203

203 ^{the} ^{of} ^{the} ^{Magistrate} ^{may} ^{dismiss} ^{the} ^{complaint} ^{if} ^{there} ^{is} ⁱⁿ ^{his} ^{judgment} ^{no} ^{sufficient} ^{ground} ^{for} ^{proceeding}

1882 S 203 same as original S 203 of 1898 Code — Except the last sentence printed in italics

1872 S 147 para 1, 1851 Ss 67, 180

Section 203 — Note 1

- 1 (87) 14 Cal 141 (144) *Dandyanath v Muspratt*

11 (24) 11 AIR 1924 Lab 630 (630)

20 Cr L Jour 82, *Shamsuddin v D.A. D.A.*

has been

S 552⁵ or S 145⁶ of the Code

The materials on which the Magistrate is to act are expressly limited by the section to —

- (1) the statement on oath (if any) of the complainant, and
- (2) the result of any investigation or inquiry under S 202,⁷ anything outside it must be discarded⁸

Thus the Court cannot take into consideration the statements of witnesses examined by the police⁹ or the evidence adduced in a counter case,¹⁰ or the result of a police inquiry not ordered by the Magistrate¹¹ or the result of an inquiry on a previous petition,¹² or the result of investigation ordered under S 202 but not held in compliance with its terms,¹³ again the Court cannot ordinarily permit the opposite party to appear and argue that process should not issue. Where, however, the complainant has obtained an order for the seizure of the opposite party's books and for restraining him from operating on his banking account the opposite party can appear and ask that such orders should be vacated.¹⁴ As to whether the proper course when a complaint is presented without the sanction required by S 197 is to dismiss it under this section, see Note 11 on S 197.

This section does not apply to complaints under the Merchant Shipping Act (21 [XXI] of 1923), which cannot therefore be dismissed under this section.¹⁵

2 "May dismiss the complaint." — Where a complaint is made to a Magistrate he has authority to dismiss it under this section or issue process under section 204.¹ Ho

5 (02) 4 Bom L R 609 (611) *Thakore Das Munchharam v Bhagwan Das Madhaldas* (This section does not apply to S 502 where no offence is alleged)

6 (39) 26 AIR 1933 Oudh 15 (15) 40 Cri L Jour 33, *Emperor v Subhan*

7 (44) 31 A I R 1944 Nag 318 (320) 46 Cri L Jour 195 I L R (1945) Nag 486 217 Ind Cas 142, *Narayan v Shankar Singh* (Result of police investigation ordered by Magistrate may form sufficient ground to act under this section—But Magistrate should be alert to prevent any police favouritism)

(32) 19 AIR 1932 Cal 697 (697) 33 Cri L Jour 636 *J K Sinha v Hemanta Kumar*

(89) 13 Bom 600 (603) *In re Ganesh Narayan*

(1900) 27 Cal 921 (924) *Mahadeo Singh v Empress*

(67) 8 Suth W R Cr 12 (13) *Queen v Harrah Chand*

[See also (26) 13 AIR 1926 Cal 795 (797) 53 Cal 606 27 Cr L J 788, *Subal Chandra v Ahadullah Sheikh*]

8 (07) 6 Cri L Jour 85 (85, 86) 9 Bom L R 742, *Mustafa v Motilal* (In this case complaint was dismissed by District Magistrate on his personal knowledge)

9 (76) 25 Suth W R Cr 10 (10), *Syed Nissar v Ramgolam*

10 (24) 11 AIR 1924 Cal 813 (814) 25 Cri L Jour 941, *Garebulla v Sadar Akanda*

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(17) 4 AIR 1917 Cal 462 (463) 17 Cri L Jour 396 35 Ind Cas 829, *Balas Lal v Pashupati*

14 (32) 19 AIR 1932 Cal 697 (697, 698) 33 Cri L Jour 636 *J K Sinha v Hemanta*

15 (33) 20 AIR 1933 Cal 647 (647) 35 Cri L Jour 25, *Jafar Ali v James Finlay & Co* (Such complaint has to be inquired into in accordance with the provisions of that Act)

Note 2

malicious
water dangers

cannot pass any other kind of order. Thus he cannot direct the police to submit a charge sheet to some other Magistrate,³ or submit the complaint to the District Magistrate after disbelieving the complaint⁴ or order the issue of a search warrant after holding that no criminal case would lie.⁴

Where a Magistrate dismisses a complaint under this section there must be a specific order to that effect.⁵ The order must be a judicial order.⁶

The following orders have been held to be dismissals of complaints under this section

- (1) An order refusing to issue process on a complaint.⁷
- (2) An endorsement on a complaint, "Enter as false. No prosecution."⁸
- (3) An order staying proceedings against some accused while proceeding with the case against others in this case there is dismissal of the complaint so far as the former persons are concerned.⁹
- (4) An order holding the complaint to be false and calling upon the complainant to show cause against his prosecution.¹⁰

The following orders have been held not to be dismissals of complaints under this section

- (1) Where a charge is made to the police and is repeated in a complaint before the Magistrate and the Magistrate passes a departmental order to the police, 'show as false' but no order is passed on the complaint itself.¹¹
- (2) A direction to the police after a complaint was referred to them that the complaint may be struck off the police file.¹²
- (3) An order expunging a charge from the list of reported offences.¹³ In this case there is no complaint at all to be dismissed.
- (4) An endorsement on the complaint 'Notice is discharged'.¹⁴
- (5) A refusal to take cognizance of an offence for want of sanction (now complaint) under s 195.¹⁵

2 (28) 15 AIR 1928 Cal 24 (25) 51 Cal 303 28 Cri L Jour 577, *Isaf Dasja v Emperor*

3 (02) 6 Cal W N 843 (844) *Mrunal v Emperor*

4 (36) 164 Ind Cas 521 (521 522) 37 Cri L Jour 991 (Cal) *S R Bagnal v Mrs Dean*

5 (69) 12 Suth W R Cr 53 (54) 3 Deng L R App 151 *Queen v Mrs Belilius* (Case stated dismissed but no order on the record to that effect)

(28) 15 AIR 1928 Bom 290 (291) 53 Bom 415 29 Cri L Jour 975 *In re Virblan Bhagaji*. (Merely saying 'notice is discharged' is not sufficient)

6 (39) 26 AIR 1939 Sind 208 (208) 1 L R (1939) Kar 277 40 Cri L Jour 807 *Joomal Tihandas v Emperor* (Issue of 'C' summary not enough)

(39) 25 AIR 1938 Sind 192 (197) 39 Cri L Jour 966 *Pherumal Lularani v Emperor* (Order granting a summary A B or C is an administrative matter and is not a proper order of dismissal)

7 (02) 29 Cal 457 (459) 6 Cal W N 638 *Gurish Chandra v Emperor* (Complaint against several persons—Magistrate proceeded against one only—Complaint against others held dismissed)

(23) 10 AIR 1913 Cal 198 (199) 24 Cri L Jour 333 *Chandi Charan v Manindra* (Where it was so assumed)

[P. 1000 (07) 11 Cal 111]

[1]

- (c) An order that the accused is warned ¹⁶
- (-) An order of reference to arbitration as it is not in the powers of a Magistrate to make such a reference ¹⁷
- (e) An order withdrawing a process once issued ¹⁸
- (o) An order for the use of summary C ¹⁹

3 Magistrate. — The word Magistrate must mean a Magistrate to whom the Code applies. The Code does not apply to proceedings before Village Magistrate (see section 1) and a dismissal by a Village Magistrate of such a proceeding is not dismissal of a complaint under this section ¹

4 Orders on complaint not to be delayed — There is nothing in the Code to show that the Magistrate must *at once* consider the complaint ¹ He must however, pass orders as expeditiously as possible it will be improper to delay the passing of orders for months ² As to the disposal of counter complaints see the undermentioned case ³

5. "Sufficient ground for proceeding" — The question whether there is sufficient ground for proceeding must as has been seen in Note 1 already, be based upon the materials referred to in the section namely, the statement on oath of the complainant and the result of any investigation or inquiry under S 90⁴ Where the facts alleged in the complaint constitute an offence and there are no circumstances apparent in the examination of the complainant such as contradictions variations or serious and unexplained delay in instituting proceedings justifying the Court in concluding that the complaint is false there would be a *prima facie* case for proceeding ¹ Where on the other hand the allegations contained in the complaint and in the complainant's oral statement disclose no criminal offence ² or are self contradictory so as to be self-destructive or are physically impossible or

¹⁶ (18) 23 Cal W N 215 (115) *Thomas v Edwards*

¹⁷ (68) 1 Agra H C B 43 (46) *Sheo Nand Roy v Mahanand Ram*

¹⁸ (07) 8 Cri L Jour 367 (369) 12 Cal W N 68 *Panchoo v Khoosdel*

¹⁹ (39) 26 AIR 1939 Sind 203 (208) 1 LR (1939) Kar 277 40 Cri L Jour 807 *Jeomal Tisandas v Emperor* (Though Magistrate may have intended by this order to dismiss the complaint under S 203, an express judicial order is necessary)

¹ (38) 25 AIR 1938 Sind 192 (192) 39 Cri L Jour 966 *Phernul Lalaram v Emperor* (Granting of a summary A B or C is a mere administrative matter—S 203 requires a judicial order)

Note 3

¹ (27) 14 AIR 1927 Mad 690 (690) 29 Cri L Jour 507, *Rama Naidu v Venkataswami*

Note 4

¹ (17) 4 AIR 1917 Pat 141 (142) 19 Cri L Jour 229 *Nawan v Jadu*

² (17) 4 AIR 1917 All 95 (95) 18 Cri L Jour 271 37 Ind Cas 639 (639) *Salimullah v Birjhan*

³ (22) 9 AIR 1922 Pat 618 (618) 24 Cri L Jour 120 *Lajji Singh v Naurangi Lal* (Disposal of one may be postponed pending disposal of other)

Note 5

¹ (08) 8 Cri L Jour 342 (343) 11 Oudh Cas 261 *Muhammad Salamat ul lah v Lala Sital Prasad*

¹ (13) 21 Ind Cas 171 (171, 172) 14 Cri L Jour 571 (Cal) *Ram Charan v Haji Meah* (Loss of currency

¹ *Krishna Rao Naidu* (There was no material discrepancy nor such delay as would warrant a summary dismissal of complaint)

¹ (72) 16 Suth W R Cr 65 (66) *Mahomed Jan v Aladi Sheikh* (Magistrate did not act illegally in dismissing the cases)

¹ (71) 16 Suth W R Cr 39 (40) *Isher Chunder v Pears* (Where *prima facie* case is made out Magistrate must proceed)

¹ (76) 25 Suth W R Cr 35 (35) *Queen v Thakoor Parsi* (Complaint not to be dismissed merely because complaint is not explicit)

² (37) 24 AIR 1937 Mad 480 (481) 38 Cri L Jour 581, *Kannayya v Venkatesam* (Alleged trespass on vacant site when neither complainant nor any one on his behalf was in actual possession — Complainant not able to say on what date trespass took place — Accused held could not be convicted and complaint ought to have been dismissed under S 203, Cr 1 C)

involve an extreme degree of improbability, and so forth, as well as in cases in which the allegations made, though nothing can be said *a priori* of their possibility or probability, are practically incapable of proof, there can be no sufficient ground for proceeding.³ Similarly, a Magistrate can dismiss a complaint if he considers with reason that the most serious allegations of grave offences are falsely interlarded with complaints of a lesser kind.⁴ Unreasonable delay in filing a complaint under s. 211, Penal Code, has been held to be a sufficiently good reason for refusing to proceed with the complaint.⁵

Where the complaint shows only a *civil dispute* as to title or as to other civil claims, a Magistrate ought not to deal with them but should dismiss the complaint.⁶ The

... .. *Gaurmath.*

Emperor.

'875, No 1552.

re v. Ma Hla Kin

3. ('44) 31 AIR 1944 Nag 318 (320) : 46 Cri L Jour 195 : 1 L R (1945) Nag 486 : 217 Ind Cas 142,

(Criminal Court not

to go behind findings of Civil Court)

(21) 63 Ind Cas 464 (464) : 23 Cri L Jour 672 (Lab), *Kapur Chand v. Ugar Sain*. (It is absurd to expect a Court to take any notice of a complaint of cheating except when it is put in by the person actually defrauded)]

4. ('44) 31 AIR 1944 Nag 318 (319) : 46 Cri L Jour 195 ILR (1945) Nag 486 217 Ind Cas 142, *Narayan v. Shanhar Singh*

5. ('35) 22 AIR 1935 Rang 485 (487) : 37 Cri L Jour 243, *Murugappa v. Raman*. (Delay of 18 months—Delay not explained at the time of filing complaint)

6 ('37) 1937 Mad W N 1238 (1239), *Murugappa Chettiar v. Morangamuthu Raja*. (Especially when the complaint is belated)

('35) 22 AIR 1935 All 883 (884) : 38 Cri L Jour 1035, *Ram Gir v. Bavi Saran Singh*. (Claim for damages)

('70) 2 N W P H C R 202 (203), *Queen v. Kishen Pershad*

('80) 3 All 283 (286), *Rasnak v. Harbans*

('23) 10 AIR 1923 All 544 (544) : 24 Cri L Jour 693, *Hukum Chand v. Emperor*. (Tenant removing some earth from plots of a landlord without consent—Question of civil nature between landlord and his tenants)

(1865) 1865 Rat 3 (3), *Beg v. Raghuo* (Complaint really a prayer for compelling the opposite party to perform an agreement for sale of house by execution of conveyance or to return the purchase money—A case for Civil Court)

('18) 5 AIR 1918 Bom 186 (187) : 42 Bom 664 : 19 Cri L Jour 597, *In re Khuma* (Complainant could better have his rights ascertained in Civil Court)

('18) 5 AIR 1918 Bom 256 (256) : 19 Cri L Jour 351, *Bai Samrath v. Emperor*. (Wrongful restraint—Joint owner locking up shop leased out by co owner without consent—No offence is committed—Dispute held of civil nature)

('21) 8 AIR 1921

716, *Emperor v. Yellappa*

(1864) 1

('74) 21

(Question whether a certain contract is

binding on complainant or not is proper for Civil Court)

('78) 4 Cal 10 (13) : 3 Cal L Rep 81, *Empress v. Abdool*. (Dispute as to which of the relatives should dispose of a minor girl in marriage is really a civil one)

('78) 4 Cal 374 (375), *Lal Das v. Nekunjo* (Father's right to the custody of the child cannot be determined in the Magistrate's Court)

('05) 3 Cal W N 974 (983) : 2 Cri L Jour 836, *Haris v. Emperor*. (Section 379 has been in this case misapplied to matters proper for Civil Courts)

in fide dispute

Tharan.

... .. *proceedings during pendency of civil suit over the same question*

('24) 11 AIR 1914 Cal 303 (911) : 25 Cri L Jour 1053, *Harry Jones v. Emperor*. (Investigation into whether a transaction was benami or not should not be undertaken by Criminal Courts)

dividing line between criminal and civil liability is sometimes indistinguishable and the Magistrate should thoroughly examine the complainant to see if any criminal offence is made out.² If the allegations disclose a criminal offence, the complaint ought not to be

- (53) 20 AIR 1933 Cal 149 (150) 31 Cri L Jour 676 *Ilama Iyer v Das Gupta* (Matter of alleged breach of contract)
- (20) 24 Cal W N 1111 (1112), *Jagrup v Emperor* (Dispute as to whether the balance of account had been settled or not)
- (21) 8 AIR 1921 Lah 185 (186) 22 Cri L Jour 142, *Kausi Ram v Emperor*, (Real dispute as to right to property)
- (23) 10 AIR 1923 Lah 329 (330) 24 Cri L Jour 369, *Karam Chand v Mathra Das* (Do)
- (25) 12 AIR 1925 Lah 249 (250) 26 Cri L Jour 287, *Ladhi Shah v Zaman Ali* (Complaint under S 417 with regard to a mortgage transaction)
- (25) 12 AIR 1925 Lah 599 (600) 27 Cri L Jour 331, *Tulsi v Emperor* (Question whether alleged mortgage was with or without possession)
- (27) 14 AIR 1927 Lah 145 (146) 28 Cri L Jour 159, *Ishar Das v Emperor* (Dispute about ownership of a plot of land)
- (57) 1847 Pun Re No 50 Cr, p 131 (132), *Gulzar v Empress* (An act may be a mere civil wrong or a criminal offence — Persons should not go to Criminal Court unless they are fully prepared to prove that the act committed is criminal and not merely a civil wrong)
- (16) 3 AIR 1916 Lah 174 (175) 17 Cri L Jour 7 (7, 8), *Pars Ram v Jalal Din* (Criminal action should be stayed pending the disposal of civil suit)
- (1862) 1 Mad H C R Cr 66 (67, 68), *Ex parte P Varadarajulu Naidu* (Magistrate should better have adjourned criminal proceedings pending the civil suit)
- (35) 8 Mad 140 (147), *In re Paul De Cruz* (Proper course was to postpone the trial)
- (24) 11 AIR 1924 Mad 31 (31) : 25 Cri L Jour 133, *Tiruvengadachariar v Chohhalingam* (Compoundable offence—Damages awarded in a civil suit—Criminal trial not justified)
- (23) 10 AIR 1923 Rang 157 (158) : 24 Cri L Jour 929, *Maung Shue Ku v Emperor*
- (05) 2 Cri L Jour 47 (49) 9 Cal W N 195, *Cassen v Jonas Hadjee*
- (05) 2 Cri L Jour 326 (327) 32 Cal 431, *Dowlat v Emperor*, (Dona fide dispute as to whether complainant has any trade mark at all or whether accused is or is not entitled to use the mark—Clear case for a Civil Court)
- (05) 2 Cri L Jour 754 (755) : 23 Mad 304, *Algaraswami Tevan v Emperor* (It is the province of Civil Courts to decide questions of ownership of land between Government and private persons just as much as between private claimants)
- (05) 2 Cri L Jour 851 (854) 9 Cal W N 1030, *Godin Shaha v Emperor* (Question as to legal guardianship)
- (06) 3 Cri L Jour 98 (102) (Kathihar), *Maion Ghela Amarchand v Jadeja Meruji* (Trial Court dismissing complaint as dispute was of a civil nature — District Magistrate directing further enquiry — District Magistrate's order set aside)
- (06) 4 Cri L Jour 227 (228) : 10 Cal W N 1009 : 4 Cal L Jour 558, *Hiranaud v Emperor* (Question of benami transactions)
- (11) 12 Cri L Jour 50 (55) : 1910 Pun Re No 33 Cr : 8 Ind Cas 1161, *Emperor v Bishen Das* (A and B
- (13) 18 Ind Cas 688 (688) : 14 Cri L Jour 123 (Lah), *Anant Singh v Emperor*
- (13) 21 Ind Cas 893 (900) 14 Cri L Jour 659 (Lah), *Shib Das v Emperor* (Theft of grass—Possession of spot whence the grass was cut was in dispute—A case for Civil Court)
- (14) 23 Ind Cas 657 (660) : 15 Cri L Jour 305 : 1914 A C 231 (PC), *Lovier v The King*
- (17) 4 AIR 1917 Mad 831 (832) 35 Ind Cas 966 (967) 17 Cri L Jour 406, *In re Bakir Ali Khan*, (Question of civil rights between a landlord and his tenant)
- (22) 67 Ind Cas 499 (499) 23 Cri L Jour 403 (Pat), *Rampabitar Singh v Kasim Ali Khan* (Dispute

ween municipality

or
(Complaint under
—Case should not be

dismissed as being of civil nature)

involve an extreme degree of improbability, and so forth, as well as in cases in which the allegations made, though nothing can be said *a priori* of their possibility or probability, are practically incapable of proof, there can be no sufficient ground for proceeding.³ Similarly, a Magistrate can dismiss a complaint if he considers with reason that the most serious allegations of grave offences are falsely interlarded with complaints of a lesser kind.⁴ Unreasonable delay in filing a complaint under s 211, Penal Code, has been held to be a sufficiently good reason for refusing to proceed with the complaint.⁵

Where the complaint shows only a *civil dispute* as to title or as to other civil claims, a Magistrate ought not to deal with them but should dismiss the complaint.⁶ The

- (10) 11 Cri L Jour 205 (209) 5 Ind Cas 714 (Lah), *Abdur Razak v Gaurinath*
 ('87) 14 Cal 141 (146) *Baidyanath v Muspratt*
 (198) 15 AIR 1999 Cal 245 (245) 20 Cr L Jour 205

- 3 (44) 31 AIR 1914 Nag 318 (320) 46 Cri L Jour 195 1 L B (1945) Nag 486 217 Ind Cas 142,

(Criminal Court not

- (21) 63 Ind Cas 464 (464) 22 Cri L Jour 672 (Lah), *Kapur Chand v Ugar Sain* (It is absurd to expect a Court to take any notice of a complaint of cheating except when it is put in by the person actually defrauded))

- 4 (44) 31 AIR 1914 Nag 318 (319) 46 Cri L Jour 195 ILR (1945) Nag 486 217 Ind Cas 142, *Narayan v Shankar Singh*

- 5 (35) 22 AIR 1935 Rang 485 (487) 37 Cri L Jour 243, *Murugappa v Raman* (Delay of 18 months—Delay not explained at the time of filing complaint)

- 6 (37) 1837 Mad W N 1238 (1239) *Murugappa Chettiar v Morangamuthu Raja* (Especially when the complaint is belated)

- (35) 22 AIR 1935 All 883 (884) 36 Cri L Jour 1035, *Ram Gir v Ravi Saran Singh* (Claim for damages)

- (70) 2 N W P H C R 202 (203), *Queen v Kishen Pershad*

- (1865) 1865 Rat 3 (3) *Reg v Raghuo* (Complaint really a prayer for compelling the opposite party to perform an agreement for sale of house by execution of conveyance or to return the purchase money—A case for Civil Court)

- (16) 5 AIR 1918 Bom 186 (187) 42 Bom 664 19 Cri L Jour 597, *In re Khuma* (Complainant could better have his rights ascertained in Civil Court)

- (15) 5 AIR 1918 Bom 256 (256) 19 Cri L Jour 351, *Bas Samrath v Emperor*, (Wrongful restraint—Joint owner locking up shop leased out by co owner without consent—No offence is committed—Dispute

716, *Emperor v Yellappa*

(Question whether a certain contract is

(78) 4 Cal

dispose of

(78) 4 Cal

determined in — Magistrate's Court)

(05) 9 Cal W N 974 (983) 2 Cri L Jour 836 *Hava v*

which of the relatives should

of the child cannot be deter-

his case

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- (33) 20 AIR 1933 Cal 149 (140) 31 Cri L Jour 676 *Ramji Iyer v. Das Gupta* (Matter of alleged breach of contract)
- (20) 24 Cal W N 1111 (1111) *Jayrup v. Emperor* (Dispute as to whether the balance of account had been settled or not)
- (21) 8 AIR 1921 Lah 180 (180) 22 Cri L Jour 142, *Khusi Ravi v. Emperor* (Real dispute as to right to property)
- (23) 10 AIR 1923 Lah 329 (330) 21 Cri L Jour 369, *Karam Chand v. Mathra Das* (Do)
- (25) 12 AIR 1923 Lah 249 (250) 26 Cri L Jour 247, *Lidhi Siah v. Zaman Ali* (Complaint under S 417 with regard to a mortgage transaction)
- (26) 12 AIR 1923 Lah 539 (600) 27 Cri L Jour 231 *Tulsi v. Emperor* (Question whether alleged mortgage was with or without possession)
- (27) 14 AIR 1927 Lah 145 (146) 23 Cri L Jour 103 *Israr Das v. Emperor* (Dispute about ownership of a plot of land)
- (67) 18-7 Pun Re No 50 Cr, p. 131 (132) *Gulzar v. Empress* (An act may be a mere civil wrong or a criminal offence — Persons should not go to Criminal Court unless they are fully prepared to prove that the act committed is criminal and not merely a civil wrong)
- (16) 3 AIR 1916 Lah 171 (173) 17 Cri L Jour 7 (7, 8) *Pars Ram v. Jalal Din* (Criminal action should be stayed pending the disposal of civil suit)
- (1862) 1 Mad H C R Cr 66 (67 C-), *Ex parte P. Varadarajulu Naidu* (Magistrate should better have adjourned criminal proceedings pending the civil suit)
- (85) 8 Mad 140 (147), *In re Paul De Cruz* (Proper course was to postpone the trial)
- (24) 11 AIR 1924 Mad 31 (31) 25 Cri L Jour 133, *Jirumengadachariar v. Chofalingam* (Compoundable offence—Damages awarded in a civil suit—Criminal trial not justified)
- (23) 10 AIR 1923 Rang 177 (178) 24 Cri L Jour 929, *Maung Shue Ku v. Emperor*
- (05) 2 Cri L Jour 47 (49) 9 Cal W N 195 *Cassem v. Jonas Hadjee*
- (05) 2 Cri L Jour 326 (327) 32 Cal 431, *Doulat v. Emperor* (Bona fide dispute as to whether complainant has any trade mark at all or whether accused is or is not entitled to use the mark—Clear case for a Civil Court)
- (05) 2 Cri L Jour 754 (755) 23 Mad 301 *Algaraswami Tetan v. Emperor* (It is the province of Civil Courts to decide questions of ownership of land between Government and private persons just as much as between private claimants)
- (05) 2 Cri L Jour 851 (851) 9 Cal W N 1030, *Godas Shaha v. Emperor* (Question as to legal guardianship)
- (06) 3 Cri L Jour 98 (102) (Pathwar) *Mamn Ghela Imarchand v. Jadeja Meruji* (Trial Court dismissing complaint as dispute was of a civil nature — District Magistrate directing further enquiry — District Magistrate's order set aside)
- (06) 4 Cri L Jour 227 (228) 10 Cal W N 1099 4 Cal L Jour 558, *Hiranand v. Emperor* (Question of benami transactions)
- (11) 12 Cri L Jour 50 (55) 1910 Pun Re No 33 Cr 8 Ind Cas 1161, *Emperor v. Bishen Das* (A and B brought complaint of cheating and fraud with regard to sale of valuable securities against C—C brought a suit on securities against A and B and obtained decree on merits — Criminal Court framed charge — Held that Magistrate ought to have stayed proceedings)
- (13) 18 Ind Cas 401 (406) 40 Cal 281 14 Cri L Jour 63, *Anathnath Dey v. Emperor*
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- (Theft of grass—Possession
- The King
- (17) 4 AIR 1917 Mad 831 (832) 35 Ind Cas 966 (967) 17 Cri L Jour 408, *In re Bakir Ali Khan* (Question of civil rights between a landlord and his tenant)
- (22) 67 Ind Cas 492 (499) 23 Cri L Jour 403 (Pat), *Rampabilar Singh v. Kasim Ali Khan* (Dispute over payment of consideration)
- (23) 71 Ind Cas 789 (791) 24 Cri L Jour 245 (Peshawar), *Khemchand v. Emperor*
- ween municipality

- 7 (20) 7 AIR 1920 All 274 (275) 42 All 522 22 Cri L Jour 84 *Mohan v. Emperor*
- (21) 8 AIR 1921 Lat 85 (87) 21 Cri L Jour 519 *Gowdaran Lal v. Sarjoo Saw* (Complaint under S 403, Penal Code—Allegations not necessarily involving adjustment of accounts—Case should not be dismissed as being of civil nature)

dismissed even if a civil remedy is obtainable⁸

A Magistrate cannot dismiss a case off hand unless a *prima facie* case of any kind is not made out⁹ Where a *prima facie* case is made out the following are not sufficient grounds on which a complaint can be dismissed

- (1) The fact that besides the complainant other persons could complain against an accused¹⁰
- (2) The fact that a libellous publication complained of is a mere republication¹¹
- (3) The withdrawal of the complaint by the complainant in a warrant case which is non compoundable¹²
- (4) The absence of personal injury to the complainant and the complainant being a mere tool of another person¹³
- (5) The fact that the complainant had no personal knowledge of the facts of the complaint¹⁴
- (6) The fact that the complainant is of low caste¹⁵
- (7) The fact that the charge might be laid to the police in the first instance¹⁶
- (8) The fact that the complaint was not preferred by a person more responsible than the one who preferred it¹⁷
- (9) The fact that there is no possibility of a conviction¹⁸
- (10) The fact that the person complained against has been exonerated in a previous departmental inquiry in which the complainant has no concern¹⁹
- (11) The fact that the complaint is cognizable by another Magistrate²⁰
- (12) The fear that the entertainment of the complaint would encourage hundreds of such complainants and would stir up old religious feelings of animosity between communities.²¹

8 (42) 29 A I R 1942 Mad 124 (124) *Sharma v Dharma Rao* (Complaint disclosing offence under

(26) 13 AIR 1926 Sind 194 (193) 27 Cri L Jour 711 21 Sind L R 293 *Crowder v Morrison*

[See (68) 9 Suth W R Cr 27 (27) *Madhub Kyburto v Keshub Singh* (Civil proceeding no bar to criminal proceedings)]

Also see S 1 Note 1 S 190 Note 17 S 200 Note 10 and S 204 Note 5

9 (23) 10 AIR 1923 Lah 663 (664) 26 Cri L Jour 167 *Waryam Singh v Emperor*

(24) 11 A I R 1924 Pat 879 (880) 24 Cri L Jour 316 *Chhedi Upadhya v Emperor* (The Magistrate ought only to see whether the complainant has *prima facie* made out a true case)

10 (27) 14 AIR 1927 All 69 (70) 27 Cri L Jour 1104 *Behari Lal v Ganga Din*

11 (83) 12 Bom 167 (168) *In re Howard* (Section 439 Penal Code makes no exception in favour of second or third publication as compared with first)

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Ahman v Abed or Rahaman (Complaint of witnesses coming to conclusion that no jury

would convict person complained against and refusing to summon accused — Held that case ought not to have been disposed of)

19 (87) 1897 Pun Re No 33 Cr p 70 (72 73) *Rallia v Alsan Shah*

20 (73) 7 Mad H C R App xxxi (xxxii)

21 (91) 1891 Pat 562 (563, 563) *Queen Empress v Pam Chandra*

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A Magistrate cannot dismiss a case off-hand unless a *prima facie* case of any kind is not made out.⁹ Where a *prima facie* case is made out, the following are not sufficient grounds on which a complaint can be dismissed—

- (1) The fact that besides the complainant other persons could complain against an accused¹⁰
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- (3) The withdrawal of the complaint by the complainant in a warrant case which is non compoundable.¹²
- (4) The absence of personal injury to the complainant and the complainant being a mere tool of another person.¹³
- (5) The fact that the complainant had no personal knowledge of the facts of the complaint.¹⁴
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- (7) The fact that the charge might be laid to the police in the first instance.¹⁶
- (8) The fact that the complaint was not preferred by a person more responsible than the one who preferred it.¹⁷
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8. (42) 29 A I R 1942 Mad 124 (124), *Sharma v. Dharma Rao* (Complaint disclosing offence under

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ceeding no bar to

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(Case of defamation.)

16. (70) 14 Sath W R Cr 36 (36), *Ameer Mahomed v Brass* (In this case High Court did not

ork and specu-

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would convict person complained against and refusing to summon accused — Held that case ought not

1. The Magistrate of the Court may, on his own personal knowledge of the affair, or on the basis of the evidence before him, dismiss the complaint.²²

2. The Magistrate may, if the proceeding would be undesirable or the motive or conduct of the complainant is deemed false or malicious.²³

3. The Magistrate may, if the complaint has been dismissed under s. 202.²⁴

4. The Magistrate may, if he is satisfied that the accused might have some defence to the charge.²⁵

A complaint may be made to an Magistrate on the point whether there is a prima facie case for proceeding against the complainant is dismissed.²⁶ The decision whether to proceed or not is a matter for the discretion of the Magistrate. Thus a complaint should not be entertained if it is manifestly false or if it is likely to lead to perjury are made in it—allegations which are not likely to be proved and which are not reasonably true part of it.²⁷

It is only in very rare cases that a Court will be justified in throwing out a complaint without giving an opportunity to the complainant to substantiate his allegations. In certain cases it becomes the duty of the Court to protect the accused from unnecessary harassment and prevent an abuse of the process of the Court.²⁸

6 Who can dismiss a complaint. — Under this section a complaint may be dismissed by —

(1) The Magistrate before whom a complaint is made,

(2) The Magistrate to whom it has been transferred,¹

(3) The Magistrate of the Magistrate who recorded the complaint and ordered inquiry.²

22 (C) 6 Cr 1 Jour 86 (N 86) 91 Cr 1 Jour 740 *Metastaf v Metastaf*

23 (16) 3 AIR 16 Mad 303 (704) 14 Cr 1 Jour 633 (631) 39 Mad 512 *Gangulieddy v Samara*

24 (16) 3 AIR 16 Mad 303 (704)

(17) 131 Cr 1 Jour 600 (601) *In re Ganesh Narayan Sathe*

(18) 13 AIR 1914 Cr 1 Jour 191 (191) 17 Cr 1 Jour 711 21 Cr 1 Jour 293 *Crozier v Morrison*

(19) 1891 Lat 519 (550) *Queen Empress v Manji (Malice)*

(20) 131 Cr 1 Jour 600 (601) (11) *In re Ganesh Narayan Sathe*

(21) 13 AIR 1914 Cr 1 Jour 191 (191) 35 Cr 1 Jour 1215 *Chamru v Maironprasad (Motive)*

24 (14) 1 AIR 1914 Cr 1 Jour 141 (14) 8 Cr 1 Jour 196 10 Cr 1 Jour 174 *Ditchan v Gopal Das*

25 (10) 17 AIR 1910 Lat 171 (180) 41 Cr 1 Jour 601 *Shedden v Budhithwan*

26 (71) 15 Cr 1 Jour 63 (54) 7 Cr 1 Jour 7, *Tal v Krishna Nath*

(71) 15 Cr 1 Jour 63 (54) 7 Cr 1 Jour 7, *Tal v Krishna Nath*

(1900) 27 Cal 126 (130 131) 3 Cal W N 601 *Chandola Dabee v Divendra Nath*

(16) 3 AIR 1916 Mad 303 (303) 14 Cr 1 Jour 633 (631) 39 Mad 512, *Gangulieddy v Samarapathy Mudali*

27 (41) 21 AIR 1914 Cr 1 Jour 318 (370) 46 Cr 1 Jour 195 11 Cr 1 Jour 1915 Nag 496 217 Ind Cas 142, *Parajan v Bhaskar Singh* (Magistrate's discretion not to be interfered with unless really necessary)

(16) 3 AIR 1916 Mad 303 (303) 14 Cr 1 Jour 633 (631) 39 Mad 512 *Gangulieddy v Samarapathy Mudali*

(26) 13 AIR 1916 Cal 795 (797) 53 Cal 606 27 Cr 1 Jour 788 *Sudul Chandra v Ahadnillah Sidi*

(32) 26 AIR 1913 Cr 1 Jour 208 (206) 11 Cr 1 Jour 1933 10 Cr 1 Jour 607 *Jecomal Telandas v Emperor* (Magistrate should exercise his own independent judgment on receipt of report of inquiry — He is not to surrender his discretion to that of the police prosecutor)

(34) 25 AIR

should be

28 (41) 21 AIR

Parajan v

29 (39) 26 AIR 1913 Cr 1 Jour 602 (605) 11 Cr 1 Jour 1933 40 Cr 1 Jour 617 *C. A. George v Usadatt Sharma* (Complaint of criminal conspiracy on mere suspicion)

Note 6

1 (36) 23 AIR 1936 Cr 1 Jour 146 (147) 30 Cr 1 Jour 217 37 Cr 1 Jour 1086 *Vernul Mangal an*

2 (26) 13 AIR 1926 Cal 470 (477) 53 Cal 350 27 Cr 1 Jour 385 (11) *Emperor v Mackay*

2 (05) 2 Cal 1 Jour 65n (65n) *Ambika Roy v Emperor*

Even if the complaint is transferred to a superior Magistrate solely for the purpose of transferring it to another, the Magistrate to whom it is sent for transfer can dismiss a complaint under this section³

The Magistrate to whom the complaint is transferred cannot, however, dismiss the complaint without giving notice to the complainant of such transfer⁴

If a complaint is transferred at the very outset to another Magistrate, he has power to take action under ss 202 and 203. But when one Magistrate has examined witnesses under s 202 and believed them, and thereupon transfers the case to another Magistrate, the latter has no power to examine the same witnesses again and proceed to dismiss the complaint under this section⁵

Where a complaint is dismissed under this section and further inquiry is ordered under s 436 the Magistrate before whom the complaint comes for such further inquiry can again dismiss it under this section⁶

7. Effect of dismissal.—A dismissal of a complaint after hearing the complainant and after considering the result of an investigation under s 202 amounts to a legal determination of the complaint¹ and the complainant can be prosecuted for making a false charge under s 182 or s 211, Penal Code². But until a complaint is dismissed under this section or otherwise disposed of no proceedings can be taken under s 182 or s 211, Penal Code³. This rule is not based on any statute but is only a precautionary rule of safety in respect of prosecutions under s 182 or s 211 of the Penal Code. So, while a prosecution under those sections might in certain circumstances be delayed or even set aside in accordance with the practice, this practice could *per se* be no ground for setting aside a conviction under s 211 or s 182 before the disposal of the case⁴

3 (24) 11 AIR 1924 All 666 (666) 25 Cr L Jour 555 *Gobind Prasad v Ram Das*

4 (94) 3 Cal W N cclxxxv (ccclxxxv) *Kali Singh v Jhari Lal*

5 (37) 24 A I R 1937 Oudh 81 (82) 12 Luck 503 37 Cr L Jour 1128, *Sheo Balak Singh v Sant Buz Singh*

6 (38) 25 AIR 1938 Mad 112 (110) 39 Cr L Jour 281, *In re Arskatta Naga Reddi*

(36) 23 A I R 1936 Sind 146 (147) 30 Sind L R 217 37 Cr L Jour 1086 *Virumal Manghanmal v Muhammad Khan*

Note 7

1 (02) 6 Cal W N 295 (296) *Surjya Hariani v Emperor*

(78) 2 Cal L Rep 315 (316 317) *In re Choolhae Telee*

2 (02) 6 Cal W N 295 (296) *Surjya Hariani v Emperor*

3 (83) 5 All 387 (383) 1893 All W N 71, *Empress v Jamna* (Section 182)

(93) 15 All 336 (338) 1893 All W N 111, *Empress v Raghu Tiwari* (Do)

(99) 1899 All W N 90 (91) *In re Gajadhar* (ss 182 and 211)

(79) 4 Cal L Rep 413 (415) *Nusratunissa Bibee v Sheikh Erad Ali*

(99) 3 Cal W N 759 (759 760) *Gunamony Saput v Empress* (Section 211)

(Section 211)

Ballabh (Section 211)

Cal W N 158 *Jogendranath v Bahu*

(99) 3 Cal W N 490 (491) *Sheikh Kutab Ali v Empress* (Do)

(39) 26 AIR 1939 Cal 340 (340) 1 I L R (1939) 1 Cal 322 40 Cr L Jour 647, *Kangali Molla v Emperor*

(30) 19 AIR 1932 Cal 393 (393) 33 Cr L Jour 514 *Lachmi Shaw v Emperor*

(32) 19 AIR 1932 Cal 550 (551) 33 Cr L Jour 724 *Charles Johns v Emperor*

Also see Note 6 on S 190

4 (30) 17 AIR 1930 Pat 602 (623) 9 Pat 126 31 Cr L Jour 931 *Suchit v Emperor*

[See also (31) 18 AIR 1931 Pat 302 (303) 32 Cr L Jour 1023 *Mahabir v Emperor*]

But even if Mr. Cole's objection does not afford a ground for proceeding under Rule 13, Code of Civil Procedure, he is afforded an opportunity to prove his case before the jury pursuant to §§ 211 or 212. Penal Code, but where he has had such an opportunity, the result of the complaint is made only after hearing him and taking evidence in support of his claim. Code, it cannot be said that he has not been given an opportunity to be heard in the trial of the complaint.

It is held that a section is illegal for want of the examination of the complainant and the complainant cannot be prosecuted for bringing a false charge.

As to whether an award for compensation can be made against the complainant if a criminal conviction is dismissed, see Note 7 on § 250 and as to a suit for expenses there see Notes on § 254.

Where a complaint has been dismissed under this section, it cannot be said that it was not on the file and District Magistrate has therefore, no power under S. 436 to order

- 5 (41) 24 AIR 1941 Pat 419 (1941) 42 Cr I Jour 332 192 Ind Cas 836 *Jasind Mandal v Chanderdeo Jaisind* (It is not enough to prove his case will not by itself warrant his prosecution in the criminal case)
- (44) 27 AIR 1941 Pat 97 (1941) 41 Cr I Jour 319 *Mah. Narain v Emperor*
- (27) 14 AIR 1941 All 107 (1941) 27 Cr I Jour 331 *D. N. Mohammed v Emperor* (It is not clear whether or not the complainant was examined)
- (27) 10 Mad 222 (1926) 2 Wee 141 (118) *Emperor v Sheikh Dairi* (Complainant was not examined) [See Oudh C. No. 244 of 1923 (1923) *Asghur Hussain v Maharaja Bhagwanjit Prasad* (There was no evidence that the complainant was examined of the groundlessness of the prosecution)]
- Also see h 476 Note 12
- 6 (26) 14 AIR 1941 Pat 145 (1941) 43 Cr I Jour 319 *Emperor v Gangi Laxmi*
- (27) 7 AIR 1941 All 125 (1941) 21 Cr I Jour 416 *Musa Lal v Emperor*
- (26) 13 AIR 1941 Pat 244 (1941) 27 Cr I Jour 719 *In re Pampippa Dillirao*
- (70) 13 Bhat W R Cr 37 (34) *Emperor v Heera Lal Ghose*
- (11) 16 Bhat W R Cr 77 (77) *In re Bishoo Darsi*
- (76) 22 Bhat W R Cr 10 (10) *Syed Nasser Hussain v P. M. Alam Singh*
- (21) 6 Cal 446 (1924) 7 Cal L J p 467 3 Bhome L R Cr 49 *Government v Karimdad*
- (21) 6 Cal 544 (1924) 8 Cal L J p 263 *Emperor v Shahu Dikara*
- (21) 7 Cal 87 (84) 8 Cal L J p 347 4 Bhome L R 70 *In re Sothina Bibi*
- (21) 7 Cal 214 (111) 8 Cal L J p 257 4 Bhome L R 129 *Gyan Chunder v Protap*
- (27) 14 Cal 707 (707) (111) *Queen Emperor v Sham Lal*
- (1909) 27 Cal 1 (125) *Mahadeo Singh v Emperor*
- (79) 4 Cal L J p 134 (136) *In re Durgji Dargut*
- (27) 7 Cal L J p 342 (344) *In re Jusuck Lal Mullick*
- (79) 4 Cal L J p 413 (415) *Mahmoodnissa Bibi v Sheikh Feroz Ali*
- (79) 4 Cal L J p 534 (537) *Sheikh Feroz Ali v Mahmoodnissa*
- (07) 2 Cal I Jour 224 (1909) 33 Cal I 2 Cr I Jour 613 10 Cal W N 158 *Jogendranath v Bilal*
- (07) 6 Cal W N 225 (227) *Surya Harans v Emperor* (In this case complainant had full opportunity)
- (07) 6 Cr I Jour 42 (42 43) 29 All 537 1907 All W N 195 4 All I Jour 471 *Emperor v Tula*
- (07) 6 Cr I Jour 340 (341) 1907 All W N 264 *Emperor v Sheo Ghulam*
- (21) 69 B L Cas 373 (370) 22 Cr I Jour 81 (All) *Sheo Palak v Emperor*
- (33) 20 AIR 1933 Pat 499 (500) 31 Cr I Jour 1140, *Gopal Singh v Raghunath*
- Also see h 145 Note 18
- [But see (24) 22 Bom 536 (503) *Imperatrix v Jyotsna Govil*]
- 7 (07) 6 Cal W N 225 (227) *Surya Harans v Emperor*
- (19) 6 AIR 1914 Pat 530 (531) 20 Cr I Jour 339 *Emperor v Mahomed Patel*
- (07) 5 Cr I Jour 419 (492) 1907 L J p 110 No 2 Cr, Chiragh Din v Emperor,
- (10) 11 Cr I Jour 339 (336) 5 Ind Cas 971 (Bom), *In re Rachappa Tippinna*
- 8 (24) 11 AIR 1914 Bom 321 (321) 48 Bom 560 25 Cr I Jour 080 *In re Ningappa Rayappa*
- (26) 13 AIR 1920 Bom 284 (285 286) 27 Cr I Jour 740 *In re Pampippa Dillirao Desai*
- (24) 11 AIR 1924 All 664 (664) 26 Cr I Jour 176 *Rekha Chamar v Emperor*
- (29) 4 Cal W N 305 (306) *Budh Nath Mahlo v Emperor*
- (01) 4 Oudh Cas 127 (131 132) *Ram Sarup v Emperor*
- Also see h 195 Note 9 and h 200 Note 21

that the complaint "should be restored to file"²

8. Dismissal without examining complainant. — The "statement on oath" referred to is the examination of the complainant under s 200¹ Where the complainant is present but not examined under that section, the material on which the Court could say whether there is sufficient ground or not is not availed of by the Court, and consequently the Court cannot dismiss the complaint² But when the complainant is *absent* on the dates on which the matter comes up for examination of the complainant, it is clear that an order dismissing the complaint is justified³

9 "And the result of the investigation or inquiry (if any) under Section 202." — Where an inquiry is ordered under s 202 and in that inquiry the complainant says that he has witnesses to prove his case, he should be given an opportunity of proving his case before the complaint is dismissed on the basis of the result of such

9 (38) 25 AIR 1938 Mad 112 (112) 39 Cri L Jour 291, *In re Arkhalla Nags Peddi* (Proper order is one for further inquiry)

Note 8

1 (32) 19 AIR 1932 Sind 58 (58-59) 25 Sind L R 468 33 Cri L Jour 330, *Hashim Moosa v Mrs G. Boodh*

2 (24) 11 AIR 1924 Bom 321 (321) 48 Bom 360 *In re Ningappa Rayappa*
(03) 30 Cal 923 (925-926) 7 Cal W N 525, *Lokenath Patra v Sanyasi Charan*

(71) 3 N W P H O R 272 (273), *In re Ram Churn*

that

(In this case the complainant was examined but order of dismissal was set aside on another irregularity)

(1900) 27 Cal 128 (130, 131) 3 Cal W N 601, *Charoobala Dabee v. Barindra Nath*

(Complainant appearing four times

and not examined)

(80) 7 Cal L Rep 382 (384) *In re Russick Lal Vaillick*

(81) 8 Cal L Rep 289 (291) *In re Chukradar Pott*

(99) 3 Cal W N 17 (18) *Satya Charan v Chairman of Utterparah Municipality*

Order of dismissal held valid

complainant duly examined under S 200—

an

witnesses attended Court and remained in attendance all day but not examined

complainant and his

in the case of the complainant, the complainant declares to prove his case *ex parte*, it can be said that the Magistrate is wrong in dismissing the complaint under this section.

When the Magistrate under S. 202 is found to have been insufficient, the Court may dismiss the complaint of the complainant based on the result of such inquiry and may order a further inquiry.¹ In complaints against police officers and other Government officials, it will be a proper exercise of discretion if the Magistrate orders an inquiry to give the complainant every opportunity to prove his allegations.²

There is no doubt if any clearly show that this section empowers the Magistrate to order a complaint without any investigation or inquiry under S. 202, if after examining the complaint, he considers there is no sufficient reason for proceeding.³

The words 'if any' were omitted from the Code by the amending Act 18 (XVIII) of 1923 and were restored to the section by the amending Act 2 (II) of 1925. The reasons for their omission are given in the Statement of Objects and Reasons of the amending Act of 1925 as follows:

'The Code for High Court in a recent decision (in the case of *Srish Chandra Bawa Malin Lal Surrai*) held that under S. 203, an investigation or an inquiry under S. 202 is necessary in all cases because the words 'if any' have been omitted from S. 203 after the words 'investigation or inquiry'. No such change was intended by the amendment made by Act 18 (XVIII) of 1923 and the proposed addition is made to clear this matter.'

When on further inquiry being ordered into a complaint dismissed under this section, the case is sent to another Magistrate for disposal, he is entitled to act on the result of the inquiry or investigation ordered by the Magistrate who originally disposed of the case.⁴

Note 9

- 1 (25) 12 AIR 1925 Cal 1031 (1031) 26 Cri L Jour 561 *Purusottam v Pandur*
- (16) 3 AIR 1916 Mad 632 (632) 16 Cri L Jour 423 24 Ind Cas 993 (1000) *Solaimuthu Pillai v Murugiah Maran*
- [See also (66) 4 Cri L Jour 213 (214) 10 Cal W N 10-6 *Pani Dhusan v F F Kemp* (It is illegal for a Magistrate to dismiss a complaint sitting in his private room and without hearing the complainant)]
- (29) 16 AIR 1929 Cal 191 (192) 35 Cal 1260 30 Cri L Jour 407, *Mahim Chandra Roy v Watson*]
- 2 (72) 17 Ind W B Cr 3 (3) *Sitab Manjee v Noshee Mukerji*
- 3 (21) 8 AIR 1921 Cal 552 (553) 25 Cri L Jour 167, *Devendra v Bhagirathi*
- (25) 15 AIR 1924 Cal 119 (120) 23 Cri L Jour 267 *Mousa Neki v Ali Mam Kaur*
- (27) 14 AIR 1927 Bom 436 (436 437) 24 Cri L Jour 675, *Dhondu Bapu v Emperor*
- (19) 6 AIR 1919 Cal 725 (725) 20 Cri L Jour 791, *Purnia Chandra v Ambika Charan* (Complaint dismissed on report of local panchayat)
- [See also (20) 7 AIR 1920 All 77 (78) 21 Cri L Jour 313 *Harshar Prasad v Emperor*]
- 4 (26) 13 AIR 1926 Mad 283 (284) 27 Cri L Jour 107, *Detankamani Mudaliar v Narayana Prasad*, (Police-officer)
- (20) 7 AIR 1920 All 77 (78) 21 Cri L Jour 343, *Harshar v Emperor* (Do)
- (24) 11 AIR 1924 Oudh 174 (174) 24 Cri L Jour 814, *Balda v Nann Ali* (Do)
- (25) 16 Ind Hat 954 (955) *In re Subrao Ramchandra* (A Government officer)
- (26) 7 AIR 1920 All 303 (304) 22 Cri L Jour 81 69 Ind Cas 369 (370) *Shco Dalah v Emperor* (Do)

Also see S. 202, Note 18

(of 1861)
tion under

10. "Shall record his reasons for so doing."—A Magistrate should record his reasons for dismissing a complaint under this section¹ The section is mandatory and the Magistrate must make it apparent in his order that he has not omitted to apply his mind to the facts before he made the order² The object of this requirement is to enable the High Court to consider whether the discretion vested in the Magistrate has been properly exercised or not³ This is an imperative provision of law and where no reasons are recorded the order of dismissal is without jurisdiction⁴ It has, however, been held that where on a complaint filed against several persons, the lower Court has declined to issue process against some of them and it appears to the High Court from the records that there are no sufficient grounds for issuing process against them, the High Court will not interfere in revision merely because the Magistrate has failed to give reasons for not issuing process, but that when it appears that the Magistrate had not good grounds for declining to issue process, the High Court will interfere in revision⁵

It has been held that reasons stated in a police report on the basis of which an order of dismissal is made are sufficient if the report itself is part of the order⁶

11. Second complaint. — A dismissal under this section is a dismissal without trial. As to whether such a dismissal is a bar to the re-hearing of the complaint or to the entertainment of a second complaint, see section 403 and Notes thereon

12 Further inquiry. — As to ordering of a 'further inquiry' into a complaint dismissed under this section see Note 9 and S 436 and Notes thereon

13 Abatement — See Note 6 on Section 217

14 Appeal. — Under s 404, no appeal will lie from any order, unless specifically provided for by the Code and no appeal is provided from an order of dismissal under this section. Further inquiry alone is provided for in section 436

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

204.* (1) If in the opinion of a Magistrate taking cognizance of an Issue of process, offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the

* 1882 S 204, 1872 S 147 para 3, Ss 148, 149, 1861 Ss 67, 248, 257

Note 10

1 (38) 25 AIR 1938 Mad 879 (880) 39 Cri L Jour 934 *In re Venkatasubba Pillai*

Merely

(DB),

(12) 13 Cri L Jour 482 (483) 1931 13 AIR 133 (134)

(26) 13 AIR 1926 Pat 57

5 (38) 25 AIR 1938 Mac

Venkatasubba Pillai

6 (10) 11 Cri L Jour 331 (331) - 5 Ind Cas 926 (Mad), *Ahmed Bee v Ameena Bee*

934, *In re*

second schedule a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which according to that column, a warrant should issue in the first instance he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provisions of section 90.

(3) When by any law for the time being in force any process fees or other fees are payable, no process shall be issued until the fees are paid, and if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

Synopsis

- | | |
|---|---|
| 1 Legislative changes. | 10 Order directing summons if a judgment |
| 2 Scope of the section | 11 Order directing summons if can be recalled |
| 3 Magistrate taking cognizance only can issue process | 12 If he has not jurisdiction himself |
| 4 The Magistrate must have taken cognizance of an offence | 13 * Some other Magistrate having jurisdiction |
| 5 * Sufficient ground for proceeding | 14 * Provisions of S 90 — Sub-section (2) See Notes on 4 90 |
| 6 * In the opinion of a Magistrate | 15 Process fee |
| 7 Issue of process | 16 Revision |
| 8 Omission to issue process | 17 Process under special or local Acts |
| 9 Notice if a process | |

NOTE to the Synop. — See the Notes indicated for the following topics

- | | |
|--|---|
| Caution and discretion must be used in issuing process. See Note 5 | Power to cancel warrant issued and issue summons. See S 75 Note 9 |
| Date of the Magistrate before issuing the process. See Note 4 | Process not issue if complaint is believed. See Note 7 |
| * He shall issue a summons. See Note 7 | Superior officer cannot order process to issue. See Note 3 |

1 Legislative changes

The words "if he has not jurisdiction himself" in sub-section (1) were inserted in sub-section (1) and added in the Code of 1893.

2 Scope of the section — Where the Magistrate does not dismiss the complaint

under S 203 but is of opinion that there is sufficient ground for proceeding he has to commence proceedings against the accused by compelling his attendance before the Court. This section relates to the procedure for effecting such attendance.¹

This is the only section authorizing a Magistrate to issue process to an accused whether he takes cognizance on a private complaint or on a police report² or any information or knowledge other than a complaint or police report³. This section applies not only where the Magistrate takes cognizance of an offence under the Indian Penal Code but also where he takes cognizance of an offence under any other law.⁴

There is no specific provision either in this section or elsewhere in the Code in regard to cases in which the accused is already under arrest or on bail. In such cases if the

Section 204 — Note 2

✓ Superior

¹ Gambling Act 16 [XVI] of 1867.
² (76) 25 South W R Cr 20 (21) *Queen v. Golan* (Offence under Police Act 5 [V] of 1801)

Magistrate thinks that there is no case against the accused he may discharge him or cancel the bail bond as the case may be⁵ or if the Magistrate considers that there is sufficient ground for proceeding he may order the accused to be produced before the Court for inquiry or trial⁶

Unless and until the Magistrate issues process for the attendance of the accused, the judicial proceedings cannot be deemed as having commenced against him⁷ Even where the case is a police case and the accused has been arrested and remanded to custody, the judicial proceedings against him cannot be considered as having commenced until the Magistrate has made up his mind to act upon the charge sheet and takes some overt action to implement his decision e. g., by ordering the accused to be produced from custody on a particular date to stand his trial⁸

For form of summons see S 68 and Sch V, Form No 1

For form of warrant, see S 75 and Sch V, Form No 11

3 Magistrate taking cognizance only can issue process — Section 190 mentions the ordinary ways in which a Magistrate takes cognizance of an offence Unless he takes cognizance as specified therein a process cannot be issued under this section.¹ A Magistrate taking cognizance on a complaint is the officer who has heard the complaint made He is the proper officer to issue a process because it is he who can best exercise a discretion with regard to the *prima facie* merits of the complaint² But a Magistrate to whom a case has been transferred under s 192 obtains complete seisin over the case and steps into the shoes of the transferring Magistrate So a Magistrate to whom a case has been transferred under s 192 is covered by the expression Magistrate taking cognizance of an offence in this section and can issue process for compelling the attendance of the accused person³ (See also s 190 Note 8) As it is only the Magistrate taking cognizance of an offence that can issue process under this section a District or superior Magistrate cannot order process to issue when a joint or subordinate Magistrate to whom a case has been made over for disposal⁴ or who has taken cognizance of the complaint⁵ has failed or refused to issue process If he wants to do so he must remove the case to his own file and then issue process

- 5 (41) 28 AIR 1941 Bom 294 (295) 42 Cri L Jour 814 198 Ind Cas 104 (DB) *J D Boywalla v Sorab Rustumji*
 6 (43) 30 AIR 1943 Pat 245 (252 253) 45 Cri L Jour 177 22 Pat 433 209 Ind Cas 482 (SB) *Gopal Marwari v Emperor*
 7 (43) 30 AIR 1943 Pat 245 (252 253) 45 Cri L Jour 177 22 Pat 433 209 Ind Cas 482 (SB) *Gopal Marwari v Emperor*
 8 (43) 30 AIR 1943 Pat 245 (252 253) 45 Cri L Jour 177 22 Pat 433 209 Ind Cas 482 (SB) *Gopal Marwari v Emperor*

Note 3

In directing
to another

- 3 (41) 28 AIR 1941 Cal 185 (190 191) 1 I L R (1941) 1 Cal 67 42 Cri L Jour 490 194 Ind Cas 39. *Hafizur Ralaman v Aminal Hoque* (Magistrate taking cognizance of case issuing summons only against one accused person—Case transferred to Honorary Magistrate—Accused summoned dying subsequently—Honorary Magistrate can summon any other accused)
 4 (03) 30 Cal 449 (451 452) *Radhabullav Raj v Benode Behari* (Against some of the accused)
 (05) 2 Cri L Jour 524 (530 532) 32 Cal 783 *Ashraf v Emperor*

E Kemp]

Under this section a Magistrate in whom a case has been transferred under s 192 after the examination of the complainant can issue process though he has not himself examined the complainant⁶

Although it is only the Magistrate who has taken cognizance of the offence who may direct issue of a process a Magistrate who is the presiding officer within the meaning of ss. 68 and 75 may sign the process, even if he may not have taken cognizance of the offence and directed issue of the process⁷

4 The Magistrate must have taken cognizance of an offence — It is only a Magistrate taking cognizance of an offence that can issue a process under this section. Where therefore, no offence has been committed but the Magistrate gets information as to the possibility of an offence being committed, the matter is only one for the interference of the police, and not one for the Magistrate to issue process¹

If, on a complaint, it should appear to the Court that the act imputed amounted to an offence under the Indian Penal Code or any other penal law in force it is the duty of the Court to proceed with the matter². But where the acts as alleged do not disclose any offence it will be an abuse of the process of the Court to allow criminal proceedings to proceed³

An application for maintenance under s 498 is not a complaint in respect of any offence and therefore, a Magistrate dealing with it cannot dismiss it under sub-s. (3) of this section⁴

Even where an offence is disclosed there must be definite evidence of an offence within the local jurisdiction of the Magistrate receiving the complaint⁵. The Court is not limited to the sections or offences mentioned in the complaint. The fact that the complainant did not specifically and in terms accuse any one under any section of the Penal Code does not matter, if the facts stated in the complaint and his sworn statement constitute an offence triable by the Magistrate who receives the complaint⁶

Where on the receipt of a complaint the police start investigation and arrest a person and on investigation report to the Magistrate that no offence has been disclosed and the Magistrate discharges the person, the order of discharge has been held to be one after taking cognizance⁷. It is not clear how a Magistrate can be said to take cognizance of an offence in such a case. He really decides not to take cognizance of the offence.

5 "Sufficient ground for proceeding" — A Magistrate taking cognizance of an offence is bound to issue process under this section only if, in his opinion there is

6 (93) 3 Cal W N cclxxxv (cclxxxv) *Kali Singh v Jhari*

7 (32) 19 AIR 1932 Pat 175 (176) 34 Cri L Jour 297 *Karluck Chandra v Emperor* (Issue of warrant.)
v *Emperor* (Per Scrabble J —

Note 4

1 (75) 1875 Rat 90 (91) *In re Fale Ali*

2 (67) 8 South W R Cr 63 (65) *Empress v Nudus Mukton* (Even if a civil suit would afford the more convenient or appropriate remedy)

(26) 13 AIR 1976 Cal 795 (797) 53 Cal 606 27 Cri L Jour 783 *Subal v Ahadullah*

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legging that cer
— False entries
in subsequent

(—S) 10 AIR 1978 Lah 915 (916) 30 Cri L Jour 160 *Amarnath v Emperor*

4 (93) 16 Mad 231 (734) 2 W R 252 *Iire Pannammal*

5 (05) 7 Cri L Jour 391 (393) 1903 All W N 115 5 All L Jour 333 *Bidu v Ghansham*

6 (99) 26 Cal 786 (789) 3 Cal W N 491, *Jagat Chandra v Queen-Empress*

Also see S 190, Notes 9 and 19

7 (41) 28 AIR 1941 Bom 291 (96) 42 Cri L Jour 814 196 Ind Cas 104 (DB) *J D Boylston v Sorab Pustongji*

sufficient ground for proceeding¹ The stage at which the sufficiency of the ground for proceeding is to be considered is, in the case of a complaint, after the examination of the complainant under S 200² If the facts alleged in the complaint and the complainant's statement show a sufficient ground for proceeding, process should issue,³ otherwise not⁴ It is not necessary in all cases that before issuing process the Magistrate should have held any inquiry⁵

If a Magistrate is satisfied on the police report that there is no sufficient ground for proceeding and the accused is under arrest, the accused must be discharged and if he is on bail the bail bond must be cancelled This is the only course open to the Magistrate though the Code does not provide what is to happen in such a case⁶

A *prima facie* case means that there is sufficient ground for proceeding⁷ Where, therefore, a *prima facie* case is made out, the Magistrate should issue process⁸ even if he

Note 5

1 (1900) 27 Cal 985 (988) 5 Cal W N 131, *Durga Das v Umesh Chandra* (Allegations not disclosing any offence—Case not to be proceeded with)

(1864) 1864 Suth W R Gap No Cr 33 (34), *In re Huronath Roy*

(1900-02) 1 Low Bur Bul 286 (267) *Mokum Maistry v Valoo Maistry*

See cases in foot note (8)

2 (71) 3 N W P H C R 272 (273), *In re Ramchurn*

(17) 4 AIR 1917 Pat 611 (612) 2 Pat L Jour 657 18 Cr L Jour 890 (891) *Jhuna Lal Sahu v. Emperor*

(10) 14 Suth W R Cr 86 (86) *Ameer Mahomed v G Brass*

(68) 4 Mad H C R 162 (164), *Rangaswami v Sabapathi*

(14) 1 AIR 1914 Cal 479 (480) 42 Cal 19 15 Cr L Jour 246 *Abhayeshwari v Rishori Mohan Banerji*

Also see Notes 13 to 16 on S 200 and the decisions noted thereunder

3 (41) 28 AIR 1941 Cal 185 (192) 42 Cr L Jour 490 1 L R (1941) 1 Cal 67 194 Ind Cas 86, *Hafizur Rahman v Aminul Hoque* (It is not necessary that the opinion of a Magistrate that there is sufficient ground for issuing process within the meaning of S 204 Cr P C, should be based on evidence in the case—The Magistrate may form that opinion from the petition of complaint, sworn statement and the report of the enquiry officer under S 202, Cr P C)

6 (41) 28 AIR 1941 Bom 294 (295) 42 Cr L Jour 814 196 Ind Cas 104 (1941) Cr P C

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(26) 13 AIR 1926 Cal 795 (797) 53 Cal 606 27 Cr L Jour 789 53 Cr L Jour 789 *Ahadullah Sheikh*

considers that a civil remedy is more appropriate⁹ It was, however, held in the under mentioned case¹⁰ that even if there was a *prima facie* case the Magistrate may in his discretion refuse to issue process

There cannot be said to be sufficient grounds in the following cases for issue of process

- (1) Where the complaint is made on information and not on personal knowledge¹¹ In such cases the Court should satisfy itself on inquiry that there is a case for the issue of process¹²
- (2) Where the allegations made in the complaint are not substantiated by the statement on oath¹³
- (3) Where the allegations disclose a dispute purely of a civil nature¹⁴

The following are not sufficient grounds for refusing issue of process

- (a) Where a *prima facie* case is made out but in the Magistrate's opinion there is no chance of conviction and no useful purpose will be served by the enquiry¹⁵
- (b) Avoidance of religious ill feeling¹⁶
- (c) The fact that the offence is cognizable by the police in the first instance¹⁷
- (d) The fact that the Magistrate thinks that it is unlikely that the proceedings will result in a conviction, though the fact that another person accused upon the same facts for the same offence has been acquitted may properly be taken into

9 (11) 12 Cri L Jour 123 (124) 9 Ind Cas 726 (Mad) *Narayanaswami v Yadiel Chetty*
 (68) 10 Sat W R Cr 40 (40) *Rosal Singh v Toolsee Chowdhry* (Charge of taking bullocks and

between partners about accounts)

Also see S 1, Note 1, S 190, Note 17, S 200, Note 10 and S 203, Note 5

10 (31) 18 AIR 1931 Cal 607 (615) 33 Cri L Jour 3 59 Cal 275, *Sher Singh v Jyendranath Sen*
 (Where AIR 1926 Cal 795 53 Cal 606 27 Cri L Jour 788 is dis sented from by Lord-Williams, J)

11. (06) 4 Cri L Jour 217 (218) 10 Cal W N 1090, *Thakur Prosad Singh v Emperor*

12 (06) 4 Cri L Jour 217 (218) 10 Cal W N 1090, *Thakur Prosad Singh v Emperor*

13 (17) 4 AIR 1917 Cal 671 (671) 18 Cri L Jour 626 (626), *Jogesh Chandra v Abdul Gani*

14 (23) 10 AIR 1923 All 544 (544) 21 Cri L Jour 693 *Huani Chand v King-Emperor* (Removing of some earth from the land of zamindar)

(23) 10 AIR 1923 Lah 329 (330) 24 Cri L Jour 363, *Karam Chand v Mathra Das* (Dispute between

der v Morrison (Dispute

error. (Entry by

cases involving

(07) 5 Cri L Jour 13 (14) 11 Cal W N 170 *Chamru Sahu v Emperor*

[See (23) 24 Cri L Jour 714 (715) (Cal) *Bhatnani v Haricharran*

(22) 67 Ind Cas 499 (499) 23 Cri L Jour 403 (Pat), *Rampabatar Singh v Kasim Ali Khan* (Process not to be issued merely because in Magistrate's opinion it may be desirable to ascertain the truth),

15 (02) 29 Cal 410 (411 412) *Kulip v Budhan*

(26) 13 AIR 1926 Cal 795 (797) 53 Cal 606 27 Cri L Jour 789, *Sabit Chandra v Akbarul Haque*

16 (91) 1891 Pat 562 (563), *Queen Empress v Lamchandri*

17 (70) 14 Sat W R Cr 36 (36) *Ameer Mohamed v G Bhai*

consideration in determining whether upon the materials before the Magistrate there is sufficient ground for proceeding¹⁸

(e) The fact that one of the accused was a member of the highest service in the land who was sworn to do justice¹⁹

Stay of proceedings — See Note 11 on S 94

6 “In the opinion of a Magistrate” — In deciding on the sufficiency of the ground for proceeding the Magistrate must be guided by his own independent opinion and not by that of others such as a police officer¹

7 Issue of process — This section provides that when a Magistrate who receives a complaint neither dismisses it under S 203 nor postpones issue of process under S 202 process for the attendance of the accused *shall issue*¹ The fourth column in the second schedule indicates whether a summons or warrant should issue in the first instance in each case But there are two exceptions to this rule Firstly, in the cases in which a summons should issue in the first instance according to the second schedule the Magistrate can under S 90 issue a warrant in lieu of or in addition to a summons in the circumstances specified in that section Secondly, in cases in which a warrant should issue in the first instance according to the second schedule, this section enables the Magistrate to issue a summons instead if he thinks fit to do so² This discretion should be so used as not to subject accused persons to the indignity of arrest unless there is real need for it³

If the Magistrate issues a warrant in a case in which he ought to have issued summons the error is not a ground for setting aside the proceedings⁴ The Magistrate in such cases can cancel the warrant and issue a summons⁵

Process should ordinarily issue against all the accused who are *prima facie* shown to have committed an offence⁶ But the Magistrate is not bound when the police report discloses one offender only, to issue process against any witnesses who may afterwards be found during trial to be accomplices.⁷ Nor is it imperative on him to proceed against a person who has been removed from the array of accused persons and is produced as a witness in the Court his failure to do so not being sufficient to invalidate the trial in respect of the other accused⁸

18 (26) 13 AIR 1926 Cal 792 (797-798) 53 Cal 606 27 Cri L Jour 788 *Subal Chandra v Al adullah Siddiki*

[See (33) 20 AIR 1933 Cal 552 (553) 84 Cri L Jour 1063 *Makhan Lal v Sakhi* (The fact that the matter has been compounded with other co-accused is no ground for refusing process)]

Also see S 403 Note 12

19 (40) 27 AIR 1910 Pat 97 (98) 41 Cri L Jour 349 *Mulji Narain v Emperor*

Note 5

1 (68-69) 4 Mad H C B 162 (165) *Rangaswamy v Sabapathi* (Until he has at least examined the complainant he is not in a position to exercise his own independent opinion)

(68) 9 Suth W R Cr 21 (21) *Borodakant Mookerjee v Kali Bhattarajee*

Note 7

1 (35) 25 AIR 1938 Sind 192 (192) 39 Cri L Jour 966 *Pierumal Lalari v Emperor* (1900) 27 Cal 793 (800) *Ji mucl Jia v Patil Mandal*

v Kasim Ali

2 (33) 21 Cal 588 (589) *Basumoti v Bidrai*

3 (27-96) 1 Upp Bur Rul 31 (31)

4 (1864) 1 Suth W R Cr 16 (16) *Aneef Putney v Rai Isunder Chuckerbuti*

consideration in determining whether upon the materials before the Magistrate there is sufficient ground for proceeding¹³

- (e) The fact that one of the accused was a member of the highest service in the land who was sworn to do justice¹⁴

Stay of proceedings — See note 11 on S 344.

6. "In the opinion of a Magistrate." — In deciding on the sufficiency of the ground for proceeding, the Magistrate must be guided by his own independent opinion and not by that of others such as a police officer¹

7. *Issue of process.* — This section provides that when a Magistrate who receives a complaint neither dismisses it under S 203 nor postpones issue of process under S 202 process for the attendance of the accused *shall issue*¹ The fourth column in the second schedule indicates whether a summons or warrant should issue in the first instance in each case But there are two exceptions to this rule Firstly, in the cases in which a summons should issue in the first instance according to the second schedule, the Magistrate can, under S 90, issue a warrant in lieu of or in addition to a summons in the circumstances specified in that section Secondly, in cases in which a warrant should issue in the first instance according to the second schedule, this section enables the Magistrate to issue a summons instead, if he thinks fit to do so² This discretion should be so used as not to subject accused persons to the indignity of arrest unless there is real need for it³

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Process should ordinarily issue against all the accused who are *prima facie* shown to have committed an offence⁶ But the Magistrate is not bound, when the police report discloses one offender only, to issue process against any witnesses who may afterwards be found, during trial, to be accomplices⁷ Nor is it imperative on him to proceed against a person who has been removed from the array of accused persons and is produced as a witness in the Court, his failure to do so not being sufficient to invalidate the trial in respect of the other accused⁸

18 (26) 13 AIR 1926 Cal 795 (797, 798) 53 Cal 606 27 Cri L Jour 788 *Subal Chandra v.*

e fact that the

19 (40) 27 AIR 1940 Pat 97 (98) 41 Cri L Jour 349, *Mulla Naram v. Emperor*,

Note 6

1 (68-69) 4 Mad H C 100 (101) 100
complainant he is not
(68) 9 South W R Cr 2

has at least examined the

Note 7

1 (38) 25 AIR 1938 Sind 192 (192) 39 Cri L Jour 966, *Pherumal Lalaram v. Emperor*
(1900) 27 Cal 705 (706) 71

It has been held that in proper cases there is nothing irregular or improper in a Magistrate first issuing process for one accused person and then changing his mind and issuing process for all the accused.⁹

When once the Magistrate issues process under this section, proceeding commences and it should go on in due course unless something occurs to show that the Magistrate has, for some cause or other, made a wrong exercise of his discretion.¹⁰ The question of commencement of proceedings becomes relevant in suits for damages for malicious prosecution or for prosecution for making false complaint, etc. Prosecution commences when proceedings commence under this section and proceedings commence when process is issued against the accused. So unless process is issued, there is no cause of action in either of the proceedings referred to above.¹¹ The view that a prosecution commences even when a complaint is made¹² is, it is submitted, not well founded and is not an accepted one.

In police cases, where the accused is under arrest, the order of the Magistrate to produce the accused from custody on a particular date to stand his trial corresponds to the order for issue of process under this section and it is such an order which marks the commencement of proceedings against the accused. This is the point at which vested rights, such as a right of appeal or right of trial by jury may accrue to him if the law as it stands at that date gives them to him.¹³

Where A and B are jointly accused of an offence but the Magistrate issues process only against A, B is competent to give evidence as a witness at the trial of A.¹⁴

9. (29) 15 AIR 1938 Lah 511 (542) : 29 Cr L Jour 293, *Alam v. Emperor*

10. (73) 19 Suth W R Cr 28 (28) : 10 Beng L R App 26, *In re Raghuo Pariah*.

(74) 21 Suth W R Cr 44 (45), *Ramkant Sirkar v. Jadub Chunder*.

11. (20) 7 AIR 1920 All 208 (209) 42 All 305, *Asmat Ali v. Qurban Ahmad*.

(32) 19 AIR 1932 All 386 (389) : 138 Ind Cas 282, *Basant Rai v. Ganga Ram*.

(91) 1891 Rat 544 (545), *Empress v. Dudhunbhai*

(10) 6 Ind Cas 877 (877, 878) 37 Cal 358, *De Rozario v. Gulab Chand Anundjee* (28 Dom 226 dissent-
ed from)

(11) 11 Ind Cas 811 (312) 38 Cal 880, *Golap Jan v. Bhola Nath* (*Approving Yates v. The Queen*,
(1885) 14 Q B D 618)

(15) 2 A I R 1915 Mad 128 (129) : 21 Ind Cas 703 (705) 37 Mad 181, *Meeran Saib v. Ratnarelu*.

proved in 37 Cal 358)

(31) 18 AIR 1931 All 665 (665) 53 All 771, *Ali Mohamed v. Zakir Ali*

(29) 16 AIR 1929 Pat 271 (271, 272) : 8 Pat 285, *Subhay Chamar v. Nandlal Sahu* (Mere fact that
plaintiff (accused) was present at enquiry does not alter position)

(10) 7 Ind Cas 255 (156) (Cal), *Golap Jan v. Bhola Nath*.

(14) 1 AIR 1914 Lah 531 (533) : 1915 Pun Re No 1 : 28 Ind Cas 273 (276), *Codharani v. Debidas*.
(But this does not conclude the matter — *Held*, in circumstances of the case plaintiff was entitled to
damages)

[See also (33) 20 A I R 1933 Pat 292 (292, 293) : 12 Pat 292, *Zakhruddin Mahomed v. Dudhu Bibi*.
(Where it was held that proceedings commenced even by the mere order for the issue of process, though
it was not issued)]

12. (77-78) 2 Dom 481 (487), *Imperatrix v. Lalshman Sakharani*

(33) 5 Dom L R 910 (915) : 28 Dom 226, *Ahmedbhai Habibbhai v. Framji Edulji*.

(1831) 6 C & P 423, *Clarke v. Postan* (Distinguished as a mere dictum in 37 Cal 358 Referred to and
not approved in 38 Cal 880)

13. (43) 30 AIR 1943 Pat 245 (252, 253) : 22 Pat 433 45 Cr L Jour 177 : 209 Ind Cas 482 (SB), *Gopal
Maricari v. Emperor*.

14. (82) 10 Cal L Rep 553 (551), *Mohesh Chander Kopali v. Mohesh Chunder Dass*.

[See also (37) 24 AIR 1937 Nag 17 (23) : 1LR (1937) Nag 315 : 38 Cr L Jour 237 (FP), *Amdul Mas
Gulzar v. Emperor*. (Police refraining from prosecuting person against whom there is sufficient
evidence — He is a competent witness in the trial of another accused)]

8 Omission to issue process — Where a Magistrate without issuing any process at all to the accused convicts him, the conviction is illegal¹ But where the accused appears in Court of his own accord without a summons, he is entitled to require that the case be proceeded with and the mere omission to issue summons becomes immaterial in such a case²

10 Order directing summons, if a judgment — An order directing issue of summons under this section is not a judgment. So where a Magistrate issued summons to an accused and the accused appeared and filed a cross complaint it was held that it was open to the Magistrate to rescind the order as to summons and send the complaints for enquiry under S 202¹

12 "If he has not jurisdiction himself" — A process is for attendance of the accused before the Magistrate issuing it but there are cases where the Magistrate issuing process has no jurisdiction to try the case as for example under S 29A in cases of complaint against an European British subject. Provision is made here for the attendance of the accused in such cases before another Magistrate having jurisdiction.

15 (3rd) 19 AIR 1932 Pat 72 (77) 33 Cn L Jour 349 *Raghunathpur v Emperor*
Note 8

2 (192) 26 Bom 552 (557). 4 Bom L R 276, *In the matter of Lakshman Gownd* (Summons is merely a means of procuring attendance)

(19) 6 AIR 1919 Lah 389 (390) 1919 Pnn Re No 5 Cr 20 Cri L Jour 3 *Emperor v M. Durr*

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idra Chandra
v Emperor (Accused)

(16) 6 AIR 1918 Ind Co2 (653) 19 Cri L Jour 527 *Mushara' v Raj Kishore* (Do)

1 (23) 10 AIR 1973 Cal 662 (66^o) 25 Cri L Jour 464 *Lalit Mohan v. Nona Lal Sarkar*

1 (23) 10 AIR 1993 Cal 667 (667) 25 Cr L Jour 464 *Lalit Mohan v Nona Lal*
Also see S 369 Note 2

[But see (07) 6 Cr L Jour 367 (369) 12 Cal W N 68 *Pandelu Glosu v Khosla Sarfar* (Withdrawal of processes without taking evidence held improper)]

power to take cognizance being distinct from jurisdiction. Such Magistrate cannot rescind the original process, but he can discharge the accused in respect of the offence for which the process was issued and issue a fresh process for any other offence alleged to have been committed.¹

14 'Provisions of Section 90' — Sub section (2) — See Notes on Section 90

15 Process fee — Subsection (3) is new and enables a Magistrate to dismiss a case for default of payment of such fees for process as are payable and ordered, within a reasonable time. An order acquitting the accused is not correct.² Even before this provision was inserted there existed the practice of dismissing the complaint for non payment of process fees as for default of prosecution³ though such a dismissal was held to be illegal in warrant cases.⁴ The Legislature has given effect to that practice by the addition of this sub section.

Where a complaint is against two persons but the complainant has paid process fees for summons against one only, the other must be discharged under this sub-section, if no summons is taken against him.⁵

The process-fees referred to in this sub section are only for the attendance of the accused at the commencement of proceedings and not for the presence of the accused on the date of judgment and a dismissal of the complaint under this sub section for non payment of process-fees for such summons is not legal.⁶

The section applies to Magistrates taking cognizance of offences and this rule as to payment of process fees refers therefore only to cases when an 'offence' is disclosed. An application for maintenance under S 493 should not be dismissed under this sub section for failure to pay process-fees, as an order for maintenance is not a conviction for an offence.⁷

Where a complaint was dismissed under this sub section in a *de novo* trial after charges had already been framed, it was held that it amounted merely to a discharge and not an acquittal, and that a second trial on the same facts would not be barred.⁸ See for further discussion, Section 403.

Where a complaint is dismissed under this sub section, the High Court, Sessions

Note 13

1. (45) 32 AIR 1915 Sind 51 (51) : 221 Ind Cas 136. 1 L R (1944) Kar 411 (DB) *Amarlal Wansanmal v Emperor* (Offence for which process was first issued not capable of being taken cognizance of as sanction and complaint under Ss 196A and 195 were absent—accused may be discharged and proceeded against for other offences)

Note 15

1. (44) 31 AIR 1944 Cal 417 (418) 46 Cr L J Jour 253 217 Ind Cas 237 (DB) *Dineswar Banerjee v Emperor*
 2. (89) 1899 Rat 491 (491) *Queen Empress v Dhola*
 (86) 2 Weir 252 (252) 16 Mad 234, *In re Ponnammal*
 3. (93) 2 Weir 323 (323), *In re Palannagari*
 [See (72) 1872 Pun Re No 21 Cr p 29 (29) *Kahan Singh v Hukum Singh* (Charge of cheating—Complaint not to be dismissed for failure to deposit expenses of producing accused after warrant has been issued)]
 (02) 4 Bom L R 276 (277) 26 Bom 559 *In re Lalshman Govind* (Complaint of criminal breach of trust—Process fee not to be asked for)]
 4. (02) 26 Bom 552 (557) 4 Bom L R 276, *In re Lalshman Govind*
 5. (25) 12 AIR 1925 All 392 (393) 26 Cr L J Jour 963 *Bhimani v Persadi*
 [See (39) 1939 Nag L Jour 201 (201) *Emperor v Nirpatsingh* (S 201 (3) appears to apply only to issue of process to the accused at the first instance)]
 6. (93) 16 Mad 234 (234) 2 Weir 252, *In re Ponnammal*
 7. (31) 18 AIR 1931 Nag 39 (40) 27 Nag L R 13 33 Cr L J Jour 603 *Shcora Sui v Dani*
 [But see (15) 2 AIR 1915 Mad 23 (24) 39 Mad 585 (589) 25 Ind Cas 1001 (1002 1003) 15 Cr L Jour 673 *Sriramulu v Arisina Rao* (Where it was held that after a charge is framed there can be no discharge, but only an acquittal and a second complaint on the same facts would be barred by S 403)]

Judge or District Magistrate may under S 436 direct a further enquiry⁸ and in such a case notice to show cause why a further enquiry should not be ordered is neither desirable nor necessary⁹

As to the fees payable see A I R Commentaries on the Court fees Act 1st (1944) Edn., S 90 and also the Appendix for rules framed by the High Courts

As to the applicability of this subsection to processes to witnesses, see Notes on Section 544

16 Revision — The High Court has ample revisional powers to interfere with the proceedings under this section and can exercise its powers at any stage of the proceedings and quash the same though it will interfere only in cases of an exceptional nature as where neither the complaint nor the prosecution disclosed a case against the accused, but process has been issued under this section.¹

Where a Magistrate having followed the procedure laid down, has exercised a discretion judicially in issuing a process² or where the error, omission or irregularity in the issue of process is one which is curable under S 537³ the High Court will not interfere. Similarly where the record does not disclose sufficient grounds for issuing process the High Court will not interfere merely because the Magistrate, taking cognizance of the matter has failed to record reasons for not issuing process⁴

17. Process under special or local Acts — See the undermentioned case¹

- 8 (38) 93 AIR 1938 Sind 192 (199) 39 Cri L Jour 966 *Pherumal Lalram v Emperor*
 [See also (38) 26 AIR 1939 Sind 38 (39) 1 L R (1939) har 228 40 Cri L Jour 287, *Chellomal v Ketalmal Jeyramdas*]
 9 (22) 9 AIR 1900 Pat 51 (34) 4 Pat L Jour 456 20 Cri L Jour 843 *Sheonarain Singh v Ram-pertab Pat*

Note 16

- 1 (99) 1899 All W N 212 (213) *Empress v Clifton*
 (96) 20 Bom 548 (545) *Queen-Empress v Nageshappa*
 (78) 20 South W R Cr 23 (30) 11 Beng L R App 8 *Abdool v Magistrate of Purnea*

(1907) 33 Cal 200 (1907) 33 Cal 200 (1907) 33 Cal 200 *Raghunath Puri v Emperor*

Also see S 439 Note 26

- 2 (26) 13 AIR 1906 Cal 795 (797) 53 Cal 606 27 Cri L Jour 788 *Subal v Ahadullah*
 [See (69) 11 South W R Cr 54 (54 55) *Queen v Russick Monce*]

- (16) 3 AIR 1916 Pat 129 (130) 18 Cri L Jour 366 (367) 1 Pat L Jour 592 *Phagu Saku v Emperor*.
 (Issue of process without examination of the complainant)

Also see Note 16 on S 200

- (12) 13 Cri L Jour 609 (611) 16 Ind Cas 257 (Cal) *Pulin Behary Das v Emperor* (Issue of process on insufficient materials)

- (1861) 1 South W R Cr 16 (16) *Ances Putney v Ramsoonder Chukerbutty* (Issue of warrant instead of process)

Ishammad Sadig v Delhi Electric Supply & Co
 but accused informed of correct section on his appearance)

- 4 (38) 25 AIR 1938 Mad 879 (879) 39 Cri L Jour 981 *In re Venkatasubba Pillai*

Note 17

- 1 (08) 8 Cri L Jour 185 (186) 1 Sind L R 67, *Imperator v Panai* (Gambling Act 4 [IV] of 1897)

205.* (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided

Synopsis

- | | |
|---|---|
| 1 Legislative changes | 6 Pardanashin lady |
| 2 Scope | 7 Permit him to appear by his pleader " |
| 3 'Whenever a Magistrate issues a summons | 8 'Pleader " |
| 4 'Dispense with " | 9 Applicability to security proceedings |
| 5 Bond from the accused | 10 'At any stage of the proceedings |
| | 11 Revision |

NOTE to the Synopsis. See the Notes indicated for the following topics

Dispensation with attendance of accused when incapable of remaining before the Court See Section 510A

No exemption when warrant is issued See Note 3

Record of reasons for refusing leave under the Section See Note 4

1 Legislative changes

Changes introduced in 1872 —

Under the Code of 1861, it was doubtful whether the Court could dispense with the personal attendance of the accused in cases in which a *warrant* was ordinarily issuable on complaint. Section 151 of the Code of 1872 made it clear that the Court could do so in cases of whatever nature, in which the Magistrate thinks fit to issue a summons "

Changes introduced in 1882 —

(1) The words 'in cases of whatever nature' of the Code of 1872 were substituted by the words 'whenever . . . issues a summons'

(2) The words 'by his pleader' were substituted for the words 'by an agent duly authorized'. This is consequent on the definition of 'pleader' newly added to the Code of 1882 in Section 4 (1) (n). That definition included any person duly authorized

(3) The words 'and if necessary' provided were newly added

Code of 1898 — The section remains unchanged since 1882

2 Scope — The general principle of the Code is that an accused person cannot be proceeded against *ex parte*¹. This section provides an exception to this general rule by enacting that the Magistrate may dispense with the *personal* attendance of the accused in a particular class of cases, namely those in which he issues a *summons*. At any stage of the proceedings, however, the Magistrate enquiring into or trying the case can direct the personal attendance of the accused if his presence is found necessary.

This section applies only to *Magistrates* and not to Courts of Session or the High Court. But s. 803 shows that the latter Courts have got similar power to dispense with the personal attendance of the accused². The High Court can also under its inherent powers

* 1882 S 205, 1872 S 151, 1861 S 261

Section 205 — Note 2

1 (75) 24 Suth W R Cr 20 (26) *Tarney C. v. Municipal Commission, Serampore*
2 (22) 9 AIR 1900 Mad 79 (79) 45 Mad 359 23 Cr L Jour 266, *Kadaman's Deti v. Emperor*
(Court of Session)

Judge or District Magistrate may, under S 436 direct a further enquiry⁸ and in such a case notice to show cause why a further enquiry should not be ordered is neither desirable nor necessary⁹

As to the fees payable see A I R Commentaries on the Court fees Act, 1st (1914) Edn., S 20 and also the Appendix for rules framed by the High Courts

As to the applicability of this sub section to processes to witnesses, see Notes on Section 544

16 Revision — The High Court has ample revisional powers to interfere with the proceedings under this section and can exercise its powers at any stage of the proceedings and quash the same though it will interfere only in cases of an exceptional nature as where neither the complaint nor the prosecution disclosed a case against the accused, but process has been issued under this section¹

Where a Magistrate, having followed the procedure laid down, has exercised a discretion judicially in issuing a process² or where the error, omission, or irregularity in the issue of process is one which is curable under S 537,³ the High Court will not interfere. Similarly where the record does not disclose sufficient grounds for issuing process, the High Court will not interfere merely because the Magistrate, taking cognizance of the matter has failed to record reasons for not issuing process⁴

17. Process under special or local Acts — See the undermentioned case.¹

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 [See also (39) 26 AIR 1939 Sind 39 (39) 1 L R (1939) Kar 228 40 Cri L Jour 287, *Chellomai v. Keralmal Jeyramdas*]
 9 (2^o) 9 AIR 1922 Pat 54 (54) 4 Pat L Jour 456 20 Cri L Jour 843 *Sheonaram Singh v. Ram-pertab Rai*

Note 16

- (32) 19 AIR 1932 Pat 12 (78) 33 Cri L Jour 349 *Itaghunath Puri v. Emperor*

Also see S 439, Note 26

- 2 (26) 13 AIR 1926 Cal 795 (797) 53 Cal 606 27 Cri L Jour 788 *Subal v. Ahadullah*
 [See (69) 11 Suth W R Cr 54 (54 55) *Queen v. Russell Monce*]

- 3 (1910) 1 L R 217 (1910) 1 L R 217 (1910) 1 L R 217

- (1) 1 L R 217 (1910) 1 L R 217

v. Emperor.

- (12) 13 Cri L Jour 609 (611) 16 Ind Cas 257 (Cal), *Pulin Behary Das v. Emperor* (Issue of process on insufficient materials)
 (1864) 1 Suth W R Cr 16 (16) *Ancef Pulney v. Ramsoonder Chulcherbutty* (Issue of warrant instead of summons in the first instance)
 (29) 16 AIR 1929 Lah 867 (867) 30 Cri L Jour 702 *Muhammad Saif v. Delhi Electric Supply & Traction Co* (Mention of wrong section in summons but accused informed of correct section on his appearance)
 4 (35) 25 AIR 1938 Mad 879 (879) 39 Cri L Jour 984, *In re Venkatasubba Pillai*

Note 17

- 1 (02) 8 Cri L Jour 185 (186) 1 Snd L R 67, *Imperator v. Paman* (Gambling Act 4 [IV] of 1857)

205.* (1) Whenever a Magistrate issues a summons, he may, if he

Magistrate may dispense with personal attendance of accused sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided

Synopsis

- | | |
|--|---|
| 1 Legislative changes | 6 Pardanashin lady. |
| 2 Scope | 7, "Permit him to appear by his pleader." |
| 3 "Whenever a Magistrate issues a summons" | 8 "Pleader" |
| 4 "Dispense with" | 9 Applicability to security proceedings |
| 5 Bond from the accused | 10 "At any stage of the proceedings" |
| | 11. Revision |

NOTE to the Synopsis See the Notes indicated for the following topics.

Dispensation with attendance of accused when incapable of remaining before the Court See Section 510A

No exemption when warrant is issued See Note 3

Record of reasons for refusing leave under the Section See Note 4

1. Legislative changes.**Changes introduced in 1872 —**

Under the Code of 1861, it was doubtful whether the Court could dispense with the personal attendance of the accused in cases in which a *warrant* was ordinarily issuable on complaint. Section 151 of the Code of 1872 made it clear that the Court could do so "in cases, of whatever nature, in which the Magistrate thinks fit to issue a summons"

Changes introduced in 1882 —

- (1) The words "in cases of whatever nature" of the Code of 1872 were substituted by the words "whenever issues a summons"
- (2) The words "by his pleader" were substituted for the words "by an agent duly authorized". This is consequent on the definition of "pleader" newly added to the Code of 1882 in Section 4 (1) (n). That definition included any person duly authorized
- (3) The words "and if necessary provided" were newly added

Code of 1898 — The section remains unchanged since 1882.

2. Scope. — The general principle of the Code is that an accused person cannot be proceeded against *ex parte*¹. This section provides an exception to this general rule by enacting that the Magistrate may dispense with the *personal* attendance of the accused in a particular class of cases, namely those in which he issues a *summons*. At any stage of the proceedings, however, the Magistrate enquiring into, or trying the case can direct the personal attendance of the accused if his presence is found necessary.

This section applies only to *Magistrates* and not to Courts of Session or District Court. But s 353 shows that the latter Courts have got similar power to dispense with personal attendance of the accused². The High Court can also under its *inherent powers*

* 1882 S 205, 1872: S 151; 1861 S 261

Section 205 — Note 2

1 (75) 24 Suth W R Cr 25 (26), *Tarney Churn v Municipal Commissioners, Serampore*,
2 (22) 9 AIR 1922 Mad 79 (79) 45 Mad 359; 23 Cri L Jour 266, *Kandamali Laxmi v Jyoti*
(Court of Session)

recognized by S 501A, dispense with such attendance³ See also S 116 and S 540A

3. "Whenever a Magistrate issues a summons." — This section does not apply where a *warrant* has been issued¹ or the accused has been arrested without a warrant² Where, however, a *summons* has been issued in the first instance and thereafter the accused is brought in under a warrant of arrest, the section would apply³ A summons can under S. 204 be issued even in cases in which a warrant is ordinarily issuable, this section will apply even to such cases if a summons has been issued⁴ Even where a warrant has been issued, the Magistrate may cancel the warrant and issue a summons,⁵ or the accused having appeared before him, it may not be necessary for him to issue a summons for the appearance of the accused⁶ In both these cases also this section will apply All that is required under this section is that the Magistrate should consider that a summons is sufficient for the appearance of the accused in the case and if he is of that opinion he may then permit the accused to appear by pleader⁷

4. "Dispense with." — The words "may, if he sees reason so to do" show that the Magistrate has a *discretion* to dispense with the personal attendance of the accused or not as he thinks fit The discretion will, however, be used liberally especially in trivial cases such as a prosecution for a municipal offence,¹ or where the accused is a pardanashin lady,² or where the accused is too ill to attend Court³ In such cases if the permission is refused, reasons for such refusal should be recorded⁴

In considering the propriety of an order under this section, the Magistrate should always take into account whether there is any material before him to indicate that an offence has been committed by the accused and whether there is anything in the nature of a *prima facie* case⁵

- (12) 13 Cr L Jour 461 (484) 15 Ind Cas 96 (Bom), *Emperor v C. W. King* (High Court)
 (18) 23 Ind Cas 489 (491) 15 Cr L Jour 281 (Cal) *Raj Rajeswari Debi v Emperor* (Magistrate refused to dispense with personal appearance of pardanashin ladies — On petition High Court allowed them to appear by pleader)
 [See also (67) 7 Suth W R Cr 78 (78) *In re Nistarnnee* (Application for dispensing with personal attendance held inadmissible apparently on the ground that there was no good reason to do so)]
 3. (30) 17 AIR 1930 Nag 61 (02) 26 Nag L R 50 31 Cr L Jour 284, *Mt Sarji v Mt Bhumi*

Note 3

v. Sardar.

Mt Bhumi

Nath.

- 6 (40) 27 AIR 1940 All 178 (180) 41 Cr L Jour 500, *Jagdish Narain v Emperor*
 7 (40) 27 AIR 1940 All 178 (180) 41 Cr L Jour 500, *Jagdish Narain v Emperor* (In this case it was observed that the stage at which order under S 205 (1) is to be passed is before the beginning of the trial.)

Note 4

v. Mt Bhumi — Magistrate re-

e impres

3. (02) 6 Cal W N 112 (112), *In re Kuran Chandra*
 (12) 13 Cr L Jour 461 (461) 15 Ind Cas 96 (Bom) *Emperor v King* (High Court dispensing with the attendance)
 4 (63) 6 All 59 (60) 18-3 All W N 207, *In re Rahim Bibi*
 5 (40) 27 AIR 1940 All 178 (180, 181) 41 Cr L Jour 500, *Jagdish Narain v Emperor*

A Magistrate can dispense with the personal attendance of the accused as often as he pleases.⁶

It is not necessary that there should be an *express order* dispensing with the personal attendance. But it is advisable that the fact should be noted in the records and not be left for implication, although omission to do so would only be an irregularity which will not justify interference in revision.⁷

5 Bond from the accused — Where the personal attendance of an accused is dispensed with a recognizance bond may be taken from him binding him to appear either in person or by pleader, and if the pleader neglects to attend when the case is called on, the bond may be forfeited and the accused made liable for the payment of the penalty. The bond cannot be taken from his pleader nor can his pleader be bound by such a bond to attend.¹

6 Pardanashin lady — Where a Magistrate issues a summons to a *pardanashin* woman who is accused of an offence, he should, as a general rule, dispense with her personal attendance and permit her to appear by pleader at least until such time as he has before him some legal and satisfactory evidence indicative of her having committed a breach of the law.¹ Such an order should not be refused merely because —

(1) the Magistrate thinks that she is not *pardanashin*,² or

(2) other women belonging to the same class that observed *pardah* had appeared in Court,³ or

(3) she is the daughter of a prostitute if she is married to a respectable husband in whose family women observe *pardah*.⁴

The Court will extend the privilege of *pardah* to women who, though not strictly observing *pardah*, are yet not accustomed generally to appear before the public.⁵ This section is one which should be freely utilised in Sind where so much prejudice exists against the appearance of females generally in public.⁶

6 (10) 14 Cal W N cxxx (cxxx) *Devendra Nath v Narendra Nath*

(17) 21 Cal W N cxxv (cxxv) *In re Sulhlata*

7 (26) 13 AIR 1926 Bom 218 (221) 50 Bom 250 27 Cri L Jour 410, *Dorabshah v Emperor*

Note 5

1 (68) 5 Bom HCR Cr 64 (67) *Peg v Lallubhai Jassubhai*

Note 6

1 (83) 6 All 59 (60) 1883 All W N 207 *In the matter of the petition of Pahim Bibi*

the case)

(31) 14 AIR 1931 Sind 37 (38) 32 Cri L Jour 665 *Mt Asu v Emperor*

(09) 9 Cri L Jour 158 (159, 160) 1 Ind Cas 101 (Lah) *Mt Habbo v Emperor* (Until the case has

reached the stage at which personal attendance is clearly and legally required in the interests of justice)

(10) 11 Cri L Jour 197 (198) 3 Sind L R 167 4 Ind Cas 1152 *Emperor v Mahomed* (Until it be-

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As to the right of a *pardanashin* woman to be exempted from personal attendance—

- (1) where she is a complainant, see S 200, Note 12 and
- (2) where she is a witness, see ss 503 and 506.

7. "Permit him to appear by his pleader." — Although the *personal* attendance of the accused may be dispensed with under this section, it is essential that he should be *represented* by his pleader. The reason is that it is necessary that some one should be present at the trial to look after the interests of the accused, and the law considers that such interest will be completely safeguarded if his pleader is in attendance.¹

The words 'appear by pleader' in their ordinary acceptance mean "represent by pleader," that is, having a pleader to act and to plead.²

The appearance by a pleader involves the performance of all acts that devolve upon the accused in the course of the trial³ such as the following.

- (1) pleading guilty or not guilty under s 255 and in cases falling under ss 242 and 243,⁴
- (2) filing a written statement embodying the plea of the accused,⁵
- (3) making the necessary answers to an examination under s 342,⁶
- (4) hearing a deposition of a witness read over, under s 360 (1),⁷
- (5) hearing of a judgment, the sentence being one of fine only, or the accused being acquitted under s 366 (2).⁸

Form No 1 of schedule V of the Code shows that the summons to an accused person may itself direct whether the accused is to appear in person or by pleader. In other words, the Magistrate may, even at the time of issuing summons, dispense with the personal attendance of the accused and permit him to appear by pleader.⁹ When a summons is sent as in Form No 1 of schedule V, containing the words "you are hereby required to appear in person or by pleader" and the accused sends his pleader who requests for permission to dispense with the personal attendance of the accused, the Magistrate cannot proceed against the accused for disobedience of the summons, even though he refuses to grant the permission. If he wants his personal attendance, an order directing such attendance should be made.¹⁰

The power to dispense with the personal attendance of the accused can be exercised by the Magistrate only so far as his *own Court* is concerned. He cannot, for instance, grant or refuse permission to appear through a pleader in the Sessions Court to which he commits the accused.¹¹

Note 7

approval in AIR 1926 Bom 218 50 Bom

should plead

¹ See Note 1: on p 24.

8 "Pleader."—Under the Codes of 1861 and 1872, the Court could, when dispensing with the personal attendance of the accused, permit him to appear by an *agent duly authorized*¹ Under the present Code, the Court can permit him to appear only by his *pleader* But the definition of the word '*pleader*' as now given in s 4 (1) (r), is very wide and includes *any person appointed by the accused with the permission of the Court to act in the proceedings against him*² In order that a person, other than a pleader authorized by law to practise in the Court, should be a '*pleader*' within the meaning of s 4 (1) (r), it is necessary that—

- (1) he should have been appointed by the accused to act for him, and
- (2) the Court should permit him to so act

The appointment and the permission need not, however, be express but may be implied from the circumstances of the case³ Thus, where the father-in-law of the accused who was unwell appeared in Court on her behalf and the trying Magistrate thereupon proceeded with the case, it was assumed that the Magistrate must have given the necessary permission.⁴

It is, however, generally advisable that something should be noted on the record to show that the person who represents the accused has been duly appointed by him and the Court has given the requisite permission for his appearance in place of the accused⁵

In the absence of an *appointment* by the accused of any person to represent him, the mere permission of the Magistrate will not entitle any person to act as a pleader for the accused and the Magistrate would have no jurisdiction to proceed with the case in the absence of the accused⁶

Illustrations

- (1) X, the estate agent of the accused appeared in Court and was permitted by the Magistrate to represent the accused It was, however, not clear that he was appointed by the accused to act for him in the proceeding It was held that the accused could not be convicted on the plea of "guilty" made by the agent⁷
- (2) The accused, a woman, was absent from her village and apparently without her knowledge, her mother-in-law appeared in Court on her behalf and was permitted to act for the accused It was held that the conviction was not sustainable⁸

9. *Applicability to security proceedings.*—This section applies to proceedings under s 106 in Chapter VIII Division A for the reason that the person against whom the proceedings are taken is an accused person But it does not apply to proceedings under ss 107 to 110, in Chapter VIII Division B,¹ inasmuch as in such proceedings the persons proceeded against are not accused persons But independently of this section, s 116 provides for dispensing with the personal attendance of the persons proceeded against in such cases

10. "At any stage of the proceedings"—Where the Court has allowed the accused to appear by pleader, but thinks it necessary or desirable that the accused should be present in person for any particular purpose, such as for examination by the Court

Note a

1. (1862) 1862 Rat 1 (2), *Reg v Ramchandra*

2. (26) 13 AIR 1926 Bom 218 (222) 50 Bom 250 27 Cri L Jour 440, *Dorabshah v Emperor*

3. See (26) 13 AIR 1926 Bom 218 (221) 50 Bom 250 27 Cri L Jour 440, *Dorabshah v Emperor*

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under s 312 or for pleading to a charge under s 255, he may order the personal appearance of the accused¹ Where the accused is convicted and the sentence is not one of fine only, the Magistrate must, under s 366, sub s. (2), direct the personal attendance of the accused for hearing the judgment² Though at any time the Magistrate can revoke the permission given to the accused to appear by a pleader, yet he should not do so in a trivial case such as an income tax prosecution and on a trivial ground such as that the accused objects to the case being tried by that Magistrate and wants a transfer of his case to some other Magistrate³

11. Revision.—Where the Magistrate has refused to excuse the personal attendance of an accused person, the High Court will in proper cases interfere in revision and will dispense with his presence¹

The High Court will not, however, interfere where the irregularity alleged is the mere omission of the Magistrate to make a record that he has given permission to the accused to appear by his pleader,² or where the case itself is an extremely trivial one³

But where there is a complete absence of jurisdiction as where the Magistrate dispenses with the presence of the accused in a case in which a warrant has been issued, the High Court will set aside the order giving such permission⁴

A Sub divisional Magistrate cannot, in revision, cancel the order of a Bench Court dispensing with the personal attendance of the accused He can only forward the record to the District Magistrate who should, under s 423 of the Code, refer the matter to the High Court⁵

CHAPTER XVIII.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT

206.* (1) Any Presidency Magistrate, District Magistrate, Sub-

Power to commit for trial divisional Magistrate or Magistrate of the first class, or any Magistrate (not being a Magistrate of the third class) empowered in this behalf by the *[Provincial Government], may commit

* 1882 S 206, 1872 S 143, 1861. Ss 37, 38

Note 10

1 (26) 13 AIR 1926 Bom 218 (219) 50 Bom 250 27 Cri L Jour 410, *Dorabshah v Emperor*
(18) 5 AIR 1918 Pat 152 (153) 19 Cri L Jour 119 43 Ind Cas 407 (407), *Jeuraj Ramjidas v. Dullavji.*

(34) 21 AIR 1934 All 693 (694) 35 Cri L Jour 879, *Ishwar Das v Bhagwan Das*
[See (37) 1937 Mad W N 182 (183), *Nagoji v Veeramana*

any person for trial to the Court of Session or High Court for any offence triable by such Court

(2) But, save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court

a Sub-Title 1 & A O for Local Government

Synopsis

- | | |
|---|--|
| <ol style="list-style-type: none"> 1 Chapter XVIII — General 2 Legislative changes 3 Magistrates empowered in this behalf 4 Effect of committal by Magistrate having no power of committal See Section 112 5 May commit 6 Triable by such Court — Not only exclusively but also from the nature of the case | <ol style="list-style-type: none"> 7 Discretion in the matter of committing or discharging the accused See Section 113 8 District Magistrate's interference with the discretion 9 Committal to Sessions Court having no local jurisdiction over the case 10 Quashing committal See Section 215 11 Sub section (2) |
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NOTE to the Synopsis See the Notes indicated for the following topics

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| <p>Committal without evidence See S 203 Notes 6 & 8 and 11</p> <p>Committal without jurisdiction See S 201 also S 213 Note 2</p> <p>Corner's inquiry—1 fleet See Note 3</p> | <p>Delegation instead of committal not permissible See S 202, Note 11</p> <p>Objects of preliminary inquiry See Note 1</p> <p>Procedure when offence triable by two Courts of different grades See Note 5</p> |
|---|---|

1 Chapter XVIII — General — Section 193 provides that a Sessions Court can take cognizance of a case in the exercise of its original jurisdiction only when the accused has been committed to it for trial. Section 191 provides that the High Court may take cognizance of offences upon commitment made to it. This chapter specifies the Magistrate who may pass orders of committal and prescribes the procedure to be followed in him for the purpose.

The inquiry prescribed by the chapter is called a *preliminary inquiry*, and before a Magistrate commits a case for trial to a Sessions Court, he must hold such a preliminary inquiry into the facts alleged against the accused¹ and satisfy himself that there is a real case for trial.²

The object of such an inquiry is two fold firstly, in order to prevent the committal of cases in which there is no reasonable ground for conviction so as on the one hand, to save the accused from the prolonged anxiety of undergoing a trial for offences that cannot be brought home to him and on the other, to save the time of the Court being wasted over cases in which the evidence would obviously not justify a conviction.³ Secondly, in order to provide that no person shall be committed for trial without being previously made acquainted with the facts and circumstances of the offence imputed to him and without being given a fair opportunity of meeting them.⁴

Section 206 — Note 1

- 1 (15) 2 AIR 1915 Bom 195 (196) 31 Ind Cas 347 (349-350) 16 Cr L Jour 747, *Emperor v Bai Mahalalal & mi*
- 2 (95) 2 Cr L Jour 534 (541) 9 Cal W N 829 *Sheobux Ram v Emperor*
- 3 (1901) 41 Ind App 7

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as Judge of Coimbatore v Kumara

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- 4 (70) 14 Both W R Cr 16 (17) *Queen v Kisto Doba*
- (95) 1895 Rat 746 (746) *Queen Empress v Vafa Razi*
- [See also (39) 26 AIR 1939 Sind 222 (224) 1 L R (1940) Kar 95 40 Cr L Jour 818 *Jashanmal J Gulrajani v Emperor* (The purpose of committal proceedings is not merely to place on record the case for the prosecution but to commit to the Court of Session for trial an offence which, after having heard the evidence for the prosecution and for the defence the Magistrate thinks has been committed)]
- 4 (45) 32 AIR 191 Lah 286 (290) (FB) *Sardara Qasam v Emperor*

2 Legislative changes.

- (1) The words "subject to the provisions of S. 443" which originally occurred at the beginning of sub s (1) of the section have been omitted by the Criminal Law Amendment Act, 12 [XII] of 1923, in view of the amendment of S 443 effected by the said amending Act
- (2) The words "(not being a Magistrate of the third class)" were newly introduced into the section by the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923

3. "Magistrates empowered in this behalf." — As the section now stands, the following Magistrates have powers of committal —

Presidency Magistrates, District Magistrates, Sub divisional Magistrates, Magistrates of the first class, and Magistrates of the second class, if they are specially empowered by the Provincial Government in this behalf¹

Before the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923, even Magistrates of the third class could be empowered to commit and in Madras all Magistrates had been so empowered to commit² except Tahsildar Magistrates of Taluqs, where there were Stationary Sub Magistrates³ The introduction of the words "not being a Magistrate of the third class" shows that third class Magistrates cannot now be so empowered

The British Consul at Zanzibar is a Magistrate empowered to commit accused for trial to the High Court of Bombay⁴

A District or Sub-divisional Magistrate to whom a sub Magistrate has submitted the case under S 349 has got the power to commit the case to the Court of Session,⁵ but he has no power to send the case back to the sub Magistrate with directions to commit it⁶ See also notes 14 and 16 on section 349

A Magistrate having power to commit does not lose the power merely because he has been specially appointed to try the accused⁷

A Presidency Magistrate's jurisdiction to commit a case is not ousted by the fact that the coroner has held an inquiry and has drawn up an inquisition under Act 4 [IV] of 1871⁸

4 Effect of committal by Magistrate having no power of committal — See Section 532.

5. "May commit" — The procedure laid down in Chapter XVIII is not confined to cases exclusively triable by a Court of Session but is also applicable to cases which, in the opinion of the Magistrate, ought to be tried by such Court¹ In other words

(81) 4 Mad 227 (228) 2 Weir 584, *Queen v Chinna Vedagars*

(Court of Session cannot add a

1. Calcutta Gazette 1873, Pt 1, p 67 Calcutta Gazette, 1891 Pt 1 p 1000 Punjab Gazette, 1873,

1 ('81) 6 All 477 (479) 1884 All WN 205, *Ramsundar v Nirodram*

(1) If the case is one exclusively triable by a Court of Session the Magistrate *must* proceed under this chapter and cannot *try* the case himself.² And when the facts *prima facie* disclose such an offence the Magistrate should commit the case and will not be justified in trying the case for deciding whether it constitutes a lesser offence.³

(2) Conversely if the offence is not of a nature triable by a Court of Session at all, this chapter will not apply and the Magistrate *must* try the case himself.⁴

(3) If the offence is one triable both by a Court of Session and by himself, the Magistrate has a discretion to decide whether to try the case himself or to proceed under this chapter.⁵ As to the proper exercise of discretion in such cases, see Note 4 on S 347

2 (95) 1895 Rat 953 (953) *Queen Empress v Bhikhi* (Offence of making false charge under S 376, Penal Code)

(10) 11 Cr L Jour 196 (197) 4 Ind Cas 1134 (Mad) *Emress v Nyan Nyem* (Magistrates ought not to give themselves jurisdiction by trying cases under S 354 Penal Code, which properly come under Ss 376 and 511, Penal Code)

(14) 1 AIR 1914 Oudh 361 (363) 15 Cr L Jour 502 *Kesrimal v Emperor* (Where a person is charged with two offences, one of which is triable by a Court of Session and the Magistrate passed an aggregate sentence without specifying the sentences for each of the offences the High Court on a verbal objection before it for the first time as to the legality of the sentence set aside the conviction and sentences in respect of the offence exclusively triable by a Court of Session after apportioning the sentence between the two offences)

(68) 9 Suth W R Cr 5 (5) *Puran v Bhuttoo* (Offence under S 459 Penal Code)

(89) 1899 Rat 476 (477) *Queen Empress v Jobania* (Magistrate not to ignore aggravating circumstances and try case himself)

(66) 6 Suth W R Cr 2 (2) *Queen v Sohoy Dome* (Case of abduction of child for purposes of stealing its ornaments)

(66) 6 Suth W R Cr 49 (49) *Shambooy Poy v Ajai Aheer* (Dacoity)

(87) 12 Mad 54 (55) 2 Weir 22 *In re Madurai*

(92 96) 1 Upp Bur Pul 231 (231) *Emress v Nyan Nyem* (Magistrates ought not to give themselves jurisdiction by trying cases under S 354 Penal Code, which properly come under Ss 376 and 511, Penal Code)

(11) 12 Cr L Jour 20 (20) 6 Ind Cas 1103 (Mad) *Jamal Mohamed v Moideensa* (Aggravating circumstances not to be ignored)

facts before him)]

[See also (71) Weir 3rd Edn 701 (707)]

(10) 11 Cr L Jour 639 (640) 8 Ind Cas 389 1910 Pon Re No 31 Cr *Lehhara v Crown* (Fact that offence exclusively triable by Sessions Court involves minor offence triable by Magistrate does not empower him to try the case)

(72 97) 1872 92 Low Bur Hol 158 (160), *Queen Empress v Nga Than Bo* (Do)]

Also see S 347 Note 4

3 (92) 5 C P L R Cr 38 *Emress v Atmaram Hajam*

(92) 5 C P L R 48 (49) *Emress v Sonhar*

4 (97) 19 All 465 (466) 1897 All W N 115 *Queen Empress v Schade* (Offence under the Opium Act 1 [I] of 1878)

(06) 3 Cr L Jour 94 (95) 3 All L Jour 14 1906 All W N 28 *Emperor v Dharam Singh* (To commit summons cases to the sessions is illegal)

(64) 1 Suth W R Cr L 14 (14) *In re Mado Mueh* (Commitment in cases under Chapter VIII is illegal)

(64) 1 Suth W R Cr 5 (5) *In re Indrobeer Thaba* (Section 20 of the Police Act 1861 makes offence triable only by Magistrate)

(70) 5 Mad H C R 277 (279) *Reg v Dionoghous* (Offences under S 30 of the Madras Act 1 [I] of 1866)

Even in cases not triable by the Magistrate but triable by a Court of Session or by some other Magistrate, he has a discretion to decide whether to proceed under this chapter or to send the case for trial by the proper Magistrate⁶

If at the time a Magistrate is asked to take cognizance of a case, he is *ab initio* convinced that the case ought to be tried by a Court of Session, he must commence proceedings under this chapter. But there is nothing to prevent a Magistrate who started with the trial of a case from subsequently deciding to commit it for trial by a Sessions Court⁷. In such cases the proceedings need not be started afresh but the Magistrate may proceed from where he left and continue the enquiry under this chapter⁸.

6 "Triable by such Court"—Not only exclusively but also from the nature of the case. — It has been seen in Note 5 that in cases exclusively triable by a Court of Session the procedure prescribed by this chapter must be adopted and that in cases not so exclusively triable the Magistrate has a discretion to decide whether to proceed under this chapter or to try the case himself. In the latter class of cases, the Magistrate must proceed under this chapter if in his opinion, the case *ought* to be tried by a Court of Session¹. As to the principles on which this discretion ought to be exercised see Note 4 on Section 317.

7 Discretion in the matter of committing or discharging the accused—See Section 213

8 District Magistrate's interference with the discretion — When the inquiry is pending before a subordinate Magistrate, the District Magistrate has no power to order committal or otherwise interfere with the discretion of the former. See S 435 Note 13. But when a sub Magistrate has discharged the accused the District Magistrate, if satisfied that the discharge was improper, may interfere under S 436 and order committal. See Notes on Section 436 and Section 437.

9 Committal to Sessions Court having no local jurisdiction over the case — As to the validity of a committal to a Sessions Court having no local jurisdiction in the place where the offence was committed, see Section 531, Note ^o.

When a native Indian subject who is charged with having committed an offence in a Native State is brought to the British territory, he will be considered to have been 'found' at the place to which he is brought and the Sessions Court having jurisdiction in that place will be competent to try the offence⁴.

10 Quashing committal — See Section 215

(18) 6 A I R 1918 Nag 141 (142) 20 Cr L Jour 97 *Emperor v Hanuman* (The committal of a case triable exclusively by the Court of Session is not illegal merely because the committing Magistrate is himself empowered under S 30 to try the case.)

[See (30) 17 A I R 1930 All 280 (280) 31 Cr L Jour 563 *Balkishen v Emperor* (It is not incumbent upon a Magistrate to go out of his way to find that a case exclusively triable by a Court of Session might arise from facts before him if they were proved.)]

6 (84) 6 All 477 (479) 1884 All W N 205 *Ramsundar v Nivolum* (Magistrate, second class, invested with powers described in S 206 inquiring an offence under S 39^a Penal Code, and discharging the accused—Discharge held valid.)

7 (12) 13 Cr L Jour 877 (882 884 885 889) 6 Low Bar Ral 129 17 Ind Cas 813 (FB), *Emperor v Channing Arnold*

(14) 1 A I R 1914 Mad 643 (644) 15 Cr L Jour 366 *In re Chinnatan* (He must then stop proceeding with the case as a trial and instead commit the case under the provisions of Chapter XVIII.)

8 (80) 2 All 910 (912) *Empress of India v Hahs Baksh*

(30) 17 A I R 1930 Cal 666 (663) 32 Cr L Jour 243 *Panchanan Sarkar v Emperor*

(21) 8 A I R 1921 All 143 (148) 22 Cr L Jour 496 *Dinzarcha v Emperor*

Also see S 317 Note 6

Note 6

1 (84) 6 All 477 (479) *Ramsundar v Nivolum*

Note 9

1 (82) 6 Bom 622 (625) *Empress v Magan Lall*

11 Sub-section (2) — Though this sub section prohibits committal to the High Court of cases triable by a Court of Session there is nothing to prevent the High Court from trying cases committed to it by a mofussil Court by exercising the power given to the High Court by section 206 sub-section (1)¹

See also the unmentioned cases²

207. The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court

Synopsis

- 1 Scope and applicability of the section
- 2 Object of preliminary enquiry in sessions cases See Sect on 206 Note 1
- 3 Ought to be tried See Note 4 on Sect on 317
- 4 Procedure where there are two or more offences one of which is triable only by a Court of Session
- 5 Joint inquiry — Legality of

NOTE to the Synopsis. See the Notes indicated for the following topics

Grounds for committal — Connection with another case See Sect on 215

Procedure on direction by High Court to commit See Note 1

Separate trial on joint commitment See Note 5

1 Scope and applicability of the section — This section contemplates a commitment to the Court of Session or High Court in two cases (a) where the offence is exclusively triable by a Court of Session or High Court and (b) where the offence is triable by a Court of Session or High Court as well as by a Magistrate but the Magistrate is of the opinion that it ought to be tried by a Court of Session or High Court. Where an offence though triable by a Court of Session or High Court is neither exclusively triable by such Court nor one which in the opinion of the Magistrate ought to be tried by such Court the Magistrate cannot commit it to the Sessions Court¹. Where an offence is not triable at all by a Court of Session it cannot be committed to the Sessions See S 200

A preliminary inquiry as prescribed by this chapter is not necessary where a case is committed to the Court of Session in obedience to the lawful orders of a superior Court²

* 1882 S 207 1872 S 189 1861 S 179

Note 11

1 (20) 7 AIR 1920 Mad 824 (825) 42 Mad 791 20 Cr L Jour 481 *In re Ganapathy Chetti* (High Court in original criminal jurisdiction can try cases committed to it instead of local Sessions Judge — Commitment is not void)

Sessions Court competent to try the offence)

Section 207 — Note 1

1. (28) 15 AIR 1928 Pat 551 (552) 29 Cr L Jour 61* *Emperor v D o Narain Mullick* (Sach

akshi (Appellate Court while setting aside conviction)

(25) 12 AIR 1925 Rang 82 (83) 2 Rang 447 26 Cr L Jour 1105 *Nga Myaing v Emperor* (Do)
[See (12) 13 Cr L Jour 719 (743) 1912 Pun Re No 7 Cr 17 I C 54, *Wadhawa Singh v Emperor*]

2 Object of preliminary inquiry in sessions cases — See Section 206 Note 1

3 'Ought to be tried' — See Note 4 on Section 317

4 Procedure where there are two or more offences one of which is triable only by a Court of Session — Where an accused is charged with two or more offences one of which is exclusively triable or ought to be tried by a Court of Session, the procedure under this chapter should be followed and the proper course is to commit him for trial for *all* the offences¹ So also, where several persons are jointly charged in respect of one transaction and it appears from the facts implicating the whole of them that one has committed an aggravated offence, which must or should be tried by a Court of Session, the Magistrate should commit all the accused for trial²

5 Joint inquiry — Legality of — There is no provision in the Code requiring a separate inquiry in respect of each person prior to commitment. The sections relating to joinder of charges viz S 233 to S 239 refer to trials only. Hence, there is no objection to hold a preliminary enquiry against a person jointly with others but the trial on commitment should be separate¹ See also S 233 Note 6 and S 239, Note 1

208.* (i) The Magistrate shall, when the accused appears or is

Taking of evidence brought before him, proceed to hear the complainant (if produced any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate

* Code of 1882 S 208 — See Note 1

Code of 1872 Ss 190 191 and 357, para 1

190 When the accused person appears or is brought before the Magistrate or if his personal Examination of com attendance is dispensed with when the Magistrate thinks fit the Magistrate plainant and witnesses shall take the evidence of the complainant and of such persons as are stated for prosecution to have any knowledge of the facts which form the subject matter of the accused and the attendant circumstances

[But see (39) 19 AIR 1939 Cal 683 (684 685) 33 Cri L Jour 770 *Nagendranath v Emperor* (Appellate Court discharging accused but saying that if the Magistrate wishes to proceed further in the matter he may commit the accused to the Court of Session — Preliminary enquiry under Chapter VIII necessary before accused can be committed)]

Note 4

- 1 (21) 61 Ind Cas 1008 (1008) 22 Cri L Jour 480 (Cal) *Probodh v Mohini*
 (83) 1883 All W N 199 (199) *Empress v Ramanand* (Although there is no absolute prohibition in the Code as to his trying the accused for offences triable by him and committing him for other offences)
 (33) 20 AIR 1933 Lah 500 (501) 34 Cri L Jour 314 *Emperor v Ujagar Singh* (Four cases in which evidence was same committed to sessions—Magistrate competent to try two—*Held* commitment order was proper)
 (97) 2 All 398 (400 405) *Empress of India v Lachman Singh*
 [See (18) 5 AIR 1918 All 126 (126) 40 All 615 19 Cri L Jour 706 *Hari Ram v Ganga*]
 2 (81) 1881 All W N 64 (64) *Empress v Khial* (On the ground of convenience)
 (99) 2 Weir 258 (258) *In re Kathu Chenchugadu*
 (63) 1 Weir 118 (119)

Note 5

Jour 773 201 Ind Cas 735

together and sending them for joint trial in one commitment — Such commitment is not illegal.)

(2) The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them.

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

Synopsis

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| <p>1 Legislative changes</p> <p>2 Object of the section.</p> <p>3 "When the accused appears or is brought before him"</p> <p>4 "Shall proceed to hear."</p> <p>5. "Hear the complainant (if any)"</p> <p>6 Take all such evidence</p> <p>7. Evidence for the prosecution.</p> <p>8 Evidence for the accused</p> <p>9 "In manner hereinafter provided"</p> <p>10. Sub-section (2)—Right of cross-examination.</p> | <p>11 Sub-section (3)—Summoning of witnesses.</p> <p>12. Officer conducting prosecution. See Section 495</p> <p>13 Procedure where, after commencing case as a trial of a warrant or summons case, the Magistrate considers the case to be one which ought to be committed to the sessions. See Section 347 and Notes thereon.</p> <p>14. Commitment by Civil or Revenue Courts in respect of offences committed before or brought under notice of such Court in course of judicial proceeding See Section 478 and Notes thereon</p> |
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NOTE to the Synopsis See the Notes indicated for the following topics :

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| Committal without evidence. See Notes 6, 8 and 11. | Record of reasons. See Note 11. |
| Duty of prosecution See Note 7 | Right of reserving cross-examination See Note 10. |
| Evidence called for by Magistrate See Note 7 | Valid reasons See Note 11. |

1. Legislative changes. — The Code of 1882 did not contain any provision corresponding to sub s. (2), though the prior Codes contained such a provision. The sub-section was inserted in the Code of 1898. See Note 10

191. The complainant and the witnesses for the prosecution shall be examined in the presence of the accused person, or of his agent when his personal attendance is dispensed with and he appears by agent

192. The accused person or his agent shall be permitted to examine and re-examine his own witnesses, and to cross-examine the complainant and his witnesses.

193. In inquiries preliminary to commitment to a Court of Session or High Court, the Magistrate shall procure the attendance of the witnesses for the prosecution as in cases usually tried upon warrant, and it shall be in his discretion to summon any witness offered on behalf of the accused person to answer or disprove the evidence against him. If the Magistrate refuses to summon a witness so offered, he shall record his reasons for such refusal.

Code of 1861 : Ss 186, 193, 194 and 207.

186. The Magistrate shall ascertain from the complainant, or otherwise, the names of any

person

Examination of the complainant and witnesses for the prosecution

193. The Magistrate shall take the evidence of the complainant, and of such persons as are stated to have any knowledge of the facts which form the subject matter of the accusation and the attendant circumstances

194.

The accused person or his agent shall be permitted to examine and re-examine his own witnesses, and to cross-examine the complainant and his witnesses.

Discretionary with the Magistrate to take evidence for the defence

207. It shall be at the discretion of the Magistrate to summon any witness who may be offered in behalf of the accused person to answer or disprove the evidence against him

2. Object of the section. — This section is intended for the benefit of the accused. Its object is that the accused should be made aware of all the evidence that he will have to meet on his trial and also that he should have a full opportunity of convincing the Magistrate that there are not sufficient grounds for committing him for trial¹

3 "When the accused appears or is brought before him" — It is necessary for a preliminary inquiry under this chapter that there must be an accused person. Where an inquiry was held in which a certain person was not put in the situation of an accused person at all but was himself examined on solemn affirmation like other witnesses, and was not given any opportunity of cross examining the other witnesses, and then was committed to the Court of Session on a charge which was the result of the inquiry, it was held that the commitment was illegal¹

The appearance of the accused under this section may be voluntary and need not be under any process issued against him under Section 201²

4 "Shall proceed to hear" — Under s 311, the Magistrate can postpone the commencement of the enquiry for any reasonable cause

5. "Hear the complainant (if any)" — The section requires that the complainant shall be heard, not necessarily examined¹

6 Take all such evidence — In an inquiry under this chapter the Magistrate is bound before he draws up a charge to take all such evidence as may be produced (1) in support of the prosecution, (2) on behalf of the accused or (3) as may be called for by the Magistrate¹ unless the evidence is irrelevant or unnecessary to prove the point in issue² It is the duty of the Magistrate to record the evidence fully in order that the accused may have ample notice of the matter with which he is charged and of the evidence by which the prosecutor seeks to prove the case³ He is not absolved from recording all the evidence produced under this section even in cases where the accused has confessed his guilt inasmuch as such confessions are often retracted later on⁴ It ought to be the endeavour of the Magistrate in the inquiry under this section to ascertain the fact of a particular offence and collect evidence thereof before commitment and not to expect convictions at the Court of Session on a vague and multifarious evidence causing suspicion of several offences but yielding proof of none⁵ As to whether the inquiry should be directed to

Section 208 — Note 2

1 (12) 13 Cri L Jour 877 (882 883) 6 Low Bur Rul 129 17 Ind Cas 813 (TB) *Emperor v Channing Arnold*

[See (39) 26 AIR 1939 Sind 292 (224) 1 L R (1940) Kar 95 40 Cri L Jour 818 *Jashanmal v. Emperor*]

[See also (81) 4 Mad 227 (227, 228) 2 Weir 584 *Queen v Channa Vedagars*]

Note 3

1 (69) 9 Sath W R Cr 54 (56 57) *Queen v Kali Churn*

2 (19) 6 AIR 1919 Lah 389 (390) 20 Cri L Jour 3 1919 Pun Re No. 5 Cr, *Emperor v Mt Puri*

Note 5

1 (45) 32 AIR 1945 Nag 127 (129) 1 L R (1915) Nag 419, *Mahmudkhan v Emperor* (Hearing a complainant merely amounts to a granting of audience)

(29) 16 AIR 1929 Cal 299 (230) 30 Cri L Jour 942 *Santiram Mandal v Emperor*

Note 6

1 (72 92) 1872 92 Low Bur Rul 538 (539) *Nga Po Se v Queen*

818 *Jashanmal v.*

2 (12) 13 Cri L Jour 413 (444) 15 Ind Cas 75 (111) *Durga Dutt v Emperor*

(33) 20 AIR 1933 All 690 (693) 55 All 1010 31 Cri L Jour 967, *S H Jhabwala v Emperor* (Super-

¹ *Via v Emperor*

ascertaining the guilt or innocence of the accused definitely or only to find out if there are *prima facie* grounds for believing the accused to be guilty, see Note 5 on Section 209

7. Evidence for the prosecution — The object of the prosecution is not to secure a conviction at any cost but to see that justice is done. Hence it is the duty of the prosecution to call as witnesses all persons who have been eyewitnesses or otherwise connected with the transaction although the evidence of any of them may be favourable to the accused and an adverse inference can be drawn from the failure to call any material witness.¹ But the prosecution is not under any duty to call witnesses whom it regards as false or unnecessary.² If the prosecution has not sent up any material witness, it is the duty of the Magistrate to call such witness and examine him himself.³ The examination of the investigating police officer is necessary in all important cases, especially of murder and dacoity.⁴

As to the right of the prosecution to abstain from examining some witnesses before the committing Magistrate and produce at the sessions trial evidence not produced in the committing Magistrate's Court see Notes on S 286

See also the observations in the undermentioned case⁵ regarding the precautions to be taken as regards chemical examiner's reports and in proving *post mortem* examinations

8 Evidence for the accused — Under this section it is the duty of the Magistrate to take all the evidence produced by the accused before framing a charge. A commitment order passed without taking the evidence produced for the defence is illegal and liable to be quashed.¹ Where however no request is made on behalf of the

Note 7

1 (41) 23 AIR 1911 Snd 169 (17th) 42 Cri L Jour 800 I L R (1911) Har 270 196 Ind Cas 863 (DB) *Ali Murod Gunguro v Emperor* (Prosecution should call and examine before committing Magistrate all witnesses they intend to call and examine in Sessions Court — But failure to do so does not vitiate trial unless accused is prejudiced thereby)

(37) 24 AIR 1937 All 182 (180 187) 38 Cri L Jour 401 *Francis Hector v Emperor* (The mere fact that the evidence of some witnesses is expected to be inconsistent with that of the complainant in some respects is no justification for refusing to examine them as witnesses)

(84) 10 Cal 1070 (1072) *Queen Empress v Ram Sahai Lall*

(8th) 8 Cal 121 (121 125) 10 Cal L Rep 151, *In the matter of Dhunnotari*

(21) 8 AIR 1921 Cal 257 (257) 22 Cri L Jour 475 *Tendram Muralidhar v Emperor*

(16) 2 AIR 1915 Cal 545 (546 547) 16 Cri L Jour 170 42 Cal 42nd *Ram v Emperor*

(16) 3 AIR 1910 Lah 409 (409) 17 Cri L Jour 267 1916 Pan Re No 12 Cr *Kaimi v Emperor*

(32) 19 AIR 1932 Lah 500 (501) 33 Cri L Jour 497 *Lachminarain v Emperor*

(29) 16 AIR 1929 Pat 343 (348) 8 Pat 625 30 Cri L Jour 1136 *Mathura Tewary v Emperor* (Prosecution has no option to choose witnesses)

(31) 1931 Mad WN 727 (728) *Nagaratna Thevan v Emperor*

[See also (38) 25 AIR 1938 1st 579 (58th) 40 Cri L Jour 147 *Yusuf Miao v Emperor* (Evidence to be recorded fully)]

2 (27) 14 AIR 1927 Mad 475 (476) 28 Cri L Jour 307 *Muthaya Thevan v Emperor*

(28) 15 AIR 1928 Pat 46 (46) 28 Cri L Jour 863 *Parbhoo v Emperor* (Unnecessary)

(32) 19 AIR 1932 Bom 279 (282) 56 Bom 431 83 Cri L Jour 613 *Vasudeo v Emperor*

Also see S 252 Note 5 and S 286 Note 0

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cases Magistrate to take care to send up evidence to prove that a body sent to the hospital for *post mortem* examination is really the body of the person referred to in the case under trial or that an article analysed by the chemical examiner was actually the article sent to him for analysis in the case under trial)

Note 8

1 (98) 20 All 264 (266) 1893 All WN 52 *Queen Empress v Ahiradi*

(24) 11 AIR 1924 All 317 (318) 46 All 137 25 Cri L Jour 624 *Jaswant Singh v Emperor*

accused to produce evidence a commitment order passed without examining the defence witnesses cannot be quashed on the ground of any irregularity or illegality.² It has been held in the undermentioned case³ that the rule laid down in this section is limited to examination of witnesses produced by the defence and should not be enlarged to include witnesses whom the accused might be prepared to produce.

9. "In manner hereinafter provided"—These words refer to Chapter XXV¹

10 Sub section (2) — Right of cross-examination. — Section 191 of the Code of 1861 and s 191 of the Code of 1872 expressly declared the right of the accused to cross examine the prosecution witnesses before commitment.² The 1882 Code omitted this provision as a redundancy, since even under s 138 of the Evidence Act, 1872, which provides that the opposite party has the right to cross examine the witnesses examined by a party the accused can cross examine the prosecution witnesses. But this omission gave room for doubts³ to remove which sub s (2) was inserted in 1898. The accused is now, of right, entitled to cross examine the witnesses for the prosecution during the preliminary enquiry before the charge is framed.⁴ The refusal or omission of the Magistrate to give the accused an opportunity to cross examine the witnesses for the prosecution is a legal flaw and will render the order of commitment liable to be set aside⁴ unless the accused has reserved the cross-examination to the Sessions Court.⁵

The proper time to exercise the right of cross examination is after the examination in chief of each witness. The accused has no right to reserve his cross examination till the examination in chief of all the prosecution witnesses is over.⁶ But the Magistrate has a

(33) 26 All 177 (178) 1903 All W N 215 *Emperor v Muhammad Hali*

(28) 15 AIR 1928 Rang 293 (293) 6 Rang 531 30 Cri L Jour 1 *Emperor v Nga Khang*

(34) 21 AIR 1934 Lah 610 (610) 30 Cri L Jour 410 *Jhana v Emperor* (Whether or not the examination of the accused's witnesses by the Magistrate will help him, he is entitled to have the witnesses examined)

[See (39) 28 AIR 1941 Lah 371 (371) 43 Cri L Jour 104

Emperor v
nity must

8, *Jashanmal v*
proper opportu

[See also (41) 28 AIR 1941 Lah 371 (371) 43 Cri L Jour 104 135 Ind Cas 692 *Ganga Prasad v Bhagwat Deo* (Sections 208 209 and 210 make it perfectly clear that defence witnesses may be examined in commitment proceedings even before the time comes to frame a charge)]

2 (41) 28 AIR 1941 Lah 371 (371) 43 Cri L Jour 104 136 Ind Cas 693 *Ahmad Din v Emperor*

3 (Magistrate's passed—

Note 9

1 (26) 13 AIR 1926 Pat 58 (59) 26 Cri L Jour 1475, *Emperor v Phagunia Bihari*

Note 10

1 (68) 10 Suth W R Cr 20 (25) *Queen v Shama Sunkar*

2 (94) 21 Cal 642 (662 663) *Queen Empress v Sagal Samba Sajo*

3 (24) 11 AIR 1924 Cal 780 (780) 51 Cal 412 26 Cri L Jour 63 *Jyotsna Nath v Emperor*

(98) 20 All 529 (531) 1898 All W N 162 *Queen Empress v Brij Narainman*

(1900-01) 5 Cal W N 110 (112) *In the matter of Surjya Narain Singh*

(30) 17 AIR 1930 Cal 751 (755) 57 Cal 945 37 Cri L Jour 182 *Nanooram v Fulchand*

4 See cases cited in foot note 3 above

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327, *Tambi v Emperor*

(1) 100

(31) 18 A

(27) 14 A

discretion in the exercise of his inherent power in suitable circumstances to allow the accused to reserve his cross-examination⁷

If the Magistrate in the exercise of his discretion, permits the reservation of cross-examination, he cannot then refuse to recall the prosecution witnesses⁸. Thus, where the accused applies for copies of statements made by prosecution witnesses to the police during the investigation with a view to cross-examine the witnesses and the Magistrate has ordered such copies to be furnished under s 162 he is bound to postpone the cross-examination of the prosecution witnesses till such copies are obtained and then allow cross-examination with reference to such statements⁹.

A Magistrate has no power to curtail the cross-examination of witnesses, by directing the counsel for the accused not to put more than six to eight questions to each witness¹⁰. The cross-examination of the prosecution witnesses under this section need not be confined to matters elicited in examination in chief¹¹. This sub-section speaks of the right of the accused to cross-examine the prosecution witnesses. But the Magistrate himself can cross-examine them if he thinks it necessary to do so for ascertaining the truth of the prosecution story¹² (*vide* Section 163, Evidence Act).

As to whether the accused is entitled to cross-examine the prosecution witnesses after the charge is framed, see Note 7 on s 213.

As to the right of the accused to cross-examine in cases commenced as trials but subsequently considered by Magistrate to be fit to be committed to sessions, see s 347, Note 5.

11 Sub-section (3) — Summoning of witnesses. — Under this sub-section, the Magistrate is bound to issue process for the attendance of any witness or the production of any document when such process is applied for, either by the prosecution or the accused¹ unless he deems it unnecessary to do so². If he refuses to issue process, he must record his reasons for his refusal and an omission to record such reasons is an illegality and the subsequent order, either of discharge, or of commitment is liable to be set aside³. Inordinate delay in applying for summons is a proper reason to refuse process⁴. So also, if it is brought to the notice of the Magistrate that the witnesses were summoned for the purpose of causing vexation to those witnesses, the Magistrate can refuse to issue summons⁵. But the Magistrate should not refuse to call evidence on behalf of the accused merely because he will have ample opportunity to produce evidence later on, when he is committed to the

7. (29) 16 AIR 1929 Cal 593 (595) 57 Cal 44 30 Cri L Jour 1107, *G V Raman v Emperor*
 (27) 14 AIR 1927 Pat 243 (245) 6 Pat 329 28 Cri L Jour 709, *Saslat Mian v Emperor*
 (19) 6 AIR 1919 Low Bur 159 (160) 9 Low Bur Rul 109 19 Cri L Jour 327, *Tarabi v Emperor*
 8 (30) 17 AIR 1930 Cal 754 (755) 57 Cal 945 32 Cri L Jour 18, *Nanooram v Fulchand*
 9 (27) 14 AIR 1927 Pat 243 (246) 6 Pat 329 28 Cri L Jour 709, *Saslat Mian v Emperor*
 10 (12) 13 Cri L Jour 443 (445) 15 Ind Cas 75 (All) *Durga Dutt v Emperor*
 [But see (29) 16 AIR 1929 Sind 137 (139) 23 Sind L R 310 30 Cri L Jour 845 *Emperor v. Walidino* (Magistrate not to allow unnecessarily lengthy cross-examination)]
 11 (71) 15 Suth W R Cr 34 (35) 6 Beng L R App 88 *Queen v Ishan Dutt*
 12. (15) 2 AIR 1915 Bom 195 (196) 16 Cri L Jour 747 *Emperor v Bai Mahalaxmi*
 (84) 7 All 160 (162) 1884 All W N 314 *Queen Empress v Kallu*

Note 11

- 1 (24) 11 AIR 1924 All 317 (318) 46 All 137 25 Cri L Jour 624 *Jaswant v Emperor*
 (03) 26 All 177 (178) 1903 All W N 215 *Emperor v Muhammad Hadi*
 [See (27) 99 Ind Cas 599 (600) 28 Cri L Jour 167 (Lab) *Hira Singh v Emperor* (Court should make every attempt to secure the evidence of persons whose evidence is extremely important for the case either by procuring their attendance or by having their evidence taken on commission)]
 2 (12) 13 Cri L Jour 778 (780) 17 Ind Cas 410 36 Mad 321, *Sessions Judge of Coimbatore v Immudi Kumara Kangaya*
 (27) 14 AIR 1927 Pat 243 (247) 6 Pat 329 28 Cri L Jour 709, *Saslat Mian v Emperor*
 3 (27) 14 AIR 1927 Mad 162 (162, 163) 27 Cri L Jour 1327, *Kanda v Sanganya*
 4 (29) 16 AIR 1929 Bom 269 (272) *Emperor v Yellappa Durgaji Jadhav*
 (16) 3 AIR 1916 Cal 106 (106) 16 Cri L Jour 415 (415) 4 Cal 608 *Emperor v Surath*
 5 (28) 15 AIR 1928 Mad 652 (652) 29 Cri L Jour 725 *Saminatha v Kupusami*

sessions.⁶ If the Magistrate has exercised his discretion and recorded his reasons for such refusal the revisional Court will not interfere with it unless the reason appears on the face of it to be untenable.⁷ A Magistrate is bound to take the evidence of the witnesses summoned under this section.⁸

As to the power of the Magistrate to require process fees and other fees, see Notes on Section 544

12 Officer conducting prosecution — See Section 495

13 Procedure where, after commencing case as a trial of a warrant or summons case, the Magistrate considers the case to be one which ought to be committed to the sessions — See Section 347 and Notes thereon

14 Commitment by Civil or Revenue Courts in respect of offences committed before or brought under notice of such Court in course of judicial proceeding — See Section 478 and Notes thereon

209. (1) When the evidence referred to in section 208, sub-sections

When accused person (1) and (3), has been taken, and he has (if necessary) to be discharged

examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless

* Code of 1852 S 209

209 When the evidence referred to in S 208, paras 1 and 2 has been taken and he has examined

When accused person the accused for the purpose of enabling him to explain any circumstances to be discharged appearing in the evidence against him such Magistrate shall if he finds that there are not sufficient grounds for committing the accused person for trial discharge him unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate in which case he shall proceed accordingly

Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if for reasons to be recorded by such Magistrate, he considers the charge to be groundless

Code of 1872 S 195, para 1 and Expl III

195 When a Magistrate finds that there are not sufficient grounds for committing the accused

or XVIII of this Act

Explanation III — An order of discharge cannot be made until the evidence of the witnesses named for the prosecution has been taken

Code of 1861 S 225

225 When a

When accused person to be discharged

should be put on his trial before himself in which case he shall proceed under Chapter XIV of this Act

6 (39) 26 AIR 1939 Sind 222 (224) 1 L R (1940) Har 95 40 Cri L Jour 818, *Jashanmal v Emperor*

7 (20) 16 AIR 1929 Bom 269 (271) 30 Cri L Jour 1066 *Emperor v Yellappa Durgaji*

[But see (27) 14 AIR 1927 Pat 243 (247) 6 Pat 399 28 Cri L Jour 709 *Sasdat Mian v Emperor* (High Court in revis on is not at all concerned as to whether the reasons given would have appealed to another person or not)]

8 (12) 13 Cri L Jour 413 (414) 15 Ind Cas 70 (All) *Durga Dutt v Emperor*

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes 2. Scope of the section 3. "When the evidence referred to in S 203, sub-ss (1) and (3) has been taken 4. Examination of the accused See S 312 and Notes thereon 5. Sufficient grounds for committing the accused 6. 'Shall discharge him 7. Effect of order of discharge | <ol style="list-style-type: none"> 8. Power of Magistrate to award compensation to accused on discharge See S 250 and Notes thereon 9. Recording reasons for discharge 10. Order by superior Court for further inquiry or commitment to sessions See Ss 435 to 439 and Notes thereon 11. "Unless it appears accordingly" 12. Sub-section (2) — Discharge without completing inquiry where charge is groundless 13. Revision See Ss 435 to 439 and Notes thereon |
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NOTE to the Synopsis See the Notes indicated for the following topics

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| <p>Committal when to be made See S 206, Notes 5 and 6</p> <p>Committal when not to be made See S 206 Note 6</p> <p>Competence to give evidence after discharge. See Note 7</p> <p>Discharge without any evidence See S 208 Note 6</p> <p>Graver offences — Committal preferable See S 206 Note 6</p> | <p>Magistrate's duty See Notes 5 and 6 See also S 209 Note 6</p> <p>Major and minor offences See Note 6</p> <p>Question of mere probabilities or complicated questions — Committal preferable See S 206 Note 6</p> <p>Refusal of Magistrate to enquire See S 209 Notes 8 and 11</p> <p>Scope of enquiry See Notes 5 and 6</p> |
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1. Legislative changes

Differences between Codes of 1861 and 1872 —

- (1) The words 'or High Court' were added after the words 'Court of Session' in the Code of 1872
- (2) If the Magistrate should hold that the accused person should be tried before himself, the Code of 1861 provided that he should proceed under Chapter XIV thereof which related to the procedure to be followed in the trial of warrant cases, but the Code of 1872 provided that in such circumstances the Magistrate should proceed under chapters XVI, XVII or XVIII thereof (which laid down the procedure for the trial of summons cases and warrant cases and for summary trials respectively)
- (3) Three explanations were added to the section in the Code of 1872. Explanation I provided that except in compoundable cases, the absence of the complainant was not in itself a sufficient ground of discharge. Explanation II provided that a discharge was not equivalent to an acquittal and did not bar the revival of a prosecution for the same offence. Explanation III provided that an order of discharge could not be made until the evidence of all the witnesses named for the prosecution had been taken.

Changes made in 1882 —

- (1) The words relating to the taking of evidence referred to in Section 208 and the examination of the accused were added at the beginning of the section
- (2) The words 'before the Court of Session or High Court or for remanding him' which occurred after the words 'for committing the accused person to take his trial' in the Code of 1872 were omitted
- (3) The words 'or some other Magistrate' after the word 'himself' were added in the Code of 1882
- (4) The three explanations to the section referred to above which occurred in the Code of 1872 were omitted
- (5) The second paragraph to the section providing for the discharge of the accused before completely taking the evidence for the prosecution and the defence was added

sessions⁶ If the Magistrate has exercised his discretion and recorded his reasons for such refusal, the revisional Court will not interfere with it unless the reason appears on the face of it to be untenable⁷ A Magistrate is bound to take the evidence of the witnesses summoned under this section⁸

As to the power of the Magistrate to require process fees and other fees, see Notes on Section 511

12 Officer conducting prosecution — See Section 495

13 Procedure where, after commencing case as a trial of a warrant or summons case, the Magistrate considers the case to be one which ought to be committed to the sessions — See Section 347 and Notes thereon

14 Commitment by Civil or Revenue Courts in respect of offences committed before or brought under notice of such Court in course of judicial proceeding — See Section 478 and Notes thereon

209.* (1) When the evidence referred to in section 208, sub-sections

When accused person (1) and (3), has been taken, and he has (if necessary) to be discharged examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless

* Code of 1882 S 209

209 111 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

which case he shall proceed accordingly

Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if for reasons to be recorded by such Magistrate, he considers the charge to be groundless

Code of 1872 S 195, para I and Expl III

195 When a Magistrate finds that there are not sufficient grounds for committing the accused When accused person person to take his trial before the Court of Session or High Court, or for remanding to be discharged ing him, he shall discharge him, unless it appears to the Magistrate that such person should be put on his trial before himself in which case he shall proceed under Chapters XVI, XVII or XVIII of this Act

Explanation III — An order of discharge cannot be made until the evidence of the witnesses named for the prosecution has been taken

Code of 1861 S 225

225 When a Magistrate finds that there are not sufficient grounds for committing the accused When accused person person to take his trial before the Court of Session or for remanding to be discharged shall discharge him unless it shall appear to the Magistrate that such person should be put on his trial before himself in which case he shall proceed under Chapter XIV of this Act

6 (39) 26 AIR 1939 Sind 292 (224) I L R (1940) Kar 95 40 Cal L Jour 818, *Jashanmal v Emperor*

7 (29) 16 AIR 1909 Bom 289 1911 206 1 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

8 (12) 13 Cal L Jour 443 (111) 15 Ind Cas 75 (All) *Durga Dutt v Emperor*

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Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes 2. Scope of the section 3. "When the evidence referred to in S 203, sub-ss. (1) and (3) has been taken" 4. Examination of the accused See S 312 and Notes thereon 5. Sufficient grounds for committing the accused 6. "Shall discharge him" 7. Effect of order of discharge | <ol style="list-style-type: none"> 8. Power of Magistrate to award compensation to accused on discharge See S 250 and Notes thereon 9. Recording reasons for discharge 10. Order by superior Court for further inquiry or commitment to sessions See Ss 435 to 439 and Notes thereon 11. "Unless it appears accordingly" 12. Sub-section (2) — Discharge without completing inquiry where charge is groundless 13. Revision See Ss 435 to 439 and Notes thereon |
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NOTE to the Synopsis See the Notes indicated for the following topics

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| Committal when to be made See S 206, Notes 5 and 6
Committal when not to be made, See S 206, Note 6
Competency to give evidence after discharge. See Note 7.
Discharge without any evidence See S 203, Note 6
Graver offences — Committal preferable See S 206, Note 6 | Magistrate's duty See Notes 3 and 6 See also S 203, Note 6
Major and minor offences See Note 6
Question of mere probabilities or complicated questions — Committal preferable See S 206, Note 6
Refusal of Magistrate to enquire See S 203, Notes 8 and 11
Scope of enquiry. See Notes 5 and 6 |
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1. Legislative changes

Differences between Codes of 1861 and 1872 —

- (1) The words "or High Court" were added after the words "Court of Session" in the Code of 1872
- (2) If the Magistrate should hold that the accused person should be tried before himself, the Code of 1861 provided that he should proceed under chapter XIV thereof which related to the procedure to be followed in the trial of warrant cases, but the Code of 1872 provided that in such circumstances the Magistrate should proceed under chapters XVI, XVII or XVIII thereof (which laid down the procedure for the trial of summons cases and warrant cases and for summary trials respectively)
- (3) Three explanations were added to the section in the Code of 1872 Explanation I provided that, except in compoundable cases, the absence of the complainant was not in itself a sufficient ground of discharge Explanation II provided that a discharge was not equivalent to an acquittal and did not bar the revival of a prosecution for the same offence Explanation III provided that an order of discharge could not be made until the evidence of all the witnesses named for the prosecution had been taken

Changes made in 1882 —

- (1) The words relating to the taking of evidence referred to in Section 203 and the examination of the accused were added at the beginning of the section
- (2) The words "before the Court of Session or High Court or for remanding him" which occurred after the words "for committing the accused person to take his trial" in the Code of 1872 were omitted
- (3) The words "or some other Magistrate" after the word "himself" were added in the Code of 1882
- (4) The three explanations to the section referred to above which occurred in the Code of 1872 were omitted
- (5) The second paragraph to the section providing for the discharge of the accused before completely taking the evidence for the prosecution and the defence, was added

Changes made in 1898 —

- (1) The words 'if necessary' were added after the words 'he has' and before the words 'examined the accused'
- (2) The words requiring reasons to be recorded for an order of discharge under sub section (1) were added

2 Scope of the section — This section specifies the procedure to be adopted where after the evidence referred to in s 208 has been taken, the Magistrate finds that there are not sufficient grounds for committing the accused. Where there are sufficient grounds a charge should be framed under s 210. There may be a further examination of witnesses after the charge is framed (ss 211 and 212), and, if the Magistrate is satisfied after such examination that there are not sufficient grounds for committing the accused to the Court of Session he can cancel the charge and discharge the accused (s 213, sub s. (2)).

The provisions of this section may be compared with those of s 253 which deals with the discharge of an accused person in the trial of warrant cases. The following are the chief points of distinction between the two sections

- (1) The ground of discharge under this section is that the Magistrate holds that there are not sufficient grounds for committing the accused person for trial, under s 253 the ground of discharge is that the Magistrate holds that *no case has been made out against the accused* which, if un rebutted, would warrant his conviction.
- (2) The order of discharge under this section is passed after the evidence for the prosecution as well as that for the defence has been taken while under s 253 the order of discharge is passed *before* the evidence for the defence is taken
- (3) Under sub s (2) of s 209, as well as of s 253 the Magistrate can discharge the accused even before the whole of the evidence referred to in sub s (1) of the respective sections has been taken. But under s 209 the Magistrate must record the reasons whether the order of discharge is under sub s (1) or under sub s (2), while under s 253 no reasons need be recorded for an order of discharge under sub s (1) though reasons have to be recorded in case of discharge under sub s (2)
- (4) There is no provision in the trial of warrant cases for cancelling a charge once framed and for discharging the accused. There is such a provision in the case of preliminary enquiries in sessions cases (s 213)

3 "When the evidence referred to in section 208, sub sections (1) and (3), has been taken" — Except in cases coming under sub s (2) the Magistrate must hear all the evidence referred to in s 208 sub ss (1) and (3) before he can consider whether there are, or are not sufficient grounds for commitment¹. Such evidence includes evidence both for the prosecution as well as the defence and, hence it is not open to a Magistrate merely on the evidence for the prosecution and before he has taken the evidence for the

Section 209 — Note 3

1 (193) 26 All 564 (567) 1904 All WN 125 1 All J Jour 299 1 Cr L Jo 510 *Fattu v Fattu*

¹ discharge without

of the accused without

1872 did not prevent the discharge of an accused person if all the witnesses named for the prosecution who are forthcoming and accessible have been examined)

(1865) 2 Suth W R Cr 65 (65) *Queen v R Anderson* (Magistrate was bound to record specially the evidence on which he thought the commitment justifiable)]

defence, to consider whether there are sufficient grounds for committing the accused.² The contrary view³ though tenable under the Codes of 1872 and 1861⁴ cannot be considered good law under the present Code in view of the express language of this section.

Under sub s. (3) of S 209, if the prosecution or the accused applies to the Magistrate to issue summons for the attendance of any witnesses whose evidence may be desired, it is open to the Magistrate to refuse the application if he thinks fit to do so. This section by requiring the Magistrate to take the evidence referred to in sub s (3) of S 208 before considering if there are sufficient grounds for committing the accused does not deprive him of the discretion he has under that sub-section to refuse to summon any witness whom a party may desire to summon.⁵

Although it is open to an accused to insist on giving his evidence before the Magistrate frames a charge against him or decides to discharge him yet an accused is not bound to tender any evidence in the preliminary inquiry and his refusal to produce any evidence in such inquiry cannot give rise to any adverse inference against him.⁶

Sub-section (2) expressly reserves the power of the Magistrate to discharge an accused person even before he has taken any evidence, if he finds that the charge is groundless. See Note 12.

4 Examination of the accused — See S 342 and Notes thereon.

5 Sufficient grounds for committing the accused — In commitment proceedings what the Magistrate has to see is whether there are sufficient grounds for commitment and not whether there are sufficient grounds for conviction. Hence where there is a *prima facie* case for commitment the Magistrate is bound to commit the accused and is not empowered to enter into nice questions of the probabilities of the case and discharge the accused on the ground that in his opinion the evidence is not sufficient to sustain a conviction.¹ But in order to satisfy himself that there are sufficient grounds for

2 (28) 15 A I R 1928 Rang 293 (299) 6 Rang 531 30 Cri L Jour 1 *Emperor v Nga Khaing* (Committing Magistrate is bound to consider the defence evidence if it is tendered and omission on his part to do so is not a mere irregularity but an illegality)

3 See (11) 12 Cri L Jour 20 (20) 8 Ind Cas 1103 (Mad) *Jamal Mahomed v Moideen Sa Rowther* (Case exclusively triable by the Sessions Court — *Prima facie* case for commitment made out—Ordinary defence evidence should not be gone into)

4 (1865) 2 South W R Cr 50 (50) *Queen v Harnath Roy*

5 (12) 13 Cri L Jour 778 (779 780) 36 Mad 391 17 Ind Cas 410 *Sessions Judge of Coimbatore v Immudai Kumara*

6 (27) 14 AIR 1927 Pat 292 (295) 28 Cri L Jour 611 *Kumar Prasad v Emperor* (Accused is not bound to disclose his defence in a preliminary enquiry)

Note 5

1 { 43 } 30 A I R 1913 Oudh 233 (235 236) 41 Cri L Jour 309 204 Ind Cas 594 *Malomed Ali v*

functions of the Sessions Judge and take upon himself the duty of sifting the evidence in cases which are on the borderline)

(42) 29 A I R 1912 Pat 38 (40) 42 Cri L Jour 767 19 Ind Cas 689 *Ganga Prasad v Bhagwat Deo* (If he comes to the conclusion that there is evidence to be weighed he ought to commit the accused for trial and he ought not to discharge the accused merely because he thinks that if he were to try the case himself he would not be prepared to convict the accused on the evidence before him. But if he comes to the conclusion that the evidence for the prosecution is such that no tribunal whether a Judge or jury could be expected to convict the accused then he ought to discharge the accused.)

(41) 28 A I R 1911 Nag 224 (225) 42 Cri L Jour 689 I L R (1919) Nag 438 195 Ind Cas 184 *In re Himloo Jaddu Gond* (Test is whether there is a case to go before the jury — The question whether an offence falls under S 302 or S 304 Penal Code is as a rule a difficult question which a Magistrate is as a rule not qualified by training or experience to decide and it should therefore be left to the Sessions Court)

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whether conviction is
- (37) 24 AIR 1937 All 373 (373) 38 Cr L Jour 609 *Ishaq v Emperor* (Magistrate, in a case of conflicting and doubtful evidence ought to commit it for trial however unevenly balanced evidence may be in his
- Idi v Emperor* (If there merely exists in
evidence before him he should commit
the evidence for itself)
Jour 613 (F B) *Panchandra Babaji v*
te ought to commit, when there is enough
- n Khilawan v Emperor*
nj, Lal v Ram Lal
- (71) 3 N W P H C R 27 (27) *Queen v Maha Singh*
(83) 6 All 40 (42) 1893 All W N 186 *Empress v Ram Lal Singh*
(03) 26 All 564 (567) 1904 All W N 120 1 All L Jour 292 1 Cr L Jour 510 *Fattu v Fattu*
(Magistrate has no power to declare the accused guilty or innocent of the offence with which he is charged)
- (18) 5 AIR 1918 All 126 (126) 40 All 615 19 Cr L Jour 706 *Hait Ram v Canga Sakai* (Sect on 209 does not empower Magistrate to write a judgment)
- (19) 6 AIR 1919 All 9 (10) 21 Cr L Jour 61 *Sahdeo v Sargoo*
(03) 27 Bom 84 (89) 4 Bom L R 779 *Emperor v Varjwandas* (It is not necessary that Magistrate should satisfy himself fully of the guilt of the accused before making a commitment)
- (27) 14 AIR 1927 All 279 (282) 48 All 443 28 Cr L Jour 281 *Emperor v Allah Mahr* (If the evidence is balanced then it is a matter to be tried and it is his duty to commit for trial)
- (10) 11 Cr L Jour 692 (694) 8 Ind Cas 831 (Bom) *In re Bai Parvati* (Where a Magistrate entertains a doubt about weight and quality of evidence the task of resolving the doubt should be left to Sessions Court)
- (26) 13 AIR 1928 Cal 508 (528) 27 Cr L Jour 509 *Kasim Ali v Sarada Kripa* (Do)
- (Magistrate can form his opinion about credibility of witnesses but he cannot closely criticise their evidence.)
- (09) 8 Cr L Jour 263 (265) 1903 Pun Re No 14 Cr *Hazara v Dushen* (The words 'sufficient grounds in S 209 do not mean sufficient grounds for convicting')
- (23) 10 AIR 1923 Lah 337 (339) 4 Lah 69 25 Cr L Jour 238 *Maulvi v Emperor*
(29) 16 AIR 1929 Lah 403 (404) 30 Cr L Jour 234 *Emperor v Wafadar*
(13) 14 Cr L Jour 509 (544 545) 21 Ind Cas 129 (Mad) *National Bank of India v Kothandarama*
(27) 14 AIR 1927 Mad 277 (278) 23 Cr L Jour 120 *Chinnammal v Konda Reddy*
(25) 12 AIR 1925 Mad 1061 (1062 1063) 48 Mad 874 26 Cr L Jour 1570 *In re Manick Padayach*
(20) 7 AIR 1920 All 50 (52) 21 Cr L Jour 318 *Makhni v Farsand Ali* (Magistrate finding that on or other of accused was concerned in the affair but discharging on ground that there was not sufficient evidence justifying a conviction—Held that he ought not to discharge)
- (20) 7 AIR 1920 Pat 541 (597) 21 Cr L Jour 303 *Bilmatkund Das v Emperor*
(20) 7 AIR 1920 Mad 94 (96) 43 Mad 330 21 Cr L Jour 91 *In re Gandi Apparazu* (Committing Magistrate discharging the accused by giving him 'benefit of doubt'—Held Magistrate was not entitled to discharge the accused)
- (16) 3 AIR 1916 Mad 1226 (1227 1228) 16 Cr L Jour 307, *Narasappayya v Narasayya*
(91) 18:1 Pun Re No 3 Cr p 9 (10) *Queen Empress v Gurdit Singh*
(93) 1893 Pun Re No 1 Cr p 4 (5) (FB) *Mangal Singh v Empress* (Magistrate is bound to consider whether the evidence discloses the existence of any of the general or special exceptions contained in Penal Code)

committing the accused for trial by a Sessions Court, the Magistrate is entitled to weigh the evidence from that point of view² and if he finds that the evidence against the accused is totally untrustworthy³ and that there are not sufficient grounds for com-

- (25) 12 AIR 1905 Oadh 167 (167) 21 Cri L Jour 1189 *Cledia Khan v Emperor*
 (03) 1903 Pan L R No 148, p 403 (409) *King Emperor v Mahi*
 (29) 16 AIR 1923 Sind 137 (137) 30 Cri L Jour 815 23 Sind L R 310, *Emperor v Walidino* (Magistrate is not justified in allowing long cross-examination of witnesses as he has only to find whether there was a *prima facie* case for committing to the sessions or not)
 (30) 17 AIR 1930 S nd 92 (103) 31 Cri L Jour 117 24 S nd L R 96, *Nur Khan v Emperor*.
 (72 92) 1 Low Pas Pal 348 (348) *Crown v Po Azim*
 (11) 13 Cri L Jour 688 (688) 16 Ind Cas 336 (Cal), *Fazir Ali v Masharulla*
 (15) 2 AIR 1915 All 88 (87) 16 Cri L Jour 139, *Manjit Pal v Emperor*
 (25) 15 AIR 1924 Bom 220 (220 221) 29 Cri L Jour 937, *Burjorji Nowroji v Emperor*
 (81) 2 Wcr 632 (633)
 (37) 22 AIR 1935 All 366 (366) 36 Cri L Jour 1103 *Alpji Din v Emperor* (Magistrate not to weigh evidence or give benefit of doubt to accused but to see whether there is sufficient evidence to commit)
 [See (33) 20 AIR 1933 Lah 39 (33) 34 Cri L Jour 39 *Mahamad Khan v Emperor* (Evidence both against and in favour of accused—Magistrate committing to sessions deliberately leaving it to Sessions Court to decide as to reliability of the evidence—Commitment not quashed)]
 [See also (31) 18 AIR 1931 Cal 607 (611) 59 Cal 275 31 Cri L Jour 3 *Sher Singh v Jstendranath Sen* (*Prima facie* case is not the same thing as proof)]
 2 (43) 30 AIR 1913 Oadh 233 (235) 44 Cri L Jour 309 201 Ind Cas 531 *Mahomed Ali v Emperor*
 (42) 29 AIR 1941 Pat 34 (40) 42 Cri L Jour 767 195 Ind Cas 690 *Ganga Prasad v Bhagwat Deo*
 (41) 23 AIR 1941 Pat 505 (506 507) 42 Cri L Jour 576 194 Ind Cas 399 *Moinuddin v Sheogobind Sahu* (Criterion to be applied by Magistrate in weighing evidence is not quite same as will be finally applied by Sessions Court at trial)
 (39) 26 AIR 1939 Bom 372 (373) 40 Cri L Jour 951 *Alberally v Ali Mahomed*
 (34) 1933 Mad W N 619 (820) *Pattu Mudali v Emperor*
 (37) 24 AIR 1937 Mad 654 (655) 38 Cri L Jour 703, *Ella Reddi v Emperor* (Magistrate is not precluded from finding that prosecution case is false)
 (37) 24 AIR 1937 Posh 19 (13) 38 Cri L Jour 427 *Fazal Razak v Emperor*
 (35) 22 AIR 1935 Bom 137 (139) 59 Bom 125 36 Cri L Jour 613 (FB) *Ranachandra Dabaji v Emperor*
 3 (41) 23 AIR 1941 Pat 505 (506) 42 Cri L Jour 576 194 Ind Cas 399, *Moinuddin v Sheogobind Sahu*
 (04) 1 Cri L Jour 519 (594) 26 All 564 1904 All W N 125 1 All L Jour 292 *Fattu v Fattu*
 (22) 9 AIR 1902 Mad 43 (44) 23 Cri L Jour 209 *Ponniah Tirumalai Vandayya v Emperor* (To hold otherwise would be to make the preliminary enquiry directed by the Code a mere matter of form while it is a matter of substance and innocent men

ld not of course

require in cases triable exclusively by the Court of Session the same high standard of proof for the prosecution as he would require in cases which he can himself finally dispose of)

(2) 5 All 161 (162 163) 1882 All W N 223 *Lachman v Juala* (There is nothing in law which prohibits discharge of the accused even though there is the evidence of witnesses who claim to be eye witnesses but whom the Magistrate entirely discredits)

(07) 6 Cri L Jour 406 (411) 12 Cal W N 117 6 Cal L Jour 760 *Rash Behari v Emperor* (Do)

(99) 21 All 265 (267) 1899 All W N 61 *In re Kalyan Singh* (Sufficiency of evidence can be considered by committing Magistrate)

(25) 2 AIR 1915 All 186 (187 188) 16 Cri L Jour 429 37 All 355 *Dharani v Joti Prasad*

(29) 9 AIR 1909 All 168 (169) 44 All 57 23 Cri L Jour 703 *Muhammad Abdul Hadi v Baldeo Sahai* (Magistrate has power to discharge accused after taking into consideration defence evidence)

(15) 2 AIR 1915 Bom 190 (196) 16 Cri L Jour 747 (748) *Emperor v Bai Mahalazmi* (Magistrate is well within his power in cross examining prosecution witnesses)

(07) 5 Cri L Jour 213 (215) 9 Bom L R 225 *Emperor v Rawji Harji*

(33) 20 AIR 1933 Bom 154 (161 162) 57 Bom 430 34 Cri L Jour 564 *Emperor v Parashram Bhisla* (Overruled in AIR 1935 Bom 137 59 Bom 125 36 Cri L Jour 613 (FB) on another point)

(24) 11 AIR 1921 Cal 639 (640) 51 Cal 849 26 Cri L Jour 117 *Tarapada v Kalipada*

(26) 13 AIR 1926 Cal 628 (598) 27 Cri L Jour 609 *Kasuri Ali v Sarada Kripa*

(02 03) 7 Cal W N 77 (79) *Harbans Singh v Fakir Das*

(99) 1899 All W N 135 (135) *Empress v Duke*

(40) 11 Cri L Jour 751 (752) 8 Ind Cas 1044 (Lah), *Mir Abdullah v Emperor*

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- (18) 5 AIR 1918 Upp Bur 11 (11, 12) 3 Upp Bur Rul 29 19 Cr L Jour 102, *Nga Hmyin v Emperor*.
(Proposition laid down in 9 Cal W N 829 2 Cr L Jour 534 is too wide and is inconsistent with provisions of subs (2) of S 213)
- (21) 8 AIR 1921 Sind 5 (6) 15 Sind L R 1 22 Cr L Jour 570, *Aidas Tehchand v Saban*
- (25) 12 A I R 1925 Oudh 167 (169) 25 Cr L Jour 1189 *Chheda Khan v Emperor* (Magistrate not bound to commit where conviction is impossible)
- (27) 14 A I R 1927 Rang 74 (78) 4 Rang 471 28 Cr L Jour 219, *Maung Htin Gyaw v Maung Po Sein*
- (33) 1903 Pun L R No 148, p 408 (409) *King Emperor v. Mahi*
- (81) 1 Weir 288 (289) (Where there is not sufficient evidence to warrant a commitment the Magistrate is not justified in making a commitment)
- (91) 2 Weir 260 (261), *Sankaraya v Keralat Subba Ayya* (Where Magistrate had doubted whether any offence had been committed at all he was justified in discharging the accused)
- (30) 1930 Mad W N 683 (683, 684), *Venkataramani v Bayya Chimpiri*
- (31) 1931 Mad W N 116 (117, 118) *Chandrasekari Malaiadrayar v Emperor* (Defence evidence showed that prosecution witnesses could not be believed—Discharge of accused is justified)
- (13) 14 Cr L Jour 491 (491) 20 Ind Cas 747 (All), *Shahad v Emperor*
- (24) 11 AIR 1924 All 664 (665) 46 All 537 25 Cr L Jour 795 *Ganpat Lal v Emperor*
- (25) 12 AIR 1925 All 670 (670, 671) 27 Cr L Jour 2, *Akbar Ali v Raja Bahadur*.
- (70) 14 Soth W R Cr 16 (16) *Queen v Kristo Doba*
- [See (26) 13 AIR 1926 Pat 5 (8) 26 Cr L Jour 1589 *Pershad Tewari v Emperor*]

- (42) 29 AIR 1942 Pat 38 (40) 42 Cri L Jour 761 195 Ind Cas 682, *Ganga Prasad v Bhagwat Deo*
(35) 22 AIR 1935 Bom 137 (139, 141 143) 59 Bom 125 36 Cri L Jour 613 (FB), *Ramchandra Babaj,*
v Emperor
(84) 1884 All W N 14 (14), *Empress v Sumer* (Insufficient evidence—Discharge justified)
(24) 11 AIR 1924 All 664 (665) 46 All 337 25 Cri L Jour 795, *Gangat Lal v Emperor* (Magistrate
satisfied that prosecution was baseless)
(93) 1895 Rat 746 (746) *Empress v Vaya Raju*
(191) 1935 (1) W B C Cr 49 (51), *Em* 12 All 1000

{Mere suspicion even strong

Magistrate discharges the accused in such a case the Magistrate cannot be said to usurp the functions of a trial Court)

[See ¶32] 19 AIR 1932 Rang 193 (194) 10 Rang 495 34 Cri L Jour 187, *Emperor v Maung Chit Sen.*

5 (39) 26 AIR 1939 Mad 253 (254, 255) 40 Cr L Jour 392, *Palaniappa Thevar v Karuppa Gounden*.
(Magistrate in preliminary inquiry of dacoity case discharging accused as no *prima facie* case was made

6 "Shall discharge him" — It has been seen in Note 5 that when the Magistrate finds that there are no sufficient grounds for committing the accused, he is bound to discharge him. Hence where in a proceeding against A some of the witnesses say that the offence was committed by A the Magistrate should not suspend the proceeding against A and go on with the case against B with a view to commit either the one or the other of them. The Magistrate should go on with the inquiry against A and proceeding should not be started against B until A is either convicted, acquitted or discharged.¹

It has been held that an order of discharge may be presumed to have been made though there is no formal order on the record.² Similarly it has been held that where a person is charged with a major offence and the Magistrate finding that such a charge does not lie frames a charge for a minor offence and proceeds on the basis of such charge his proceeding amounts to a discharge of the accused with reference to the major offence so as to enable a Court of revision to direct a further inquiry or a commitment to the sessions.³ But where the prosecution did not press for a charge being framed for a major offence the mere fact that the accused has been charged with a minor offence does not mean that he has been discharged in respect of the major offence.⁴

7. Effect of order of discharge — An order of discharge does not operate as an acquittal and does not bar a fresh trial of the accused for the same offence (S 403). But the person discharged is no longer an accused person and the disqualification of an accused person to give evidence in his own case does not attach to him.¹ A discharge is also such a termination of a prosecution as would entitle the discharged person to maintain an action for damages for malicious prosecution.²

8 Power of Magistrate to award compensation to accused on discharge — See S 250 and Notes thereon

9 Recording reasons for discharge — The Magistrate must record his reasons when he discharges an accused person under this section.¹ But he need not record a formal judgment as laid down in S 367.² Where there are several accused and different accused are discharged at different stages of the inquiry it is enough if the reasons for their discharge are recorded at the end of the inquiry.³

out against them—Magistrate acting properly in assessing evidence—Sessions Judge who took different view held acted improperly in ordering commitment of accused for dacoity without specific finding of *prima facie* evidence of dacoity)

(73) 1973 Rat 73 (73) *Reg v Sangapa* (Magistrate not justified in discharging an accused person merely because he had been illegally arrested by the police)

(74) 1874 Pan Re No 17 Cr p 29 *Nihal Singh v Mohanda* (Offence disclosed different from offence complained—No ground for discharge)

Note 6

1 (29) 16 AIR 1929 Snd 17 (17) 30 Cr L Jour 459 *Sher Mahomed v Emperor* (A contrary proceeding)

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3

20 Cr L Jour 778 *Sheo Narain Singh v Padma*

(32) 19 AIR 1932 Nag 80 (85) 33 Cr L Jour 558 *Ram Rao v Emperor*

4 (19) 6 AIR 1919 Mad 847 (847) 19 Cr L Jour 945 41 Mad 982 (983) *In re Marappa Goundan*
Also see S 253 Note 4 S 403, Note 14 and S 437 Note 8

Note 7

1 (06) 9 Cr L Jour 370 (372) 4 Low Bur Rnl 362 *Aung Min v Emperor* (This is so whether the order of discharge is legal or illegal)

2 (81) 6 Bom 376 (380) *Vetri v Cooraya Narayan*

Note 9

1 (39) 26 AIR 1939 Bom 372 (374) 40 Cr L Jour 951 *Alberally v Ali Mahomed*

(27) 14 AIR 1927 Rang 74 (78) 4 Rang 471 28 Cr L Jour 919 *Maung Htin Gyu v Maung Po Sein*

2 (18) 5 AIR 1918 All 126 (126) 40 All 615 19 Cr L Jour 706 *Hait Ram v Ganja*

3 (29) 9 AIR 1929 Mad 190 (196 197) 21 Cr L Jour 269 *Narayanan v Emperor*

mitment⁴ he is bound to discharge the accused under this section. See also Notes on S 437, and the undermentioned cases⁵

(09) 11 Cr L Jour 18 (19) 4 Ind Cas 612 1909 Pan Re No 10 Cr, *Sultani v Emperor*
peror

(16) 3 A I R 1916 Mad 1226 (1227 1228) 16 Cr L Jour 307 (308), *Narasappayya v Narasayya*
(Magistrate may examine varying statements of the witnesses for prosecution in order to adjudge on their credibility)

(18) 5 AIR 1918 Upp Bur 11 (11 12) 3 Upp Bur Rnl 29 19 Cr L Jour 102 *Nga Hmyin v Emperor*.
(Proposition laid down in 9 Cal W N 829 2 Cr L Jour 534 is too wide and is inconsistent with provisions of sub s (2) of S 213)

(21) 8 AIR 1921 Sind 5 (6) 15 Sind L R 1 22 Cr L Jour 570 *Andas Tekchand v Saban*

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(70) 14 Suth W R Cr 16 (16) *Queen v Kristo Doba*

[See (26) 13 AIR 1926 Pat 5 (8) 26 Cr L Jour 1589 *Pershad Tewari v Emperor*]

4 (49) 30 AIR 1943 O A 933 (935) 44 Cr L Jour 309 304 Ind Cas 50 16

v Emperor

(84) 1884 All W N 14 (14) *Empress v Sumer* (Insufficient evidence—Discharge justified)

(24) 11 AIR 1924 All 664 (665) 46 All 537 25 Cr L Jour 795 *Ganpat Lal v Emperor* (Magistrate satisfied that prosecution was baseless)

(91) 2 W & R 255 (257) Cr ... Commitment was quashed)

(Mere suspicion even strong

Magistrate discharges the accused in such a case the Magistrate cannot be said to usurp the functions of a trial Court.)

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6. "Shall discharge him" — It has been seen in Note 5 that when the Magistrate finds that there are no sufficient grounds for committing the accused, he is bound to discharge him. Hence, where in a proceeding against A some of the witnesses say that the offence was committed by B, the Magistrate should not suspend the proceeding against A and go on with the case against B, with a view to commit either the one or the other of them. The Magistrate should go on with the inquiry against A, and proceeding should not be started against B until A is either convicted acquitted or discharged¹.

It has been held that an order of discharge may be presumed to have been made though there is no formal order on the record². Similarly, it has been held that where a person is charged with a major offence and the Magistrate finding that such a charge does not lie, frames a charge for a minor offence and proceeds on the basis of such charge, his proceeding amounts to a discharge of the accused with reference to the major offence so as to enable a Court of revision to direct a further inquiry or a commitment to the sessions³. But where the prosecution did not press for a charge being framed for a major offence, the mere fact that the accused has been charged with a minor offence does not mean that he has been discharged in respect of the major offence⁴.

7. Effect of order of discharge — An order of discharge does not operate as an acquittal and does not bar a fresh trial of the accused for the same offence (S 403). But the person discharged is no longer an accused person and the disqualification of an accused person to give evidence in his own case does not attach to him¹. A discharge is also such a termination of a prosecution as would entitle the discharged person to maintain an action for damages for malicious prosecution².

8. Power of Magistrate to award compensation to accused on discharge — See S 250 and Notes thereon.

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out against them—Magistrate acting properly in assessing evidence—Sessions Judge who took different view held acted improperly in ordering commitment of accused for dacoity without specific finding of *prima facie* evidence of dacoity).

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Note 6

1 (29) 16 AIR 1909 Sind 17 (17) 30 Cr L Jour 459 *Sher Mahomed v Emperor* (A contrary procedure is not illegal but was held to be unsuitable)

2 (77) 1 Bom 610 (619) *Reg v Hanmantia*

3 (19) 6 AIR 1919 All 66 (66-67) 42 All 128 20 Cr L Jour 778 *Sheo Narain Singh v Radha Mohan*

(32) 19 AIR 1932 Nag 85 (85) 33 Cr L Jour 558 *Ram Rao v Emperor*

4 (19) 6 AIR 1919 Mad 817 (817) 19 Cr L Jour 945 41 Mad 982 (983) *In re Marappa Goundan*
Also see S 253 Note 4 S 403, Note 14 and S 437 Note 8

Note 7

1 (08) 9 Cr L Jour 370 (372) 4 Low Bur Bal 362 *Aung Min v Emperor* (This is so whether the order of discharge is legal or illegal)

2 (81) 6 Bom 376 (380) *Venu v Coorja Narayan*

Note 9

1 (39) 26 AIR 1939 Bom 372 (374) 40 Cr L Jour 951 *Akberally v Ali Mahomed*

(27) 14 AIR 1927 Rang 74 (78) 4 Rang 471 28 Cr L Jour 219 *Maung Htin Gyan v Maung Po Sein*

2 (18) 5 AIR 1918 All 126 (126) 40 All 615 19 Cr L Jour 706 *Hait Ram v Ganga*

3 (22) 9 AIR 1922 Mad 195 (196, 197) 24 Cr L Jour 269 *Naramban v Emperor*

10 Order by superior Court for further inquiry or commitment to sessions—See Ss 433 to 439 and Notes thereon

11. "Unless it appears . . . accordingly."—Where there are not sufficient grounds for commitment, the Magistrate may, in proper cases, try the case himself or send it to any other Magistrate for trial instead of discharging the accused¹ But where there are good grounds for commitment the Magistrate is bound to frame a charge and commit the case to the Court of Sessions. He has no power in such cases to send the case to a Magistrate with special powers under S 30, although such specially empowered Magistrate may have jurisdiction to try the offence² A Magistrate should not treat a grave offence beyond his jurisdiction as a less grave offence in order to bring it within his jurisdiction³

12 Sub-section (2) — Discharge without completing inquiry where charge is groundless—Section 195 of the Code of 1872 expressly forbade a Magistrate in a preliminary inquiry under this chapter to discharge an accused person before completely taking the evidence for the prosecution. This provision has been omitted in the later Codes and sub s (2) has been added which expressly permits the Magistrate to discharge an accused person at any stage of the inquiry if he finds that the charge is groundless although he has not fully taken the evidence either for the prosecution or for the accused¹ Thus, when the account given by the prosecutor himself, of a transaction is of such a nature as to deprive it of a criminal character, the Magistrate is justified in concluding that the charge is groundless and in discharging the accused immediately without proceeding further with the inquiry² But an order of discharge under this sub-section can only be passed by a Magistrate who is legally seized of the case. Thus, where

Note 11

1 (37) 24 AIR 1937 Lah 217 (219) 38 Cri L Jour 992 *Kurpal Singh v Emperor*, (Magistrate has jurisdiction to decide whether the offence is triable by Session Court or is triable by himself—Where there is nothing to show that the Magistrate snatched at any jurisdiction or perversely held that the offence was one triable by himself in order to minimize the offence his order will not be upset)

(99) 22 Mad 459 (460) 2 Weir 251 *Queen Empress v Rangamani*

(84) 10 Cal 85 (86) 13 Cal L Rep 375 *Empress v Paramananda* (Section 209 empowers a Magistrate holding an enquiry to try the case himself if he thinks that only an offence within his jurisdiction has been committed although there is some evidence which if believed would take the case out of his jurisdiction—But this course should be very rarely, if ever, taken by any officer invested with special powers under S 30)

2 (93) 7 Cal W N 457 (460), *Amir Khan v Emperor*

Also see S 30, Note 3

3. ('45) 32 AIR 1945 Sind 125 (127) 1 L R (1945) Kar 109 221 Ind Cas 31 *Dr Sanmukhsing Tejasing Yogi v Emperor* (Forged document valuable security—Intention to use for cheating—Case is triable by Sessions Court—Magistrate cannot ignore facts and usurp jurisdiction)

Magistrate

Jhalwar (Numerous persons rioting and causing grievous hurt and death—Person accused of causing death absconding—Charge against accused held ought to be framed under S 302 or at least S 304 read with S 149 Penal Code—Magistrate held could not try case by framing charge under Ss 147 and 325 read with S 149 Penal Code)

Rachhey

(41) 28 AIR 1941 Sind 36 (38) 42 Cri L Jour 460 193 Ind Cas 451 *Mansharam Gianchand v Emperor* (Magistrate should not usurp jurisdiction he has not got by merely altering numbers of sections, e g, by treating offence under S 220, Penal Code as one under S 347, Penal Code—Offence of serious nature such as under S 220, Penal Code—Magistrate should commit case even if he has jurisdiction)

(11) 12 Cri L Jour 20 (20) 8 Ind Cas 1103 (Mad) *Jamal Mahomed v Moideen Sa*

Note 12

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367 55 All 1040, S II *Jhalwala v Emperor*
h v Emperor

Also see S 253, Note 7.

a case cannot be taken cognizance of, for want of a complaint from the proper source under S. 10, the Magistrate cannot discharge the accused under this sub section³

13 Revision — See §§ 435 to 439 and Notes thereon

210.* (f) When, upon such evidence being taken and such exami-

When charge is to be framed nation (if any) being made, the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged

Charge to be explained
and copy furnished to
accused

(2) As soon as such charge has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so requires, be given to him free of cost

Synopsis

- | | |
|--|--|
| 1 Legislative changes (S 210 and S 213) | 8 Joinder of charges See Notes on S 207 and S 233 to 239 |
| 2 Scope of the section | 9 Power of Sessions Court to add to or alter charge framed by committing Magistrate See Notes on S 226 |
| 3 'When upon such evidence being taken | 10 Plea of insanity raised in defence — Procedure See S 460 |
| 4 Examination of the accused See S 317 and Notes thereon | 11 Sub section (2) — Charge to be read and explained to accused |
| 5 'Is satisfied that there are sufficient grounds for committing the accused | 12 Right of accused to cross examine prosecution witnesses after charge is framed See S 213 Note 7 |
| 6 'He shall frame a charge | |
| 7 Form and contents of charge See S 221 to 232 | |

* Code of 1882 S 210

210 When upon such evidence being taken and such examination (if any) being made the Magistrate finds that there are sufficient grounds for committing the accused for trial he shall frame a charge under his hand declaring with what offence the accused is charged.

Charge to be explained and copy furnished to accused

As soon as the charge has been framed it shall be read and explained to the accused and a copy thereof shall if he so requires be given to him free of cost.

Code of 1872 S 198, para 1 and S 199

198 When the Magistrate determines to send the accused person before the Court of Sessions or High Court for trial he shall after the evidence has been recorded make a written instrument under his hand and seal declaring with what offence the accused person is charged and shall direct him to be tried by such Court on such charge. He shall also record his reasons for committing such accused person.

199 As soon as the charge on which the accused person is to be tried has been prepared it shall be read and explained to him and a copy or translation thereof shall be furnished to him if he so require.

Code of 1861 Ss 227 and 233

227 As soon as the charge on which the accused person is to be tried has been prepared as hereinafter directed it shall be read to him and a copy furnished to accused person.

233

What the charge is with what offence the accused person is charged and shall direct the accused person to be tried by such Court on such charge. A copy of this instrument shall be forwarded with the record of the preliminary inquiry to the Court of Session before which the accused person is to be tried and a copy shall also be sent to the Public Prosecutor to the officer appointed to conduct the prosecution.

(Magistrate having no authority to transfer to Court of Sessions)

11. "Unless it appears... accordingly," — Where there are not sufficient grounds for commitment the Magistrate may, in proper cases, try the case himself or refer it to any other Magistrate for trial instead of discharging the accused¹ But where there are good grounds for commitment the Magistrate is bound to frame a charge and commit the case to the Court of Session. He has no power in such cases to send the case to a Magistrate with special powers under S 30, although such specially empowered Magistrate may have jurisdiction to try the offence² A Magistrate should not treat a grave offence beyond his jurisdiction as a less grave offence in order to bring it within his jurisdiction³

12 Sub-section (2) — Discharge without completing inquiry where charge is groundless — Section 195 of the Code of 1972 expressly forbade a Magistrate in a preliminary inquiry under this chapter to discharge an accused person before completely taking the evidence for the prosecution. This provision has been omitted in the later Codes and sub s (2) has been added which expressly permits the Magistrate to discharge an accused person at any stage of the inquiry if he finds that the charge is groundless although he has not fully taken the evidence either for the prosecution or for the accused¹. Thus when the account given by the prosecutor himself of a transaction is of such a nature as to deprive it of a criminal character, the Magistrate is justified in concluding that the charge is groundless and in discharging the accused immediately without proceeding further with the inquiry². But an order of discharge under this sub-section can only be passed by a Magistrate who is legally seized of the case. Thus where

1 (37) 24 AIR 1937 Lah 217 (219) 38 Cri L J 992 *Kirpal Singh v Emperor* (Magistrate has jurisdiction to decide whether the offence is triable by Sessions Court or is triable by himself — Where there is nothing to show that the Magistrate scooped at any jurisdiction or perversely held that the offence was one triable by himself in order to minimize the offence his order will not be upset) (99) 22 Mad 459 (460) 2 Weir 254 *Queen Empress v Rangamani* (11) 10 Cal 25 (28) 13 Cal 1 Ran 37 *Emperor v Para gunda* (S at n 202, m 25)

2 (03) 7 Cal W N 457 (460) *Amir Khan v Emperor*
Also see S 30 Note 3

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(41) 28 AIR 1941 S nd 36 (38) 42 Cr L Jour 460 193 Ind Cas 451 *Mansharam Ghanchand v Emperor* (Magistrate should not usurp jurisdiction he has not got by merely altering numbers of sections e g by treating offence under S 220 Penal Code as one under S 347, Penal Code—Offence of serious nature such as under S 220, Penal Code—Magistrate should commit case even if he has jurisdiction)

Note 12

1 (84) 1984 Rat 201 (201) *Dhanjibhoy v Pyarji*
 (33) 20 AIR 1933 All 690 (694) 34 Cal L Jour 967 55 All 1040, S II Jhalwala v Emperor
 2 (28) 15 AIR 1928 Lah 915 (916), *Amar Nath v Emperor*
 (84) 1984 Rat 201 (201) *Dhanjibhoy v Pyarji*
 Also see S. 253, Note 7

a case cannot be taken cognizance of, for want of a complaint from the proper source under S. 195, the Magistrate cannot discharge the accused under this sub section³

13 Revision — See Ss 435 to 439 and Notes thereon

210.* (1) When, upon such evidence being taken and such examination (if any) being made, the Magistrate is satisfied that

When charge is to be framed there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged

Charge to be explained and copy furnished to accused (2) As soon as such charge has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so requires, be given to him free of cost

Synopsis

- | | |
|---|--|
| 1 Legislative changes (S 210 and S 213) | 8 Joinder of charges See Notes on S 207 and Ss 213 to 230 |
| 2 Scope of the section | 9 Power of Sessions Court to add to or alter charge framed by committing Magistrate See Notes on S 226 |
| 3 "When upon such evidence being taken" | 10 Plea of insanity raised in defence — Procedure See S 469 |
| 4 Examination of the accused See S 342 and Notes thereon | 11 Sub section (2) — Charge to be read and explained to accused |
| 5 'Is satisfied that there are sufficient grounds for committing the accused' | 12 Right of accused to cross-examine prosecution witnesses after charge is framed See S 213, Note 7 |
| 6 'He shall frame a charge' | |
| 7 Form and contents of charge See Ss 221 to 230 | |

* Code of 1882 S 210

210 When upon such evidence being taken and such examination (if any) being made the Magistrate finds that there are sufficient grounds for committing the accused for trial he shall frame a charge under his hand declaring with what offence the accused is charged

Charge to be explained, and copy furnished to accused As soon as the charge has been framed it shall be read and explained to the accused and a copy thereof shall if he so requires be given to him free of cost

Code of 1872 S 198, para t and S 199

198 When the

Contents of charge

person is charged and shall direct him to be tried by such Court on such charge He shall also record his reasons for committing such accused person

199. As soon as the charge on which the accused person is to be tried has been prepared it shall be read and explained to him and a copy or translation thereof shall be furnished to him if he so require

Code of 1861 Ss 227 and 233

Copy of charge to be furnished to accused 227 As soon as the charge on which the accused person is to be tried has been prepared as hereinafter directed it shall be read to him and a copy

233

What the charge is with what offence the accused person is charged and shall direct the accused person to be tried by such Court on such charge A copy of this instrument shall be forwarded with the record of the preliminary inquiry to the Court of Session before which the accused person is to be tried and a copy shall also be sent to the Public Prosecutor or to the officer appointed to conduct the prosecution

3 (33) 20 AIR 1933 Mad 413 (416) 31 Cr L Joar 800 *Subramanya v Sivani Kannu*
[See (41) 28 AIR 1941 Mad 833 (833 834) *Nanji Reddy v Narasamma* (Magistrate having no jurisdiction to try case—He should either submit records to District Magistrate to transfer to Court of competent jurisdiction or return complaint for presentation to proper Court)]

11 "Unless it appears . . accordingly." — Where there are not sufficient grounds for commitment the Magistrate may, in proper cases, try the case himself or refer it to any other Magistrate for trial instead of discharging the accused.¹ But where there are good grounds for commitment the Magistrate is bound to frame a charge and commit the case to the Court of Sessions. He has no power in such cases to send the case to a District Magistrate with special powers under s 30, although such specially empowered District Magistrate may have jurisdiction to try the offence.² A Magistrate should not treat a grave offence beyond his jurisdiction as a less grave offence in order to bring it within his jurisdiction.³

12 Sub section (2) — Discharge without completing inquiry where charge is groundless — Section 195 of the Code of 1972 expressly forbade a Magistrate in a preliminary inquiry under this chapter to discharge an accused person before completely taking the evidence for the prosecution. This provision has been omitted in the later Codes and sub s (2) has been added which expressly permits the Magistrate to discharge an accused person at any stage of the inquiry if he finds that the charge is groundless although he has not fully taken the evidence either for the prosecution or for the accused¹. Thus, when the account given by the prosecutor himself of a transaction is of such a nature as to deprive it of a criminal character the Magistrate is justified in concluding that the charge is groundless and in discharging the accused immediately without proceeding further with the inquiry². But an order of discharge under this sub section can only be passed by a Magistrate who is legally seized of the case. Thus where

1 (37) 24 AIR 1937 Lah 217 (210) 36 Cri L Jour 992 *Kirpal Singh v Emperor* (Magistrate has jurisdiction to decide whether the offence is triable by Session Court or is triable by himself — Where there is nothing to show that the Magistrate snatched at any jurisdiction or perversely held that the offence was one triable by himself in order to minimize the offence his order will not be upset) (89) 22 Mad 459 (480) 2 Weir 254 *Queen Empress v Rangamani*
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3 (45) 82 AIR 1945 Sind 125 (127) I L R (1945) Kar 109 231 Ind Cas 31 *Dr Sanjivlal Singh Teja Singh Yogi v Emperor* (Forged document valuable security—Intention to use for cheating—Case is

magistrate

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(41) 28 AIR 1941 Sind 36 (38) 42 Cri L Jour 460 193 Ind Cas 461 *Mansharam Gianchand v Emperor* (Magistrate should not usurp jurisdiction he has not got by merely altering numbers of sections e.g. by treating offence under S 220 Penal Code as one under S 347 Penal Code—Offence of serious nature such as under S 220 Penal Code—Magistrate should commit case even if he has jurisdiction)

(11) 12 Cr L Jour 20 (20) 8 Ind Cas 1103 (Mad) *Jamzi Mahomed v Moideen Sa*

1 (84) 1884 Rat 201 (201) *Dhanjibhoy v Pyarji*
(33) 20 AIR 1933 AN 690 (694) 34 Cri L Jour 967 55 All 1040, *S H Jhalwala v Emperor*
2 (28) 15 AIR 1918 Lah 945 (948), *Amar Nath v Emperor*
(84) 1884 Rat 201 (201) *Dhanjibhoy v Pyarji*
Also see S 233 Note 7

a case cannot be taken cognizance of, for want of a complaint from the proper source under S. 195 the Magistrate cannot discharge the accused under this sub section⁵

13 Revision — See Ss 435 to 439 and Notes thereon

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Synopsis

- | | |
|---|--|
| <p>1 Legislative changes (S 210 and S 213)</p> <p>2 Scope of the section</p> <p>3 'When upon such evidence being taken'</p> <p>4 Examination of the accused See S 312 and Notes thereon</p> <p>5 'Is satisfied that there are sufficient grounds for committing the accused'</p> <p>6 'He shall frame a charge.'</p> <p>7 Form and contents of charge See Ss 221 to 232</p> | <p>8 Joinder of charges See Notes on S 207 and Ss 233 to 239</p> <p>9 Power of Sessions Court to add to or alter charge framed by committing Magistrate See Notes on S 216</p> <p>10 Plea of insanity raised in defence — Procedure See S 469</p> <p>11 Sub section (2) — Charge to be read and explained to accused</p> <p>12 Right of accused to cross-examine prosecution witnesses after charge is framed See S 213 Note 7</p> |
|---|--|

* Code of 1882 S 210

210 When upon such evidence being taken and such examination (if any) being made the Magistrate finds that there are sufficient grounds for committing the accused for trial he shall frame a charge under his hand declaring with what offence the accused is charged

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Code of 1872 S 198, para 1 and S 199

198 When the

Contents of charge

He shall also record his reasons for committing such accused person

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Copy of charge to be furnished to accused 227 As soon as the charge on which the accused person is to be tried has been prepared as hereinafter directed it shall be read to him and a copy or translation of it shall be furnished to him if he require it

233 When the Magistrate has determined to send the accused person before the Court of Session for trial he shall make a written instrument under his hand and seal declaring with what offence the accused person is charged and shall direct the accused person to be tried by such Court on such charge A copy of this instrument shall be forwarded with the record of the preliminary inquiry to the Court of Session before which the accused person is to be tried and a copy shall also be sent to the Public Prosecutor or to the officer appointed to conduct the prosecution

3 (33) 20 AIR 1933 Mad 413 (416) 31 Cr L Jour 800 *Subramanya v Swami Kannu*
 (See (41) 28 AIR 1941 Mad 833 (833 831) *Nanji Reddi v Narasamma* (Magistrate having no jurisdiction to try case—He should either submit records to District Magistrate to transfer to Court of competent jurisdiction or return complaint for presentation to proper Court))

10 Order by superior Court for further inquiry or commitment to sessions — See Ss 435 to 439 and Notes thereon

11. "Unless it appears . . . accordingly." — Where there are not sufficient grounds for commitment the Magistrate may in proper cases try the case himself or send it to any other Magistrate for trial instead of discharging the accused¹ But where there are good grounds for commitment the Magistrate is bound to frame a charge and commit the case to the Court of Session. He has no power in such cases to send the case to a Magistrate with special powers under s 80, although such specially empowered Magistrate may have jurisdiction to try the offence² A Magistrate should not treat a grave offence beyond his jurisdiction as a less grave offence in order to bring it within his jurisdiction³

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Note 11

1 (37) 24 AIR 1937 Lah 217 (219) 39 Cri L Jour 992 *Kirpal Singh v Emperor* (Magistrate has jurisdiction to decide whether the offence is triable by Sessions Court or is triable by himself — Where there is nothing to show that the Magistrate snatched at any jurisdiction or perversely held that the offence was one triable by himself in order to minimize the offence his order will not be upset)

(99) 22 Mad 459 (460) 2 Weir 254 *Queen Empress v Rangarani*

(84) 10 Cal 85 (86) 13 Cal L Rep 875 *Empress v Paramananda* (Section 203 empowers a Magistrate to try a case if he is legally seized of the case and the offence is triable by him) — ion has is juris powers

under s 30)

2 (03) 7 Cal WN 457 (460) *Amir Khan v Emperor*

Also see S 30 Note 3

3 (1) 20 Cal 105 (106) 13 Cal L Rep 875 (1884) 10 Cal 105 (106) 13 Cal L Rep 875

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Katkar (Numerous persons rioting and causing grievous hurt and death—Person accused of causing death absconding—Charge against accused held ought to be framed under S 302 or at least S 301 read with S 149 Penal Code—Magistrate held could not try case by framing charge under Ss 147 and 305 read with S 149 Penal Code)

(41) 28 AIR 1911 Snd 36 (38) 42 Cri L Jour 460 193 Ind Cas 464 *Mansharam Gianchand v Emperor* (Magistrate should not usurp jurisdiction he has not got by merely altering numbers of sections e.g. by treating offence under S 220 Penal Code as one under S 347 Penal Code—Offence of serious nature such as under S 220 Penal Code — Magistrate should commit case even if he has jurisdiction)

(11) 12 Cri L Jour 20 (20) 8 Ind Cas 1103 (Mad) *Jamal Mahomed v Moideen Sa*

Note 12

1 (61) 1884 Rat 201 (201) *Di anj bloy v Pyarji*

(33) 20 AIR 1933 All 690 (694) 34 Cri L Jour 967 55 All 1040, S H Jhalwala v Emperor

2 (29) 15 AIR 1918 Lah 915 (946) *Amir Nath v Emperor*

(81) 1884 Rat 201 (201) *Dhanjibhay v Pyarji*

Also see S 203 Note 7

a case cannot be taken cognizance of, for want of a complaint from the proper source under S 195, the Magistrate cannot discharge the accused under this sub section³

13 Revision — See Ss 435 to 439 and Notes thereon

210.* (1) When, upon such evidence being taken and such examination (if any) being made, the Magistrate is satisfied that to be framed there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged

Charge to be explained and copy furnished to accused (2) As soon as such charge has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so requires, be given to him free of cost.

Synopsis

- | | |
|---|--|
| 1 Legislative changes (S. 210 and S 213) | 8 Joinder of charges See Notes on S 207 and Ss 233 to 239 |
| 2 Scope of the section | 9 Power of Sessions Court to add to or alter charge framed by committing Magistrate See Notes on S 276 |
| 3 'When upon such evidence being taken' | 10 Plea of insanity raised in defence — Procedure See S 469 |
| 4 Examination of the accused See S 342 and Notes thereon | 11 Sub section (2) — Charge to be read and explained to accused |
| 5 "Is satisfied that there are sufficient grounds for committing the accused" | 12 Right of accused to cross examine prosecution witnesses after charge is framed See S 213, Note 7 |
| 6 'He shall frame a charge.' | |
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* Code of 1882 S 210

210 When upon such evidence being taken and such examination (if any) being made the Magistrate finds that there are sufficient grounds for committing the accused for trial he shall frame a charge under his hand declaring with what offence the accused is charged

Charge to be explained, and copy furnished to accused As soon as the charge has been framed it shall be read and explained to the accused and a copy thereof shall, if he so requires be given to him free of cost

Code of 1872 S 198, para 1 and S 199

198 When the Magistrate determines to send the accused person before the Court of Session or High Court for trial he shall after the evidence has been recorded make a written instrument under his hand and seal declaring with what offence the accused person is charged and shall direct him to be tried by such Court on such charge We shall also record his reasons for committing such accused person

199 As soon as the charge on which the accused person is to be tried has been prepared it shall be read and explained to him and a copy or translation thereof shall be furnished to him if he so require

Code of 1861 Ss 227 and 233

Copy of charge to be furnished to accused person **227** As soon as the charge on which the accused person is to be tried has been prepared as hereinafter directed it shall be read to him and a copy or translation of it shall be furnished to him if he require it

233 When the Magistrate has determined to send the accused person before the Court of Session for trial he shall make a written instrument under his hand and seal declaring with what offence the accused person is charged and shall direct the accused person to be tried by such Court on such charge A copy of this instrument shall be forwarded with the record of the preliminary inquiry to the Court of Session before which the accused person is to be tried and a copy shall also be sent to the Public Prosecutor or to the officer appointed to conduct the prosecution

3 (33) 20 AIR 1933 Mac.
[See (41) 28 AIR 1911 *
jurisdiction to try case—
competent jurisdiction o

NOTE to the Synopsis See the Notes indicated for the following topics

Addition or amendment of charges See Note 2	Framing charge as opposed to commitment See Note 2
Commitment where some to be committed and others who need not be committed See S 206 Note 6	Improper addition of charges See Note 6
Discharge even after charge See Note 2	Jurisdiction of District Magistrate to interfere See S 206 Note 8
Duties of Magistrate under this chapter See Ss 209 to 213 S 209 Notes 5 and 6 S 209 Note 6	Object of the section See S 206, Notes 3 and 4
Duty of framing charge is with Magistrate See Note 6	Scope of enquiry See S 209 Notes 5 and 6
	Sessions Court without jurisdiction See S 206, Note 9

1. Legislative changes (S 210 and S. 213)

Differences between Codes of 1861 and 1872 —

Referring to the circumstances under which a case could be committed to the sessions S 226 of the Code of 1861 used the words 'when evidence has been given before a Magistrate which appears to be sufficient for the conviction of the accused' whereas the words used in S 196 of the Code of 1872 were 'when evidence has been given before a Magistrate which appears to justify him in sending the accused person to take his trial'

Changes made in 1882 —

- (1) The opening words of the section were added in order to make it clear that the Magistrate must consider the evidence for the accused also before determining the question whether he should discharge the accused or whether he should frame a charge against him
- (2) The provision for the supply of a translation of the charge to the accused which occurred in the prior Code (S 199) was omitted
- (3) The provision that the supply of a copy of the charge to the accused should be *free of cost* was new
- (4) The Code of 1872 provided that the order for commitment should be made in the charge itself (S 199 of the Code) whereas the Code of 1882 provided for a separate order of commitment (S 213)

Changes made in 1898 —

Sub section (2) to S 213 was nowly added providing for the cancellation of a charge already framed by the Magistrate and the discharge of the accused even after a charge was framed against him

Changes made after 1898 —

The words 'such charge' in subs (2) of S 210 were substituted for the words 'the charge' by S 53 of the Code of Criminal Procedure (Amendment) Act 1923 (18 [XVIII] of 1923)

2 Scope of the section — Section 209 lays down when an accused person may be discharged in commitment proceedings. This section provides for the framing of a charge in such proceedings. A charge under this section should be framed only if the Magistrate is satisfied that there are good grounds for commitment. But the mere framing of a charge does not by itself amount to a commitment which should be made by a separate order under S 213¹. It may also be noted that the order of commitment under S 213 cannot be made immediately on a charge being framed, or simultaneously with it² without anything further being done. There is a further procedure to be followed under Ss 211 to 213 before an order of commitment can be made.

open to
evidence

being taken he finds there are not sufficient grounds for committing the accused he can cancel the charge and discharge the accused³ It is also open to a Magistrate to amend the charge after it is framed and proceed to try the case himself instead of committing it to the sessions.⁴

3 "When, upon such evidence being taken" — This expression refers to the evidence mentioned in S 208 sub ss. (1) and (3)¹ The section requires that the Magistrate should consider whether there are sufficient grounds for committing the accused to the sessions, only after such evidence has been taken Hence the Magistrate has no power to frame a charge under this section until he has taken all the evidence which the accused may desire to produce² But this does not mean that a Magistrate is bound to summon any witness that a party may desire to call under sub s (3) of S 208 the Magistrate has a discretion to refuse an application for summons to any witness³ Similarly the Magistrate need not go on recording evidence when it is unnecessary to do so Thus when the evidence already let in by the prosecution is sufficient to establish a *prima facie* case against the accused the Magistrate is not bound to take the rest of the prosecution evidence also⁴ Section 208 sub s (1) empowers the Magistrate to call for any evidence that he may consider necessary and it is open to him to call witnesses himself and take their evidence for the purpose of finding out if the case is a fit one for committal to the sessions⁵

As to the power of a Magistrate to frame a charge on the basis of evidence recorded by another Magistrate see Notes on Section 350

See also Notes on Sections 208 and 209

4 Examination of the accused — See Section 341 and Notes thereon

5 Is satisfied that there are sufficient grounds for committing the accused" — A charge must be framed under this section only on the Magistrate being satisfied that there are sufficient grounds for commitment¹ As to what are sufficient grounds for commitment see Notes on S 209 and the undermentioned cases² An accused cannot be committed to the sessions on a charge that he is liable by reason of a previous conviction to an enhanced punishment under S 75 Penal Code unless there is *prima facie* evidence on the record to prove the previous conviction³

3 (40) 27 AIR 1940 Pat 355 (359) 19 Pat 413 41 Cr L Jour 931 *Musalru v Emperor*

[But see (81) 1881 Rat 161 (169) *In re Mari* (Case under prior Code not good law)]

4 (10) 11 Cr L Jour 486 (488) 7 Ind Cas 450 (Dom) *Emperor v Venkatesh Sadashiv*

Also see S 213 Note 1

Note 3

1 (38) 23 AIR 1936 Lah 533 (535) 17 Lah 176 37 Cr L Jour 749 (F13) *Ali Niamat v Emperor*

2 (98) 20 All 264 (266) 1898 All W N 62 *Queen Empress v Ahmad*

(94) 1 Cr L Jour 357 (357 358) 26 All 177 *Emperor v Muhammad Hadi*

3 (12) 13 Cr L Jour 778 (779 780) 17 Ind Cas 410 36 Mad 391 *Sessions Judge of Coimbatore v Immudi Kumara Kangaya*

4 (33) 20 AIR 1933 All 690 (691 695) 55 All 1010 34 Cr L Jour 967 *S H Jhabwala v Emperor*
(66) 3 Mad H C R App u (w)

5 (26) 13 AIR 1926 Lat 5 (8) 26 Cr L Jour 1589 *Parshad Tewari v Emperor* (If the police do not send up all the material witnesses it is the committing magistrate's duty to examine them himself)

Note 5

1 (81) 1881 Pun Re No 6 Cr p 5 (6) *Empress v Giano*

2 (97) 15 Mad 393 (395 396 397) 1 Weir 366 *Srinivasa v Anaswami* (Charge under S 372 Penal Code against manager of temple for appointing dancing girl for temple — Finding that dancing girl of temple lived partly at least by prostitution—Held that charge must be framed)

(81) 6 Cal 592 (583) 8 Cal L Rep 255 *Empress v Salik Roy* (Charge under S 211 Penal Code for bringing false charge — Held that commitment was not illegal merely because the complaint which the accused made had not been judicially inquired into but was based on the report of the police that the case was a false one)

3 (41) 28 AIR 1941 Snd 173 (176) 1 LR (1941) Kar 308 43 Cr L Jour 19 197 Ind Cas 93 *Potkar Chitarnal v Emperor* (Conviction at p not enough)

NOTE to the Synopsis See the Notes indicated for the following topics *

Addition or amendment of charges See Note 2
 Committal where some to be committed and others who need not be committed See S 206, Note 6
 Discharge even after charge See Note 3
 Duties of Magistrate under this chapter See Ss 209 to 213 S 209, Notes 5 and 6 S 203, Note 6
 Duty of framing charge is with Magistrate See Note 6

Framing charge as opposed to committal See Note 2.
 Improper addition of charges See Note 6
 Jurisdiction of District Magistrate to interfere See S 206, Note 8
 Object of the section See S 206, Notes 3 and 4
 Scope of enquiry See S 209, Notes 5 and 6
 Sessions Court without jurisdiction See S 206, Note 9

1. Legislative changes (S. 210 and S. 213)

Differences between Codes of 1861 and 1872 —

Referring to the circumstances under which a case could be committed to the sessions, S 226 of the Code of 1861 used the words "when evidence has been given before a Magistrate which appears to be sufficient for the conviction of the accused" whereas the words used in S 196 of the Code of 1872 were "when evidence has been given before a Magistrate which appears to justify him in sending the accused person to take his trial . . ."

Changes made in 1882 —

- (1) The opening words of the section were added in order to make it clear that the Magistrate must consider the evidence for the accused also before determining the question whether he should discharge the accused or whether he should frame a charge against him
- (2) The provision for the supply of a *translation* of the charge to the accused, which occurred in the prior Code (S 199), was omitted
- (3) The provision that the supply of a copy of the charge to the accused should be *free of cost* was new
- (4) The Code of 1872 provided that the order for commitment should be made in the charge itself (S 193 of the Code) whereas the Code of 1882 provided for a separate order of commitment (S 213)

Changes made in 1898 —

Sub section (2) to S 213 was newly added providing for the cancellation of a charge already framed by the Magistrate and the discharge of the accused even after a charge was framed against him

Changes made after 1898 —

The words "such charge" in subs (2) of S 210 were substituted for the words "the charge" by S 53 of the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923)

2 Scope of the section — Section 209 lays down when an accused person may be discharged in commitment proceedings. This section provides for the framing of a charge in such proceedings. A charge under this section should be framed only if the Magistrate is satisfied that there are good grounds for commitment. But the mere framing of a charge does not, by itself, amount to a commitment, which should be made by a separate order under S 213¹. It may also be noted that the order of commitment under S 213 cannot be made immediately on a charge being framed, or simultaneously with it² without anything further being done. There is a further procedure to be followed under Ss 211 to 213 before an order of commitment can be made. Moreover, it is open to a Magistrate to take further evidence after the charge is framed and if upon such evidence

being taken, he finds there are not sufficient grounds for committing the accused, he can cancel the charge and discharge the accused³. It is also open to a Magistrate to amend the charge after it is framed and proceed to try the case himself instead of committing it to the sessions.⁴

3 "When, upon such evidence being taken" — This expression refers to the evidence mentioned in s 208, subs (1) and (3)¹. The section requires that the Magistrate should consider whether there are sufficient grounds for committing the accused to the sessions, only after such evidence has been taken. Hence, the Magistrate has no power to frame a charge under this section until he has taken all the evidence which the accused may desire to produce². But this does not mean that a Magistrate is bound to summon any witness that a party may desire to call under subs (3) of s 208 the Magistrate has a discretion to refuse an application for summons to any witness³. Similarly, the Magistrate need not go on recording evidence when it is unnecessary to do so. Thus, when the evidence already let in by the prosecution is sufficient to establish a *prima facie* case against the accused the Magistrate is not bound to take the rest of the prosecution evidence also⁴. Section 203 sub s (1) empowers the Magistrate to call for any evidence that he may consider necessary and it is open to him to call witnesses himself and take their evidence for the purpose of finding out if the case is a fit one for committal to the sessions⁵.

As to the power of a Magistrate to frame a charge on the basis of evidence recorded by another Magistrate, see Notes on Section 350

See also Notes on Sections 208 and 209

4 Examination of the accused — See Section 342 and Notes thereon

5 "Is satisfied that there are sufficient grounds for committing the accused" — A charge must be framed under this section only on the Magistrate being satisfied that there are sufficient grounds for commitment¹. As to what are sufficient grounds for commitment, see Notes on s 209 and the undermentioned cases². An accused cannot be committed to the sessions on a charge that he is liable by reason of a previous conviction to an enhanced punishment under s 75 Penal Code, unless there is *prima facie* evidence on the record to prove the previous conviction³.

3 (40) 27 AIR 1940 Pat 355 (353) 19 Pat 413 41 Cri L Jour 931 *Musahru v Emperor*
[But see (81) 1681 Rat 161 (162) *In re Mari* (Case under prior Code not good law)]

4 (10) 11 Cri L Jour 486 (488) 7 Ind Cas 450 (Dom) *Emperor v Venkatesh Sadashiv*
Also see S 213 Note 1

Note 3

1 (36) 23 AIR 1936 Lah 533 (535) 17 Lah 176 37 Cri L Jour 742 (Fb) *Mt Niamat v Emperor*

2 (9*) 20 All 261 (265) 1898 All W N 52 *Queen Empress v Ahmadi*

(04) 1 Cri L Jour 357 (357 358) 26 All 177 *Emperor v Muhammad Hadi*

3 (1*) 13 Cri L Jour 778 (779 780) 17 Ind Cas 410 36 Mad 321, *Sessions Judge of Coimbatore v Immudi Kumara Kangaya*

v Emperor

police do not
send up all the material witnesses it is the committing Magistrate's duty to examine them himself)

Note 5

1 (81) 1681 Pun Re No 6 Cr, p 5 (6) *Empress v Gyano*

2 (9*) 15 Mad 323 (325 326 327) 1 Weir 366 *Srinivasa v Annaswami* (Charge under s 372, Penal Code against manager of temple for appointing dancing girl for temple — Finding that dancing girl of temple lived partly at least by prostitution—Held that charge must be framed)

(81) 6 Cal 582 (583) 8 Cal L Rep 255, *Empress v Sahk Roy* (Charge under s 211, Penal Code, for bringing false charge — Held that commitment was not illegal merely because the complaint, which the accused made had not been judicially inquired into but was based on the report of the police that the case was a false one)

3 (41) 25 AIR 1941 Sind 173 (176) 11R (1911) Kar 303 43 Cri L Jour 12 197 Ind Cas 93, *Pokar Chuharmal v Emperor* (Conviction slip not enough)

6 'He shall frame a charge' — The task of framing a charge is the duty of the Magistrate and not of the prosecutor¹ The Magistrate must base the charge on the materials before him and not merely on the allegations of the complainant or prosecutor. He may frame a charge for any offence disclosed on the evidence though it may be different from that mentioned in the complaint² In framing a charge the Magistrate must confine his attention to the question as to what offence is disclosed on the materials before him and should not be influenced by any considerations as to what would be the effect of framing a charge for a particular offence³ Further, the Magistrate should be careful not to mention anything in the charge in a form which is not justified by the materials before him⁴

Though a Magistrate is at liberty to frame a charge for any offence disclosed on the materials before him he cannot frame a charge which would amount to his prejudging the case which has to be tried by another Court. Thus where an accused was charged with the offence of wrongful confinement and he raised the defence that he had lawful excuse for his act because the person confined was caught in his house under circumstances which led to the belief that he had committed house breaking by night and the Magistrate committed the accused not only for wrongful confinement but disbelieving the defence, also for fabricating false evidence and making a false charge it was held that the commitment in respect of the two last charges was illegal inasmuch as in putting the accused on his trial on such charges the Magistrate was really prejudging the defence which the accused had raised to the first charge⁵

Where under s 423 the appellate Court directs a Magistrate to commit the accused for trial before the Court of Session the Magistrate has no jurisdiction to make further enquiry and the enquiry already held is sufficient for the purposes of this chapter. The Magistrate is then to frame a charge under this section and to proceed under ss 211 and 212 to commit the accused⁶ See also section 423 Note 30

7 Form and contents of charge — See Sections 221 to 230

8 Joinder of charges — See Notes on Section 207 and Sections 233 to 239

9 Power of Sessions Court to add to or alter charge framed by committing Magistrate — See Notes on Section 226

10 Plea of insanity raised in defence — Procedure — See Section 469

11 Sub section (2) — Charge to be read and explained to accused — This sub section requires that after the charge is framed it must be read and explained to the accused. A mere framing of the charge is not enough¹

12 Right of accused to cross examine prosecution witnesses after charge is framed — See Section 213 Note 7

Note 6

1 (69) 1889 Pun Re No 26 Cr p 85 (89) (FB) *Sant Singh v Empress*

2 (69) 12 Suth W R Cr 40 (41) 5 Beng L R App 89 *Kal das v Molendranati*

(38) 11 C P L R Cr 9 (9 10) *Local Government v Sitka Misalman*

Also see S 204 Note 5

3 (01) 1901 Pun Re No 5 Cr p 15 (15 16) 1901 Pan L R 51 *Mulraj v Empress*

Also see S 234 Note 7

4 (89) 1889 Pun Re No 26 Cr p 85 (90) (TB) *Sant Singh v Empress*

5 (79) 4 Cal L Rep 338 (339 340) *In the matter of Turbulla*

6 (30) 29 AIR 1935 All 579 (583) 36 Cri L Jour 1013 *Sahdeo Ram v Emperor*

Note 11

1 (1860) 2 Suth W R Cr 50 (50) *Queen v Hurnath Poy*

211.* (1) The accused shall be required at once to give in orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

(2) The Magistrate may, in his discretion, allow the accused to give further list in any further list of witnesses at a subsequent time, and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

Synopsis

- | | |
|---|---|
| 1a Object of the section | 4 Refusal of Magistrate to summon witnesses |
| 1 'The accused shall be required | 5 Reserving of defence by the accused |
| 2 'At once | 6 Failure of the accused to give a list — Effect of |
| 3 Right of accused filing the list—Enforcement of attendance of witnesses | 7 Further list |

1a. Object of the section — The purpose of this section is merely that executive authorities should be able to compel the attendance of such witnesses as the accused wishes to be summoned in order that when the trial of the case comes on in the Sessions Court the case may be heard from day to day and no time should be wasted. Under s 201 the accused can examine witnesses who are present in Court although they were not previously named by him¹

1. "The accused shall be required" — After the charge framed against the accused has been read and explained to him under s 210 sub s (2) the Magistrate is bound under this section to require the accused to give in a list of witnesses if any, whom he wishes to be summoned to give evidence on his trial in the Court of Session¹. The accused must be clearly and specifically asked for a *list of witnesses*. It is not enough to put the question 'Have you any evidence?' Such a question is ambiguous and might suggest to the accused, only an inquiry as to whether he has witnesses ready in Court².

The language of the section is imperative and a failure to ask an accused person to give in his list of witnesses will render his conviction liable to be quashed even though he has been tried along with others who had been so asked³.

It is also necessary that the names of witnesses for the defence must appear on the record. Where a Magistrate omits to enter the names of witnesses for the defence on the record and the omission is brought to the notice of the Sessions Judge, he ought not to try the accused, in the absence of such witnesses⁴.

2 "At once" — The list of witnesses should be presented as soon as the charge has been framed¹. The view taken in the undermentioned decision² that it is ordinarily

* 1882 S 211 1872 S 200 paras 1 and 3 1861 S 227

Section 211 — Note 1a

1 (36) 23 AIR 1936 Lah 533 (535 536) 17 Lah 176 37 Cri L Jour 742 (FD) *At Anant v Emperor*

Note 1

1 (1865) 2 Bath W R Cr 50 (50) *Queen v Hurnath Roy*

Note 2

1 (40) 27 AIR 1936 Cr 100 (100) 40 Cr 100 (100) *Emperor* (It is not till the last minute

incumbent on the accused to put in his list of defence witnesses on the day when the order of commitment is made is, it is submitted, incorrect

3. Right of accused filing the list — Enforcement of attendance of witnesses. — The accused is entitled, as a matter of right, to have the witnesses named by him in the list, summoned and examined on his behalf at the trial¹ In the event of the witnesses ignoring or not complying with the summons, the accused is entitled to have their attendance enforced² and the Crown is charged with the duty of securing their attendance³ The examination of such witnesses cannot be refused on the ground that it would be inconvenient to adjourn the case in order to secure their attendance⁴ When some of the witnesses named in the list given by the accused do not appear, an application for enforcing their attendance should not be refused, though made when the case is ready for arguments⁵ A conviction will not, however, be set aside on the ground that the attendance of some of the witnesses was not enforced unless the accused has been thereby prejudiced⁶

4 Refusal of Magistrate to summon witnesses — A Magistrate may, under the second proviso to S 216, refuse to summon any witness mentioned in the list on the ground that such witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice He cannot, however, refuse to summon a witness on the ground that he is suspected to be implicated in the offence with which the accused is charged¹ or that the Magistrate entertains doubts as to the value of the evidence of such witness² or that the list contains a large number of witnesses³ Where a further list is given under sub s (2), subsequent to the order of commitment, the Magistrate is bound, on receipt of such list, to exercise his discretion and state distinctly whether he would summon the witnesses or not If he is of opinion that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice, the Magistrate ought to proceed under the second proviso to S 216⁴

5 Reserving of defence by the accused — Though the language of the section is imperative, there is nothing in it which enables the Magistrate to prevent the accused person from reserving his defence for the Court of Session¹ As a matter of fact, the accused is entitled to reserve his defence, and refuse to disclose the names of witnesses whom he intends to call at the trial² Thus, where an accused on being asked to give a

Note 3

- 1 (1860) 27 ALJ 1010 (Pat 255 (1860)) 19 Pat 418 41 Cr L J 2021 16 Cal 1000
- (1860) .
- (1865) .
- (71) .
- (71) .
- (75) .
- (31) .
- (30) .

Also see S 216, Note 2, S 257, Note 3 and S 291, Note 3

- 2 (30) 17 AIR 1930 Cal 188 (188) 31 Cr L J 2021 16 Cal 1000

- (31) 18 AIR 1931 Cal 6 (7) 58 Cal 412

- 3 (31) 18 AIR 1931 Cal 6 (7) 58 Cal 41

- 4 (31) 18 AIR 1931 Cal 6 (7) 58 Cal 41

Also see S 291, Note 3

- 5 (20) 7 AIR 1920 Cal 531 (531) 47 Cal 758 21 Cr L Jour 842, *Fousuddi v Emperor*

- 6 (30) 17 AIR 1930 Cal 188 (190) 31 Cr L Jour 695, *Kali Bilash v Emperor*

Note 4

1. (71) 15 Cr L J 1000 (1900) 15 Cr L J 1000 Bahadur
- 2 (71) 1
- 3 (85) 1
- 4 (71) 1

[See also .

, *Musahru v Emperor*]

Note 5

- 1 (70) 13 Suth W R Cr 1 (11) 4 Beng L R App 1, *In re Mohesh Chunder*

2. (92) 14 All 242 (247) 1892 All W N 83, *Queen Empress v Hargobind Singh*

list of witnesses does not give it but says he will file a list subsequently, the Magistrate would be acting with sound judicial judgment and in accordance with law, if he does not cross-examine the accused as to the names of his witnesses and what those witnesses would be called to prove.³ This is because there may be the danger, in some cases of the accused running the risk of his witnesses being tampered with. In such a case it will be wise on the part of the accused to decline to give a list to the Magistrate, and to reserve his defence for the Court of Session.⁴

But an accused person who has reserved his defence cannot claim to keep back any of his witnesses mentioned in the list from being examined by the Magistrate under S 212 on the ground that his right of reserving the defence would be prejudicially affected thereby.⁵

6 Failure of the accused to give a list — Effect of — If an accused person on being asked by the Magistrate to give in a list of his witnesses declines to give in such a list he cannot compel the Magistrate after committal to issue summonses for witnesses on his behalf. He is, however, entitled under S 291 to call any witness in the Court of Session and examine him if he is in attendance in such Court whether or not he has caused such witness to be summoned.¹ In such a case if the accused applies to the Sessions Court for issue of summonses to any witness he is not entitled to the issue of such summonses. But the Sessions Court has a discretion to issue summonses in such a case and where the Sessions Court considers that the evidence of a witness would be material it is the duty of the Sessions Court to issue summonses to such witness.²

Where an accused person gives no list of witnesses to the committing Magistrate and applies at a late stage of the trial in the Sessions Court for an adjournment thereof in order to procure the attendance of witnesses for his defence it would be perfectly legal for the Court to refuse the application.³ See also S 291 and Notes thereon.

7 Further list — It has been seen that for an accused to have his witnesses summoned as of right he must give in a list under this section. Where he does not give in his list immediately after the charge is framed the Magistrate has a discretion to accept a list subsequently.¹ When a further list has been allowed to be filed by the Magistrate under sub s. (2), it is governed by the same principles as a list under sub s. (1).²

3 (90) 14 All 242 (215) 1892 All W N 83 *Queen Empress v Hargobind Singh*

4 (97) 19 All 502 (504) 1897 All W N 134 *Queen Empress v Shukur Ali*

5 (96) 18 All 380 (390 381) 1896 All W N 114 *In the matter of Rudra Singh*

Also see S 212 Note 1

Note 6

1 (36) 23 AIR 1936 Lah 533 (536) 17 Lah 176 37 Cri L Jour 742 (FB) *Mt Niamat v Emperor* (Sections 211 and 291 read together show that if the accused has willing witnesses at the Sessions Court he can be allowed to produce them but if he requires the Court to issue process for compelling attendance he is confined to those witnesses whose names he has previously included in his list of witnesses.)

(97) 19 All 500 (503) 1897 All W N 134 *Queen Empress v Shukur Ali*

Also see S 216 Note 2, S 291 Note 3 and S 540 Note 7

2 (40) 27 AIR 1940 Pat 355 (358 359) 19 Pat 413 41 Cri L Jour 931 *Musafir v Emperor* (It is not a wise exercise of the discretion for the Sessions Judge to reject the application on the ground that it is not bona fide or to offer to issue summonses at the risk of the accused and on his depositing the expenses of the witnesses though the rejection of the application is not in violation of the law.)

(97) 19 All 502 (504) 1897 All W N 134 *Empress v Shukur Ali* (14 All 242 explained)

3 (25) 12 AIR 1925 Lah 557 (557 558) 27 Cri L Jour 134 *Nasir Singh v Emperor*

(24) 25 Cri L Jour 97 (97 98) 76 Ind Cas 97 (Pesh) *Abdul Walab v Emperor*

Note 7

1 (40) 27 AIR 1940 Pat 355 (358) 19 Pat 413 41 Cri L Jour 931 *Musafir v Emperor*

(36) 23 AIR 1936 Lah 533 (535) 17 Lah 176 37 Cri L Jour 742 (FB) *Mt Niamat v Emperor*

(31) 18 AIR 1931 All 434 (435) 53 All 692 37 Cri L Jour 849 *Parvati v Emperor*

2 (30) 17 AIR 1930 Cal 189 (189) 31 Cri L Jour 695 *Kali Dulash v Emperor*

incumbent on the accused to put in his list of defence witnesses on the day when the order of commitment is made is, it is submitted, incorrect

3. Right of accused filing the list — Enforcement of attendance of witnesses — The accused is entitled, as a matter of right, to have the witnesses named by him in the list, summoned and examined on his behalf at the trial¹ In the event of the witnesses ignoring or not complying with the summons, the accused is entitled to have their attendance enforced² and the Crown is charged with the duty of securing their attendance³ The examination of such witnesses cannot be refused on the ground that it would be inconvenient to adjourn the case in order to secure their attendance⁴ When some of the witnesses named in the list given by the accused do not appear, an application for enforcing their attendance should not be refused, though made when the case is ready for arguments⁵ A conviction will not, however, be set aside on the ground that the attendance of some of the witnesses was not enforced unless the accused has been thereby prejudiced⁶

4 Refusal of Magistrate to summon witnesses — A Magistrate may, under the second proviso to S 216 refuse to summon any witness mentioned in the list on the ground that such witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice He cannot, however, refuse to summon a witness on the ground that he is suspected to be implicated in the offence with which the accused is charged¹ or that the Magistrate entertains doubts as to the value of the evidence of such witness² or that the list contains a large number of witnesses³ Where a further list is given under sub s (2), subsequent to the order of commitment, the Magistrate is bound, on receipt of such list, to exercise his discretion and state distinctly whether he would summon the witnesses or not If he is of opinion that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice, the Magistrate ought to proceed under the second proviso to S 216⁴

5 Reserving of defence by the accused. — Though the language of the section is imperative, there is nothing in it which enables the Magistrate to prevent the accused person from reserving his defence for the Court of Session¹ As a matter of fact, the accused is entitled to reserve his defence, and refuse to disclose the names of witnesses whom he intends to call at the trial² Thus, where an accused on being asked to give a

Note 3

1 (40) 27 AIR 1910 D 255 250 250

ror,

Also see n 21b, Note 2 S 261, Note 3 and S 291, Note 3

(30) 17 AIR 1930 Cal 183 (188) 31 Cri L Jour 695, *Kali Bilash v Emperor*

(31) 18 AIR 1931 Cal 6 (7) 58 Cal 412 32 Cri L Jour 316, *Ram Mamud v Emperor*

3 (31) 18 AIR 1931 Cal 6 (7) 58 Cal 412 32 Cri L Jour 316, *Ram Mamud v Emperor*

4 (31) 18 AIR 1931 Cal 6 (7) 58 Cal 412 32 Cri L Jour 316, *Ram Mamud v Emperor*

Also see S 291 Note 3

5 (20) 7 AIR 1920 Cal 531 (531) 47 Cal 756 21 Cri L Jour 812, *Foizuddin v Emperor*

6 (30) 17 AIR 1930 Cal 188 (190) 31 Cri L Jour 695, *Kali Bilash v Emperor*

Note 4

1. (71) 15 Suth W R Cr 7 (7) 6 Beng L R App 1, *In re Mohesh Chunder Bahadur*

2 (71) 15 Suth

3 (85) 11 Cal 70

4 (71) 16 Suth

(See also ('40) 2 . . .

— Musahru v Emperor]

Note 5

1. (70) 15 Suth W R Cr 1 (11) 4 Beng L R App 1, *In re Mohesh Chunder*

2. (92) 14 All 242 (245) 1892 All W N 83, *Queen Empress v Hargobind Singh*

list of witnesses does not give it but says he will file a list subsequently, the Magistrate would be acting with sound judicial judgment and in accordance with law, if he does not cross-examine the accused as to the names of his witnesses and what those witnesses would be called to prove.¹ This is because there may be the danger in some cases of the accused running the risk of his witnesses being tampered with. In such a case it will be wise on the part of the accused to decline to give a list to the Magistrate, and to reserve his defence for the Court of Session.²

But an accused person who has reserved his defence cannot claim to keep back any of his witnesses mentioned in the list from being examined by the Magistrate under S 212 on the ground that his right of reserving the defence would be prejudicially affected thereby.³

6 Failure of the accused to give a list — Effect of — If an accused person on being asked by the Magistrate to give in a list of his witnesses declines to give in such a list he cannot compel the Magistrate after committal to issue summonses for witnesses on his behalf. He is, however, entitled under S 201 to call any witness in the Court of Session and examine him if he is in attendance in such Court whether or not he has caused such witness to be summoned.¹ In such a case if the accused applies to the Sessions Court for issue of summonses to any witness he is not entitled to the issue of such summonses. But the Sessions Court has a discretion to issue summonses in such a case and where the Sessions Court considers that the evidence of a witness would be material it is the duty of the Sessions Court to issue summonses to such witness.²

Where an accused person gives no list of witnesses to the committing Magistrate and applies at a late stage of the trial in the Sessions Court for an adjournment thereof in order to procure the attendance of witnesses for his defence it would be perfectly legal for the Court to refuse the application.³ See also S 201 and Notes thereon.

7 Further list — It has been seen that for an accused to have his witnesses summoned as of right he must give in a list under this section. Where he does not give in his list immediately after the charge is framed the Magistrate has a discretion to accept a list subsequently.¹ When a further list has been allowed to be filed by the Magistrate under sub s (2), it is governed by the same principles as a list under sub s (1).²

3 (97) 14 All 242 (245) 1892 All W N 83 *Queen Empress v Hargobind Singh*

4 (97) 19 All 507 (504) 1897 All W N 134 *Queen Empress v Shakir Ali*

5 (98) 18 All 380 (380 381) 1896 All W N 114 *In the matter of Pudra Singh*

Also see S 212 Note 1

Note 6

1 (96) 23 AIP 1936 Lah 533 (536) 17 Lah 176 37 Cri L Jour 742 (FB) *Mt Nian et v Emperor* (Sections 211 and 201 read together show that if the accused has willing witnesses at the Sessions Court he can be allowed to produce them but if he requires the Court to issue process for compelling attendance he is confined to those witnesses whose names he has previously included in his list of witnesses.)

(97) 19 All 507 (503) 1897 All W N 134 *Queen Empress v Shakir Ali*

Also see S 216 Note 2 S 201 Note 3 and S 510 Note 7

2 (40) 27 AIR 1940 Pat 355 (358 359) 19 Pat 413 41 Cri L Jour 931 *Musafiru v Emperor*

3 (25) 12 AIR 1925 Lah 557 (557 558) 27 Cri L Jour 134 *Nazir Singh v Emperor*
(24) 25 Cri L Jour 97 (97 98) 76 Ind Cas 97 (Pesh) *Abdul Walab v Emperor*

Note 7

1 (40) 27 AIR 1940 Pat 355 (358)

(36) 23 AIR 1936 Lah 533 (535) 17

(31) 18 AIR 1931 All 434 (435) 53

2 (30) 17 AIR 1930 Cal 188 (189)

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or

An accused committed for trial before a High Court is entitled under sub s (2) to give to the Clerk of the Crown at any time before his trial, a further list of witnesses for his defence

212* The Magistrate may, in his discretion, summon and examine

Power of Magistrate to examine such witnesses any witness named in any list given in to him under section 211.

1 Scope of the section. — The object of the section is twofold *firstly* to prevent any hasty commitment and to ensure a thorough enquiry previous to the commitment and *secondly* to prevent the concoction of false evidence after the commitment.² In order to achieve this object the section gives the Magistrate the widest possible discretion to summon and examine any witness named in the list given by the accused under S 211. Thus he may summon and examine the witnesses for the defence even when the accused has reserved his defence for the Court of Session.³ The discretion thus vested entitles the Magistrate to ascertain after weighing the evidence,⁴ whether there is a presumption of guilt against the accused or whether he is innocent⁵ for it is possible that after hearing the witnesses for the defence the enquiry may result in the discharge of the accused under S 213 sub s (2).⁶ But this discretion has to be exercised sparingly and cautiously as any inconsiderate or premature examination of witnesses may prejudice the accused in his defence at the trial in the Sessions Court.⁷

The accused has no right to have his witnesses summoned and examined *after the charge* is framed under S 210.⁸ And a Magistrate is not required to *record* his reasons for acting or refusing to act under this section.⁹

* 1882 S 212 1872 S 200 para 2 1861 S 207

[See however (40) 27 AIR 1940 Pat 305 (358) 19 Pat 413 41 Cri L Jour 931, *Musahru v Emperor* (In this case it is observed that the discretion to accept a supplementary list of witnesses under sub section (2) is to be exercised subject to the provisos to S 216 — It is submitted that this is not correct—Section 216 does not refer to the acceptance of a supplementary list of witnesses under sub section (2) of Section 211 but to the question of issuing processes to the witnesses named by the accused and does not make any distinction between witnesses named in the list submitted under sub section (1) and those named in the supplementary list submitted under sub section (2) of this section)]

Also see S 291 Note 3

Section 212 — Note 1

1 See (70) 14 Suth W R Cr 16 (16) *Queen v Kristo Doba* (Necessity of making proper inquiries before committing to sessions pointed out)

[But see (70) 13 Suth W R Cr 1 (11) 4 Beng L R App 1 *In re Mohesh Chunder*]

2 See (70) 13 Suth W R Cr 1 (11) 4 Beng L R App 1 *In re Mohesh Chunder*

3 (96) 18 All 380 (381 382) 1896 All W N 114 *In the matter of Rudra Singh*

Also see S 211 Note 5

4 (10) 11 Cri L Jour 751 (750) 8 Ind Cas 1041 (Lah) *Mir Abdullah v Emperor*

5 (70) 14 Suth W R Cr 16 (16) *Queen v Kristo Doba*

(12) 13 Cri L Jour 778 (780) 36 Mad 321 17 Ind Cas 410 *Sessions Judge of Coimbatore v Immudai Kumara Rangaya*

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213. (1) When the accused, on being required to give in a list of order of commitment under section 211, has declined to do so, or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under section 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be), and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment

(2) If the Magistrate, after hearing the witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused

a Sub-section (2) was newly added in the Code of 1893 For legislative changes see Sect on 210, Note 1

Synopsis

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|--|---|
| <p>1 May make an order committing the accused</p> <p>2 Commitment by Magistrate having no territorial jurisdiction—Effect Sec 531 and Notes thereon</p> <p>3 Commitment to Sessions Court having no territorial jurisdiction to try the offence—Effect Sec Notes on Ss 215 and 531</p> | <p>4 Reasons for commitment</p> <p>5 Power of Magistrate to cancel charge and discharge accused or to try him himself</p> <p>6 "After hearing the witnesses for the defence</p> <p>7 Right of accused to cross examine prosecution witnesses after charge is framed</p> <p>8 Practice</p> |
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NOTE to the Synopsis See the Notes indicated for the following topics

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| <p>Compromise by prosecutor after committal See Note 1</p> <p>Committal in cases of several persons jointly charged See S 206 Note 6</p> <p>Committal of a case triable by Magistrate—Record of reasons See Note 4</p> | <p>Committal of some and trial of the rest See Note 5</p> <p>Defence evidence includes cross examination of prosecution evidence See Note 7</p> <p>Duty of Magistrate to weigh evidence See Note 5</p> <p>No cancellation after committal See Note 5</p> <p>No discharge after committal See Note 5</p> |
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1 "May make an order committing the accused"—This section leaves it to the discretion of the committing Magistrate whether or not to commit an accused to the Sessions. Hence, even after a charge is framed with a view to commitment the Magistrate may change his mind and proceed to try the case himself or cancel the charge and discharge the accused see sub section (2)

2 Commitment by Magistrate having no territorial jurisdiction—Effect — See S 531 and Notes thereon

3 Commitment to Sessions Court having no territorial jurisdiction to try the offence — Effect — See Notes on Ss 215 and 531

4. Reasons for commitment — The section requires the committing Magistrate to record his reasons for committing a case to the Court of Session¹ Where the

¹ Code of 1882 S 213

213 When the accused on being required to give in a list under S 211 has declined to do so or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under S 212 the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be) and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment

1872 S 198 para 1 and S 200 para 2 1861 Ss 226 227

Section 213 — Note 1

- 1 (10) 11 Cr L Jour 486 (187 488) 7 Ind Cas 150 (Bom) *Emperor v Venkatesh*
Also see S 210 Note 2

Note 4

- 1 See (1865) 2 Suth W R Cr 65 (65) *Queen v Anderson* (Magistrate making an inquiry with a view to commit is bound to record specially the evidence on which the commitment is made)

offence is not exclusively triable by a Court of Session, the reasons must disclose grounds, not only for not discharging the accused, but also for committing the case to the Court of Session instead of its being tried by the Magistrate himself² As to what are proper grounds for committing a case, see Notes on Ss 206, 207, 209 and 210

5. Power of Magistrate to cancel charge and discharge accused or to try him himself. — The enactment of sub section (2) in the Code of 1893 makes it clear that even after a charge is framed with a view to commitment, the Magistrate has power to cancel the charge and discharge the accused if, in view of the evidence of the defence witnesses examined subsequent to the charge, the Magistrate considers that there are not sufficient grounds for committing the case¹ The decisions prior to the Code of 1893, which held that the Magistrate had no such power,² are no longer good law But the sub-section is only intended to provide for cases, in which the evidence recorded after a charge, so changes the aspect of the case as to leave no reasonable doubt that a conviction is not sustainable It does not apply when the evidence merely casts some doubt on the case³ But when the Magistrate comes to the conclusion that the evidence of the defence witnesses, examined subsequent to the charge, rebuts that produced for the prosecution or renders it so incredible or unreliable that a conviction will not follow, he may act upon his opinion and pass an order of discharge⁴ See also S 209, Notes 3 and 5 and S 210, Note 5

The power to cancel a charge and discharge the accused applies only *before* the case is committed Once the case has been committed, the Magistrate becomes *functus officio* and cannot thereafter change his mind and cancel the commitment or discharge the accused⁵ Moreover the Magistrate's power under the sub section arises only in cases

(66) 5 Suth W R Cr 6 (6), *Empress v Kodai Kahar* (Magistrate in his grounds of commitment should specifically note with exactness and precision the proof against each particular prisoner and the manner in which it is supported)

(66) 5 Suth W R Cr 17 (18), *Queen v Ishur Manjee* (Magistrate should give in the grounds of commitment particulars of the case—He should render his grounds of commitment a proper and complete act of accusation)

2. (14) 1 AIR 1914 Bom 237 (238) 38 Bom 114 14 Cri L Jour 609 *Emperor v Nanji* (Omission to give reasons in such a case is not a mere irregularity but illegality)

Also see S 347, Note 4

Note 5

Magistrate of his jurisdiction to proceed with the case and to try the case himself instead of committing it)

2 (81) 1891 Rat 161 (162) *In re Mars*

3 (1900 02) 1 Low Bur Rul 348 (348), *Crown v Po Nyan*

4 (41) 28 AIR 1941 Pat 505 (507) 42 Cri L Jour 576 191 1st Cas 399, *Moinuddin v Sheogobind Sahu*

(22) 9 AIR 1922 All 168 (169) 44 All 57 22 Cri L Jour 703 *Ma Abdul v Baldeo Sahai*

(15) 2 AIR 1915 All 186 (188) 37 All 355 16 Cri L Jour 429, *Dharam Singh v Joti Prasad*

(25) 12 AIR 1925 All 670 (670) 27 Cri L Jour 2, *Akbar Ali v Raja Bahadur* (This discretion is to be carefully exercised)

ed committed to Sessions upon
er evidence to cancel some of

allowing the prosecutor to file a compromise)

made cannot be annulled by

(81) 4 All 150 (152) 1881 All W N 167, *Empress of India v Janghir*. (Do)

Also see S 215, Note 7 and S 345, Note 15

where he has taken further evidence after the framing of the charge where he has *not* taken such further evidence he cannot cancel the charge once framed and discharge the accused⁶ The power of cancelling a charge once framed and discharging the accused does not apply to trials of *warrant cases* the only course open to a Magistrate who after framing a charge in such cases finds that the charge is unsustainable is to acquit the accused see S 255 and Notes thereon see also Note 1 and Notes on Section 210

6 "After hearing the witnesses for the defence"—As has been seen in Note 5 the power of the Magistrate under sub s (2) to cancel the charge and discharge the accused arises only in cases in which after framing the charge the Magistrate *examines further defence witnesses* where further evidence is not taken by him he cannot cancel the charge and discharge the accused⁷

As to whether the phrase *witnesses for defence* in sub s (2) is wide enough to cover evidence elicited by cross-examination of prosecution witnesses see Note 7

7 Right of accused to cross examine prosecution witnesses after charge is framed.—Under the general principles of evidence (see Evidence Act, Section 176) and the specific provision contained in S 208 subsection (2) the accused in preliminary inquiries in *sessions cases* is entitled as of right to cross examine the witnesses for the prosecution Ordinarily the cross examination of each witness must be made immediately after his examination in chief is over it cannot be reserved till the examination in chief of all the witnesses for a side is over though the Court can in the exercise of its discretion allow such reservation Hence an accused who has declined to cross-examine the prosecution witnesses then and there and who has not been permitted by the Magistrate to reserve his cross examination till a later stage is not entitled to cross examine the prosecution witnesses after the charge is framed¹ *a fortiori* if he has already cross examined the prosecution witnesses under S 208 before the charge was framed he is not entitled to cross-examine them again after the charge is framed² (Contrast the right of an accused in the trial of *warrant cases* under S 256) The expression *witnesses for the defence* in sub s (2) refers to witnesses whom the Magistrate in his discretion examines under S 212 that expression does *not* include the witnesses for the prosecution who are cross examined and therefore does not confer any right on the accused to cross examine the prosecution witnesses after the charge is framed³ But the Magistrate has an *inherent power* to allow the accused an opportunity to cross examine the prosecution witnesses after the charge is framed⁴ Further if the accused did not have an opportunity of cross-

6 (1902) 2 Low Bur Rul 140 (140) *King Emperor v Nga Po Sau*.

7 (1955) 12 AIR 1925 Oudh 547 (547-548) 26 Cri L Jour 520 *Bishambarnath v Emperor* (Magistrate finding that there is no proof that accused has committed a part of the offence but that there are *prima facie* grounds for believing that he committed the other part and that the circumstances require a commitment to the sessions In committing the case to the sessions with regard to the latter part of the offence the Magistrate cannot discharge the accused with reference to the former part of the offence but must acquit the accused It is only in respect of the offence which is committed to the sessions that the proceedings are taken out of the purview of Chap 21 under S 347 and with reference to the other part of the offence the procedure under that chapter alone should be followed and after a charge is framed an accused can only be acquitted and cannot be discharged Section 317 does not authorize such a discharge)

Note 6

1 (1903) 2 Low Bur Rul 140 (140) *King Emperor v Nga Po Sau*

Note 7

1 (1929) 16 AIP 1909 Cal 593 (593-594-595) 57 Cal 41 30 Cri L Jour 1107 G 1 *Paman v Emperor*

(31) 18 AIR 1931 Bom 517 (518) 33 Cri L Jour 68 A. R. Dhat v Emperor

(19) 6 AIR 1919 Low Bur 159 (160) 9 Low Bur Rul 109 19 Cri L Jour 327 *Tambi v Emperor*

(17) 4 AIR 1917 Oudh 200 (200) 18 Cri L Jour 105 19 Oudh Cas 239 *Baldeo v Emperor*

2 See (31) 18 AIR 1931 All 434 (435) 53 All 692 30 Cri L Jour 849 *Pam Ghulam v Emperor*

3 (1929) 16 AIR 1929 Cal 593 (593a) 57 Cal 44 30 Cri L Jour 1107 *Raman v Emperor*

4 (1929) 16 AIR 1929 Cal 593 (593a) 57 Cal 44 30 Cri L Jour 1107 *Raman v Emperor*

examining the prosecution witnesses before the charge was framed, he is entitled to cross examine them after the charge is framed and before the order for commitment is passed⁵

As to the right of an accused to cross examine prosecution witnesses in cases where the proceedings are started as a trial of a warrant case but subsequently the Magistrate decides to commit the case to the Court of Session see S 347 and Notes thereon

8 Practice — See the undermentioned cases¹

214. [Person charged outside presidency towns jointly with European British subject] (*Repealed by the Criminal Law Amendment Act, 1923 (XII of 1923), S 10*)

The provisions of the repealed section have been partly incorporated in S 443

215.† A commitment once made under section 213 by a competent Magistrate or by a Civil or Revenue Court under section 478, can be quashed by the High Court only, and only on a point of law

Synopsis

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|--|---|
| 1 Legislative changes | 7 'By the High Court only' |
| 2 Scope of the section | 8 "On a point of law" |
| 3 "Once made" | 9 Grounds held insufficient for quashing commitment |
| 4 Under section 213 etc | 10 Time for quashing commitment |
| 5 Competent Magistrate | 11 Effect of quashing commitment |
| 6 'Civil or Revenue Court under section 478' | |

NOTE to the Synopsis See the Notes indicated for the following topics

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| Commitment made to the prejudice of accused See Note 9 | Joint inquiry and investigation See Note 9 |
| Commitment of an approver See Note 9 | No application to quash commitment will lie after commencement of trial See Note 10 |
| Commitment of an European British subject See Note 9 | Not giving reasons may invalidate See Note 8 |
| Commitment without discretion See Note 8 | Section does not apply to directions to commit but the High Court may revise See Note 2 |
| Insufficient evidence how far a ground See Notes 8 and 9 | Want of sanction under S 195 and lapse of sanction See Note 8 |
| Irregularities in procedure how far vitiate the trial See Note 7 | When commitment cannot be quashed See Note 10 |
| Issuing a warrant instead of summons See Note 9 | When Sessions Court can discharge without trial See Note 7 |
| Joint inquiry does not vitiate commitment See Note 9 | |

* Code of 1898, original S 214

214 If any person (not being an European British subject)

Person charged outside
presidency towns jointly
with European British
subject
High Court and not before

1882 S 214, 1872 S 197, 1861 S 226

† 1882 S 215 1872 S 197 Expl, 1861 — Nil

(19) 6 AIR 1919 Low Bur 159 (160) 9 Low Bur 100 10 C 17

32 Cr L Jour 183, Nanoram Goenka v Ful-

Note 8

- 1 (66) 6 South W R Cr 9 (10) *Queen v Khouda Senhal* (The grounds of commitment and the remarks of the committing officer should be entered or copied in the calendar which ought to be complete in itself)
- (65) 9 South W R Cr Cir 5 (7) (Magistrate should be careful to arrange their commitments with a view to the trials taking place at the earliest or next ensuing session, in order to avoid the needless detention of accused persons for prolonged periods)

1. Legislative changes.

- (1) There was no section corresponding to this in the Code of 1861.
- (2) The explanation to S 197 of the Code of 1872, which corresponded to this section, did not contain the equivalent of the words 'under S 213,' and "or by a Civil or Revenue Court under S 478."
- (3) In S 215 of the Code of 1882 the words 'under S 213 or 214' were for the first time introduced and even that section did not contain the words 'or by a Civil or Revenue Court under S 478.'
- (4) In the Code of 1893, the words 'or by a Court of Session under S 477 or by a Civil or Revenue Court under S 478' were introduced after the word "Magistrate".
- (5) The section was amended in 1923. The words 'or S 214' appearing after the figures '213' were removed by the Criminal Law Amendment Act, 12 [VII] of 1923, consequent on the repeal of S 214. Likewise the words 'or by a Court of Session under S 477' occurring after the words "by a competent Magistrate" were removed by the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923, consequent upon the repeal of S 477.

2. Scope of the section — Where a commitment is made —

(1) under S 213 by a competent Magistrate, or

(2) by a Civil or Revenue Court under S 478,

it can be quashed only by the High Court and only on a point of law.¹

When the commitment is not made under S 213 or S 478, this section does not apply. Thus a commitment under S 437² or under S 446³ or by the Appellate Court under S 423⁴ or by the High Court under S 526⁵ is not one under S 213 and the High Court can, in revision where such an order of commitment is open to revision, consider the propriety of the order of commitment on points both of law and of fact. But even in such cases, in actual practice, the High Court will not go beyond the rule contained in this section and interfere in revision on grounds of fact.⁶ An order of commitment under S 347, however, falls within the purview of S 213 and can be quashed if at all only under this section.⁷

When a commitment is not made by a competent Magistrate, the commitment may be quashed under S 532, which does not apply when the commitment is made by a

Section 215 — Note 2

- 1 (24) 11 AIR 1924 Rang 165 (167) 1 Rang 526 25 Cri L Jour 261, *Mahomed Mordin v Emperor*. (High Court cannot quash commitment merely because of doubts as to credibility of evidence)
 (20) 7 AIR 1920 Mad 144 (145) 43 Mad 361 21 Cri L Jour 28 *Venkatagiri Aiyer v N M Firm*

by High Court only on a point of law]]

- 3 (45) 32 AIR 1915 Lah 1 (2) 219 Ind Cas 464 46 Cri L Jour 649 (DB) *Bhagat Ram v P T James*
 [But see (44) 46 Pun L R 178 (178), *Bhagat Ram v Taylor* (Sections 337, 437, 446 and 526 are provisions of first nature — They do not lay down procedure when a Court is to commit—Section 213 lays down the procedure — Section 215 therefore applies)]
 4 (22) 9 AIR 1922 Low Bur 40 (40) 11 L B R 375 25 Cri L Jour 518, *Emperor v Nga Thet She*
 5 (04) 1 Cri L Jour 275 (277) 27 Mad 54 7 Ind Cas 752 *In re Kalagava Bapiiah* (Commitment order by High Court under S 526 is not revisable)
 6 (45) 32 AIR 1915 Lah 1 (2) 46 Cri L Jour 648 219 Ind Cas 464 (DP), *Bhagat Ram v P T James*.
 7 (24) 11 AIR 1924 Sind 61 (62, 63) 17 Sind L R 188 26 Cri L Jour 149 *Uttibai v Emperor*

he himself can cure the irregularity in the committal proceedings in a trial before him⁷

The Judicial Commissioner of Sind, sitting in the Sessions Division, is not divested of his dual capacity as a High Court Judge and he can quash commitments under this section even when sitting as a Sessions Judge⁸ Similarly, a single Judge of the High Court exercising original criminal jurisdiction has jurisdiction to quash a commitment made to that Court under this section⁹

The principles laid down in S. 537 should generally guide the High Court in dealing with an application under this section¹⁰

8. "On a point of law."—A commitment can be quashed only on a point of law¹ The test is to see from the judgment of the Magistrate what his findings on the evidence are and whether those findings are capable *prima facie* of sustaining the charges he has framed and on which the commitment to the Court of Session is made.² A commitment should only be quashed when on the face of it there is something of the nature of a fatal flaw in the prosecution³ In dealing with an application under this section, the High Court is not required to appreciate the evidence, but it proceeds on the assumption that the facts as stated in the order of commitment will be proved at the trial All that the High Court is required to apply its mind to is to see whether, assuming the facts are proved, they do justify the conviction of the accused or not⁴ The following are illustrative instances of errors of law justifying the quashing of the commitment:

(1) Where the commitment is made without any enquiry or examination of the prose-

7. ('44) 31 AIR 1944 Sind 47 (48) : ILR (1943) Kar 259 : 45 Cri L Jour 269 : 210 Ind Cas 449, *Emperor v. Ible Allahditto* (For example in cases where there is not on the record proof of previous convictions in a committal on a charge under S. 75, Penal Code, or in a case in which the accused has in fact been questioned about his previous convictions before there is sufficient evidence legally admissible on the

(38) 25 AIR 1938 Rang 105 (107) : 39 Cri L Jour 470, *M. I. Manisa v. The King*.

(29) 18 AIR 1929 Cal 777 (778) : 56 Cal 785 : 31 Cri L Jour 184, *Emperor v. Gurish*

[But see ('42) 29 AIR 1942 Bom 212 (213) : 43 Cri L Jour 773 : ILR (1942) Bom 534 : 201 Ind Cas 5 either in Sessions in

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Mackenzie Mackey.

(11) 12 Cri L Jour 320 (321) : 10 Ind Cas 616 (Sind), *Emperor v. Jhamandas*

Note 8

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Emperor (Held that there is no medical evidence to prove offence is not point of law)

Fernandez v.

cution witness⁵ or on an enquiry so imperfect as to result in prejudice to the accused⁶

- (2) Where the charge framed is altered or added to at a late stage and the commitment is made without re-examining the witnesses as required by S 213 and without allowing the production of evidence with reference to the altered or added charge⁷
- (3) Where the commitment is made in the absence of the accused,⁸ or without giving him a reasonable opportunity of showing cause against the committal,⁹ or of cross-examining the prosecution witnesses¹⁰ or without examining the witnesses tendered by the accused¹¹
- (4) Where the commitment is made on evidence legally inadmissible¹² such as evidence taken even prior to the apprehension of the accused¹³
- (5) Where the commitment is made to a Court of Session or High Court which has no authority to try the case¹⁴

- 5 (82) 4 Mad 227 (227, 228) 2 Weir 591, *Queen v Chinna Vedagiri Chetty*
 (13) 13 Cri L Jour 443 (444, 445) 15 Ind Cas 75 (All), *Durga Datt v Emperor*
 (06) 1906 All W N 306 (307) 4 Cri L Jour 452 *Emperor v Mathura* (A committal without examining witnesses of the defence on the ground of an order of superior Court is illegal and will be quashed)
 (76) 1878 Rat 100 (101) *Reg v Sita*
 6 (81) 1891 Pun Re No 8 Cr p 6 (6), *Empress v Gyano*
 7 (24) 11 AIR 1924 All 663 (665 666) 25 Cri L Jour 798 *Mohan Lal v Emperor*
 (74) 22 Suth W R Cr 14 (16) 14 Beng L R 54, *Queen v Mt Itwarya*
 (21) 8 A 1 R 1921 All 148 (148 149) 22 Cri L Jour 498, *Damarcha v Emperor* (The accused was seriously prejudiced by such alteration of the charge)
 [See also (72) 17 Suth W R Cr 44 (44) *Queen v Mooktaram*]
 8 (01) 5 Cal W N 110 (113) *In the matter of Surya Narain Singh*
 (81) 1891 Pun Re No 22 Cr p 47 (49), *Empress v Harbat* (Not even the Sessions Judge can order committal of accused not present before the Magistrate at the original enquiry)
 9 (13) 14 Cri L Jour 605 (605) 21 Ind Cas 477 (Lab), *Anokha Singh v Emperor* (Commitment without notice to the accused quashed)
 (01) 28 Cal 434 (437 438) 5 Cal W N 609 *Reilly v King Emperor*
 10 (93) 21 Cal 842 (663), *Empress v Sagat Samba* (The prejudice to the accused was aggravated as the Sessions Judge allowed such evidence in the sessions trial)
 (15) 2 A 1 R 1915 All 411 (412) 38 All 29 16 Cri L Jour 801 *Rustom v Emperor* (Conviction was illegal as absconding of the accused was not proved)
 (70) 13 Suth W R Cr 21 (22) 4 Beng L R App 69 *Queen v Hari Dass*
 (27) 14 AIR 1927 Pat 243 (246) 6 Pat 329 28 Cri L Jour 709, *Sasdat Hasan v Emperor*
 (30) 17 AIR 1930 Cal 754 (755 756) 57 Cal 945 32 Cri L Jour 183 *Nandorai Goenka v Fulci and Jaypuria*
 (12) 13 Cri L Jour 877 (883 897 889) 17 Ind Cas 813 6 Low Bur Rul 129 (FD) *Emperor v Chaning Arnold*
 11 (98) 20 All 264 (265) 1898 All W N 50 *Queen-Empress v Ahmadi*
 (01) 1 Cri L Jour 357 (358) 26 All 177 *Emperor v Muhammad Hadi*
 (06) 4 Cri L Jour 452 (452 453) 1906 All W N 306, *Emperor v Mathura*

Suryanarayana
 Emperor v Mihai Lal

ror (Separate trials and

convictions of two persons — Order for commitment of both to sessions for joint trial for conspiracy — Commitment on evidence taken in former trials)

- (29) 16 AIR 1929 Sind 250 (251 252) 30 Cri L Jour 1121, *Wahid Buz v Emperor*
 13. (04) 2 Weir 209 (260) *In re Chinnappan*
 14 (10) 11 Cri L Jour 51 (55) 4 Ind Cas 812 (All) *Emperor v Jagmohan* (Where the offence consists in the giving of false information to the police and the case does not go further than a police enquiry the offence falls within the first paragraph of S 211 and not the second paragraph of S 211—Commitment is therefore bad in law)
 (97) 19 All 465 (465 466) 1897 All W N 115 *Queen Empress v Schade* (Case under S 9 Opium Act of 1878—Magistrate taking cognizance of the case could not commit it to Sessions Court)

he himself can cure the irregularity in the committal proceedings in a trial before him?⁷

The Judicial Commissioner of Sind, sitting in the Sessions Division, is not divested of his dual capacity as a High Court Judge and he can quash commitments under this section even when sitting as a Sessions Judge⁸ Similarly, a single Judge of the High Court exercising original criminal jurisdiction has jurisdiction to quash a commitment made to that Court under this section⁹

The principles laid down in § 537 should generally guide the High Court in dealing with an application under this section¹⁰

8. "On a point of law."—A commitment can be quashed only on a point of law¹ The test is to see from the judgment of the Magistrate what his findings on the evidence are and whether those findings are capable *prima facie* of sustaining the charges he has framed and on which the commitment to the Court of Session is made² A commitment should only be quashed when on the face of it there is something of the nature of a fatal flaw in the prosecution³ In dealing with an application under this section, the High Court is not required to appreciate the evidence, but it proceeds on the assumption that the facts as stated in the order of commitment will be proved at the trial All that the High Court is required to apply its mind to is to see whether, assuming the facts are proved, they do justify the conviction of the accused or not⁴ The following are illustrative instances of errors of law justifying the quashing of the commitment

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cution witness⁵ or on an enquiry so imperfect as to result in prejudice to the accused⁶

(2) Where the charge framed is altered or added to at a late stage and the commitment is made without re-examining the witnesses as required by S 213 and without allowing the production of evidence with reference to the altered or added charge⁷

(2) Where the commitment is made in the absence of the accused,⁸ or without giving him a reasonable opportunity of showing cause against the committal,⁹ or of cross-examining the prosecution witnesses¹⁰ or without examining the witnesses tendered by the accused¹¹

(4) Where the commitment is made on evidence legally inadmissible¹² such as evidence taken even prior to the apprehension of the accused¹³

(5) Where the commitment is made to a Court of Session or High Court which has no authority to try the case¹⁴

5 (80) 4 Mad 227 (227 228) 2 Weir 594 *Queen v Chinna Vedagiri Chetty*

(19) 13 Cri L Jour 443 (444, 445) 15 Ind Cas 75 (All), *Durga Datt v Emperor*

(06) 1906 All W N 306 (307) 4 Cri L Jour 450 *Emperor v Mathura* (A committal without examining witnesses of the defence on the ground of an order of superior Court is illegal and will be quashed)

(76) 1876 Rat 100 (101) *Reg v Sita*

6 (81) 1891 Pun Re No 6 Cr p 6 (6), *Empress v Gyaio*

7 (24) 11 AIR 1924 All 665 (665 666) 25 Cri L Jour 798 *Mohan Lal v Emperor*

(74) 22 Suth W R Cr 14 (16) 14 Beng LR 54 *Queen v Ut Itwarya*

(21) 8 A I R 1921 All 148 (148 149) 22 Cri L Jour 496 *Damarcha v Emperor* (The accused was seriously prejudiced by such alteration of the charge)

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(the Sessions Judge can order committal of accused not present before the Magistrate at the original enquiry)

9 (13) 14 Cri L Jour 605 (605) 21 Ind Cas 477 (Lab) *Anokha Singh v Emperor* (Commitment without notice to the accused quashed)

(01) 25 Cal 434 (437 438) 5 Cal W N 609 *Paily v King Emperor*

10 (93) 21 Cal 642 (663) *Empress v Sagal Samba* (The prejudice to the accused was aggravated as the Sessions Judge allowed such evidence in the sessions trial)

(15) 2 A I R 1915 All 411 (412) 98 All 29 16 Cri L Jour 861 *Rustoi v Emperor* (Conviction was illegal as absconding of the accused was not proved)

(70) 13 Suth W R Cr 21 (22) 4 Beng LR App 69 *Queen v Hari Dass*

(27) 14 AIR 1927 Pat 243 (246) 6 Lat 329 26 Cri L Jour 709 *Sasdat Mian v Emperor*

(30) 17 AIR 1930 Cal 754 (755 756) 57 Cal 945 32 Cri L Jour 182 *Nandorain Goenka v Fulchand Jappuria*

(12) 13 Cri L Jour 877 (883 887 888) 17 Ind Cas 813 6 Low Bur Rul 129 (FB) *Emperor v Channing Arnold*

11 (98) 20 All 264 (265) 1898 All W N 52 *Queen Empress v Ahmadi*

(04) 1 Cri L Jour 357 (358) 26 All 177 *Emperor v Muhammad Hadi*

(00) 4 Cri L Jour 452 (452 453) 1906 All W N 306, *Emperor v Mathura*

Suryanarayana

Emperor v Mitha Lal

ror (Separate trials and

convictions of two persons — Order for commitment of both to sessions for joint trial for conspiracy — Commitment on evidence taken in former trials)

(29) 16 AIR 1909 Sind 250 (251 252) 30 Cri L Jour 1121, *Wahid Buz v Emperor*

13 (04) 2 Weir 259 (260) *In re Chinnappan*

14 (10) 11 Cri L Jour 54 (55) 4 Ind Cas 812 (All) *Emperor v Jag Mohan* (Where the offence consists in the giving of false information to the police and the case does not go further than a police enquiry, the offence falls within the first paragraph of S 211 and not the second paragraph of S 211—Commitment is therefore bad in law)

(97) 19 All 465 (465 466) 1897 All W N 115 *Queen Empress v Schale* (Case and r 99 of 1878—Magistrate taking cognizance of the case could not commit it to Sessions Court)

- (6) Where the commitment is made by a Magistrate who is disqualified under S 55c,¹⁵ but not when he has merely taken part in the identification parade¹⁶
- (7) Where the commitment is made by a Magistrate who has no jurisdiction to do so¹⁷
- (8) Where the commitment is made on no legal ground, e.g., a commitment on the ground that it is done on the request of the accused or that the case had created a sensation or that the amount involved is large,¹⁸ or that the District Judge or District Magistrate has directed a committal,¹⁹ or that it is in accordance with a Government resolution²⁰ or that the case involved a complicated question of law²¹
- (9) Where the commitment is made on the ground that the accused had been committed in some other connected case, without the Magistrate being of opinion that he cannot himself award adequate punishment²² (On this point see also section 317, Note 4)
- (10) Where two sets of accused are committed on the ground that one or the other of them is guilty of the offence²³
- (11) Where, in cases requiring previous sanction or complaint, the commitment is made on an enquiry held without such sanction or complaint,²⁴ or on an enquiry held prior to the grant of the sanction,²⁵ or on an inquiry based on an invalid

[See ('69 70) 5 Mad H C R 277 (279), *Reg v Donoghue* (Case under the old Code — In this case a European British subject was tried in the sessions division of the original side of High Court)]

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24. (17) 4 AIR 1917 Lah 338 (341) 18 Cri L Jour 548 (551) 1917 Pun Re No 19 Cr, *Emperor v. Gurditta*

(69) 6 Bom H C R Cr 51 (55) *Reg v Muhammad Khan* (Where false evidence was given before a Magistrate who himself committed the accused for trial by the Sessions Court, held that no formal objection as to want of

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No. 120, In re Venkatachala Pillai (Sub Registrar's sanction was found)

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sanction²³ As to the effect on commitment of absence of certificate or sanction under S 158, see S 158, Note 7.

- (12) Where the commitment is made without proper reasons in cases not triable exclusively by the Court of Session and in which the Magistrate can pass an adequate sentence²⁴ But if the Magistrate considers that he cannot award an adequate sentence or on some other proper grounds considers that the case ought to be tried by the Sessions Court commitment is not illegal and will not be quashed²⁵ See also S 317 Note 4

- (13) There is a difference of opinion as to whether a commitment made when there is no evidence at all to convict the accused can be quashed According to the

- 26 (21) 6 Cal 584 (555) 8 Cal L Rep 265, *Empress v Shilo Behara*
 (1931) 16 Mad 465 (473, 474) 3 Mad L Jour 227 2 Weir 220, *Queen Empress v Samuier*
 Also see S 439 Note 26
 27 (40) 27 AIR 1940 Oudh 15 (15, 16) 40 Cri L Jour 903, *Sheemangal Pande v Emperor*
 (38) 25 AIR 1938 Sind 79 (79) 39 Cri L Jour 507, *Emperor v Waroo*
 (37) 24 AIR 1937 Sind 32 (32, 33) 39 Cri L Jour 379 31 Sind L R 403, *Emperor v Ghousbakh*
 (18) 5 AIR 1918 Sind 60 (61) 11 Sind L R 79 19 Cri L Jour 319, *Emperor v Ismail* (Case of simple hurt which Magistrate was competent to try and punish adequately—Commitment amounts to error in law and hence will be quashed)
 (06) 3 Cri L Jour 94 (95, 96) 3 All L Jour 14 1906 All W N 28 *Emperor v Dharam*
 (1900-07) 1 Low Bur Bul 154 (159, 160) *Crown v Major Hodgson*
 (13) 14 Cri L Jour 637 (635) 21 Ind Cas 897 (Bom) *Emperor v Asha Bhai* (Here the connection with another sessions case was found to be remote as not to embarrass the accused if separately tried. — So commitment quashed)
 (72) 17 Suth W R Cr 14 (14), *In re Ananto Koyburt*
 (02) 4 Bom L R 67 (86) *King Emperor v Pema Ranchod*
 (29) 16 AIR 1929 Cal 766 (761, 762) 57 Cal 1042 31 Cri L Jour 506 (CB), *Girish Chandra v Emperor*
 (29) 16 AIR 1929 Cal 777 (776) 56 Cal 785 31 Cri L Jour 184, *Emperor v Girish Chandra Kundu*
 (32) 19 AIR 1932 Lah 263 (264) 33 Cri L Jour 630, *Kesar v, Emperor* (Unnecessary commitment justifies quashing of commitment order)
 (34) 21 AIR 1934 Lah 95 (95) 35 Cri L Jour 1459, *Emperor v Mir Alam* (Accused charged under S 149, Penal Code, committed to sessions for convenience — Ground ceasing to exist, commitment is bad in law)
 (97) 24 Cal 429 (431, 432) 1 Cal W N 414 *Queen-Empress v Rayemullah Mandal*
 (10) 11 Cri L Jour 54 (54, 55) 4 Ind Cas 812 (All), *Emperor v Jagmohan*
 (30) 17 AIR 1930 Sind 145 (146) 24 Sind L R 157 31 Cri L Jour 596, *Emperor v Allahabad* (Even if the death of a person is involved in the offence)
 (14) 1 AIR 1914 Sind 94 (95) 8 Sind L R 23 15 Cri L Jour 664, *Diwani Chand v Emperor*
 (21) 11 AIR 1924 Sind 61 (63, 64) 17 Sind L R 188 26 Cri L Jour 149, *Uthidas v Emperor*
 (17) 4 AIR 1917 Lah 251 (252) 18 Cri L Jour 524 (526) 1917 Pun Re No 13 Cr, *Emperor v Ali* (That opposite party has been committed to the sessions in respect of the same transaction is a good reason)
 See (36) 23 AIR 1936 Pesh 139 (139) 37 Cri L Jour 852 *Emperor v Madan Lal* (Commitment of a case which the committing Magistrate could try himself under the Code (without the assistance of power under S 30) is an error of law and can be quashed)
 28 (18) 5 AIR 1918 Nag 141 (142) 20 Cri L Jour 97 *Emperor v Hanuman*
 (20) 7 AIR 1920 Sind 55 (56, 57) 14 Sind L R 85 21 Cri L Jour 791, *Ghani v Emperor*,
 (13) 14 Cri L Jour 304 (304) 19 Ind Cas 960 (All) *Emperor v Baldeo*
 (86) 1836 All W N 256 (256), *Empress v Behara*
 (19) 6 AIR 1919 Mad 907 (908, 909) 42 Mad 83 19 Cri L Jour 997 *Crown Prosecutor v Bhagavathi*
 (31) 21 AIR 1924 Cal 107 (107) *Emperor v ...*
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 not brought on record—Case committed—Defect can be remedied in Sessions Court)
 (42) 29 AIR 1912 Mad 440 (441) 43 Cri L Jour 715 200 Ind Cas 740 *In re T Veeranna*
 (Joint Magistrate before whom accused was charged under S 511 and S 379 Penal Code,
 to sessions —
 commitment quashed
 as begun and

(1943) Kar 239 210 Ind Cas 449
 O—Proof of previous convictions

High Courts of Calcutta²⁹ Allahabad,³⁰ Patna³¹ and Rangoon³² the Chief Courts of Lower Burma³³ and Oudh³⁴ and the Judicial Commissioners Court of Sind³⁵ the conviction can be quashed in such cases. The decisions of the Lahore³⁶ and Madras³⁷ High Courts are conflicting. The High Court of Bombay³⁸ and the Court of the Judicial Commissioner at Nagpur³⁹ hold that want of evidence to sustain the charges is not a ground for quashing the commitment. See also the under mentioned case⁴⁰. The *appraisal* of evidence is however only a question of fact⁴¹.

See also the undermentioned cases⁴²

- (01) (01) 5 Cal W N Nix (xci) *Kali Kant Biswas v Empress*
(01) 5 Cal W N 411 (412 413) *Jogeshwar Ghosh v King Emperor*
(0a) 2 Cri L Jour 383 (386) 2 Cal L Jour 46 *Emperor v Chandra Kumar Misser*
(05) 2 Cri L Jour 534 (548 549) 9 Cal W N 829 *Sheobux Ram v Emperor*
30 (40) 27 AIR 1940 All 396 (397) 1 L R (1940) All 531 41 Cri L Jour 869 *Emperor v Mishra Lal*
(83) 6 All 69 (101) 1883 All W N 225 *Empress v Narotam Das*
(84) 1884 All W N 14 (14) *Empress v Sumar*
31 (24) 11 AIR 1924 Pat 754 (755) 25 Cri L Jour 636 *Mt Gobindia v Emperor* (Case under S 82 Registration Act.—Sub Registrar cannot enquire into truth or falsity of recitals as false recital is no offence)
32 (24) 11 AIR 1924 Rang 165 (187) 1 Rang 596 25 Cri L Jour 261 *Mahomed Moidin v Emperor* (But not if there is some evidence)
33 (16) 6 AIR 1916 Low Bur 148 (147) 9 Low Bur Rul 208 19 Cri L Jour 801 *Thambi v Emperor*
34 (26) 89 Ind Cas 345 (346) 28 Cri L Jour 137 (Oadh) *Emperor v Jagannath*
35 (32) 19 AIR 1930 Sind 157 (169) 26 Sind L R 407 34 Cri L Jour 14 *Manram v Emperor*
36 (45) 82 AIR 1945 Lah 1 (2) 48 Cri L Jour 848 219 Ind Cas 464 (DB) *Bhagat Ram v P T. James* (Yes)
(31) 18 AIR 1931 Lah 467 (487) 32 Cri L Jour 867 *Hassan Din v Emperor* (No)
(80) 17 AIR 1930 Lah 545 (545) 81 Cri L Jour 814, *Gansham Das v Emperor* (Yes)
37. (35) 2 AIR 1915 Mad 24 (24 25) 15 Cri L Jour 665 *In re Sessions Judge of Coimbatore* (No)
(31) 1631 Mad W N 381 (383 384) *Bakthavatsalu Naidu v Emperor* (Yes)
38 (31) 16 AIR 1931 Bom 617 (519) 33 Cri L Jour 68 *K R Bhai v Emperor*
(11) 12 Cri L Jour 256 (258 257) 10 Ind Cas 802 (Bom) *Emperor v Sulaiman*
39 (35) 22 AIR 1935 Nag 202 (205) 36 Cri L Jour 1383 31 Nag L R 360 *Marois Jaiaram v Emperor* (Quest on of insufficiency of evidence is not a point of law)
(25) 12 AIR 1920 Nag 409 (412) 26 Cri L Jour 1045 *Ismail v Emperor*
40 (14) 1 AIR 1920 Nag 409 (412) 26 Cri L Jour 1045
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on which accused can be reasonably convicted is no ground for quashing commitment)
(1900) 27 Cal 1041 (1047) 4 Cal W N 615 (FB) *Nemas Chatteraj v Empress* (Whether the act of kidnapping was complete)
(26) 15 AIR 1926 Pat 493 (494) 5 Pat 538 27 Cri L Jour 792 *Nanhak Sao v Emperor* (Do)]
42 (45) 49 Cal W N 284 (285) *Emperor v Ujagar Singh* (Magistrate not complying with the provisions of Sections 208 and 360—Prejudice caused to accused—Commitment can be quashed)
(12) 13 Cri L Jour 757 (259) 39 Cal 409 14 Ind Cas 641 *Abdul Gani v Asizul Haq*
(03) 2 W 262 (262) *In re Jagathambal*
(1901) 23 Bom 402 (402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500)
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(08) 8 Cri L Jour 153 (153 154) 31 Mad 272 *In re Arunachallam*
(83) 1883 All W N 257 (257) 6 All 123 *Empress v Zalaria* (Sessions trial on a charge of grievous hurt—Death of person hurt during trial—Commitment quashed—Fresh inquiry for culpable homicide ordered)
(83) 1883 All W N 39 (39) 5 All 233 *Empress v Sheodin* (Commitment quashed on a misjoinder of charges)

9 Grounds held insufficient for quashing commitment.—The following have been held not to be grounds for quashing a commitment —

- (1) Where the Magistrate finds subsequent to the order of committal that he should not have committed the accused¹
- (2) Where a joint commitment is made of several accused when with reference to S 233, they should have been committed separately. In such cases the Sessions Court can try the accused separately or amend the charge.²
- (3) Where the committing Magistrate acts on the evidence recorded by the Magistrate from whose file the case has been transferred to his own Court (S 350 applies to such a case³)
- (4) Where the commitment is made merely on wrong exercise of discretion⁴
- (5) Where the only evidence against the accused is the uncorroborated testimony of an accomplice. The reason is that acting upon such evidence in proper cases is not illegal⁵. Where the commitment is made to the same Sessions Judge who gave the direction for prosecution of the accused for the offence of giving false evidence before him, when there is no Assistant or Additional Sessions Judge in the District⁶
- (6) Where the first class Magistrate who had discharged the accused under S 200, committed him as per orders of the District Magistrate passed under S 430. The reason is that the order of such Magistrate was not without jurisdiction⁷
- (7) Where a civil suit is pending in respect of a document in connexion with which the accused had been committed by the Civil Judge under S 478, for using a forged document⁸. In such cases it would, however, be desirable to postpone further criminal proceedings till the decision of the civil suit⁹
- (8) Irregularities of procedure before the Magistrate who transfers the case to a superior Magistrate under section 319 do not vitiate the committal by the latter

v. Emperor.

(11) 12 Cr L Jour 66 (66, 67) : 9 Ind Cas 361 (Cal), *Lal Behari Singh v. Emperor*.

(35) 22 AIR 1935 Oudh 9 (9) : 36 Cr L Jour 175, *Emperor v. Chhedamni*. (Commitment not quashed on technical grounds as Sessions Judge had ample opportunity to remedy defects and quashing would have meant unnecessary delay and expense to accused.)

Note 9

Karim (Sitting as a Court of revision High Court will not enter into facts of a particular case and see whether Magistrate exercised proper discretion in holding that he could not award an adequate sentence and in committing the case.)

(18) 5 AIR 1918 All 296 (296) : 19 Cr L Jour 221, *Emperor v. Goda Ram*

Magistrate¹⁰

- (9) Where the commitment for trial in one and the same case of some accused is for robbery and of some for receiving property stolen in that robbery¹¹
- (10) Where the commitment is made by a Civil Court (as opposed to Military Court) of a British born European soldier, on proceedings taken at the request and consent of military authorities¹²
- (11) Commitment in two different cases, for offences under S 193, Penal Code, in one, and under Ss 471 and 109 of the same Code in another, in respect of the same act, though it is not desirable that there should be two trials in respect of the same act¹³
- (12) Non observance of the provisions of S 360, before the committing Magistrate and partly before the Court of Session¹⁴
- (13) After the commitment to the Sessions, the fact that graver charges triable by the Court of Session have been withdrawn is no ground for quashing the commitment in respect of the minor charges triable by the Magistrate and thereby take away the right of trial by jury¹⁵
- (14) Omission to issue notice under S 204, where the accused is present¹⁶
- (15) Where the case is triable by a Court of Session, the mere fact that the Magistrate did not give reasons for commitment when there was a specially empowered Magistrate who could try the case¹⁷
- (16) Where an approver whose pardon has been withdrawn has been committed, the mere fact that he was examined as a witness only in the preliminary enquiry and not in the trial before the Sessions Judge or the fact that the pardon had been withdrawn by the District Magistrate and not by the Sessions Judge is not a ground for quashing the commitment¹⁸
- (17) The fact that some of the co accused are not yet arrested¹⁹
- (18) The fact that the evidence is doubtful²⁰ or that it is insufficient²¹ or that the

10 (42) 29 AIR 1942 Mad 440 (441) • 200 1st Cas 740 43 Cri L Jour 715, *In re Veeranna* (Joint Magistrate before whom accused was charged under S 511 and S 379, Penal Code, erroneously thinking S 75 Penal Code to be applicable and transferring case to Sub-Magistrate — Sub Magistrate holding that *prima facie* case was made out and committing accused to sessions — Commitment held not illegal.)
(87) 1887 Rat 350 (359) *Queen-Empress v Bapuda*
[See also (44) 31 AIR 1944 Sind 47 (48) 45 Cri L Jour 269 1 L R (1943) Kar 259 210 1st Cas 449, *Emperor v Isha Allah Ditta* (Charge under S 75 Penal Code — Proof of previous convictions not brought on record — Case committed — Defect can be remedied in Sessions Court — Commitment will

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13 (25) 12 AIR 1925 Oudh 610 (610, 611) 26 Cri L Jour 1567, *Emperor v Gajadhar*
14 (25) 12 AIR 1925 Cal 928 (928, 929) 26 Cri L Jour 1276 *Abdur Rahim v Emperor* (Recall of

15. (10) 11 AIR 1934 Lah 326 (3-4) *Indoo v Emperor*

19. (10) 11 Cri L Jour 333 (333) 5 1st Cas 933 (Mad), *In re Ramasami*
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v. *Mishra Lal*

evidence is not direct but circumstantial²² The test to be applied, in such cases, to decide whether a committal ought or ought not to be made on the facts, is this—asuming that the whole evidence telling against the accused is true, is there a case which a Judge at a trial could leave to a jury? If the evidence is such that the Judge would have been bound to rule that there was no evidence on which a jury could convict, then a committal ought not to be made. If there was any evidence which called for an answer—however great the preponderance in favour of the prisoner might be—then the committal was proper²³

- (19) Where the Magistrate discharged the accused but subsequently becoming aware of the presence of another witness cancelled his order of discharge, took further evidence and committed the accused. It was held there was no *prejudice* to the accused²⁴
- (20) Records disclosing only an offence triable by the Magistrate himself or an offence other than the one charged²⁵
- (21) The order for further enquiry under S 437, which ended in the commitment being made without notice to the accused²⁷
- (22) Not examining the defence witnesses under S 203 for reasons recorded²⁸
- (23) Commitment for an offence under S 211 of the Penal Code by reason of the Magistrate proceeding on the report of the police that the complaint was false, without making a judicial enquiry into the complaint²⁹
- (24) Vagueness of sanction to prosecute³⁰
- (25) Absence of an order for retrial by the Sessions Judge, who set aside the conviction in appeal, is not a ground for quashing the commitment by another Magistrate on fresh proceedings³¹
- (26) The omission by the Magistrate to weigh the evidence and express any opinion whether the guilt had been proved³²
- (27) A commitment by the Munsif under S 478 for offences under Ss 467 and 471,

(30) 23 AIR 1936 Sind 9 (7) 37 Cri L Jour 314 29 Sind L R 281 *Francis Xavier Fernandes v. Emperor* (A plea that there is no medical evidence on the record to prove that the accused committed the offence with which he is charged, does not raise any point of law and is no ground for quashing commitment)

(1864) 1 Suth W R Cr 8 (8), *Queen v. Gokul Dandari*

(22) 9 AIR 1922 Oudh 109 (109) 23 Cri L Jour 79 *Mahabir v. Emperor*

[See also (18) 5 AIR 1918 Upp Bur 11 (12) 3 Upp Bur Rul 29 19 Cri L Jour 102, *Ngā Hymy v. Emperor*]

22 (1900) 4 Cal W N cxvi (cxvi) *Empress v. Ananda Kishore Chowdhuri*

23 (05) 2 Cri L Jour 534 (548) 9 Cal W N 829 *Sheobux Ram v. Emperor*

24 (1911) 10 Cal 111 (111) 10 Cal W N 111 (111) 10 Cal W N 111 (111) 10 Cal W N 111 (111)

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32 (1911) 10 Cal 111 (111) 10 Cal W N 111 (111) 10 Cal W N 111 (111)

21 (01) 3 Bom L R 703 (703, 704), *King Emperor v. Pandurang*

28 (08) 8 Cri L Jour 221 (223) 36 Cal 48 1 Ind Cas 469, *Phanindra Nath v. Emperor*

(19) 13 Cri L Jour 778 (780) 36 Mad 321 17 Ind Cas 410, *Sessions Judge of Coimbatore v. Kangaya*,

(Long delay in producing defence witnesses)

(1865) 2 Suth W R Cr 50 (50) *Queen v. Hurnath Roy*

(16) 3 AIR 1916 Cal 106 (106) 10 Cri L Jour 415 (415) 42 Cal 608, *Emperor v. Surath* (Application

by accused for summoning further witnesses on day of commitment was refused)

21 (1911) 10 Cal 111 (111) 10 Cal W N 111 (111) 10 Cal W N 111 (111)

22 (1911) 10 Cal 111 (111) 10 Cal W N 111 (111) 10 Cal W N 111 (111)

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Emperor v. Madhau Laxman

31 (02) 29 Cal 412 (413, 414) *Abdul Ghani v. Emperor*

32 (37) 20 AIR 1933 Lah 39 (39) 38 Cri L Jour 39, *Mahommed Khan v. Emperor*

Penal Code, cannot be quashed because the document in question has not been given in evidence³³

- (28) The commitment of an European British subject to the Court of Session by the Extra Assistant Commissioner of Baluchistan is not without jurisdiction and cannot be quashed³⁴

See also the undermentioned cases³⁵

As to whether a commitment can be quashed on ground of want of territorial jurisdiction, see S 531, Note 2

10 Time for quashing commitment. — The High Court can, according to the view taken by the Patna High Court, quash the commitment *at any stage* of the proceedings¹ The Calcutta High Court had, in an earlier case,² taken a similar view but has, in recent cases,³ expressed the view that a commitment cannot be quashed after the accused has been put on his trial and pleads to the charge as it is then too late to object to the commitment This latter view is shared also by the High Courts of Madras⁴ and Lahore⁵ and the Court of the Judicial Commissioner of Sind⁶ Where the accused is put on his trial and pleads to the charge, the Judge should proceed according to law and dispose of the case under Chapter XXIII of the Code or the Public Prosecutor may, with the consent of the Court, withdraw the prosecution under S 491⁷

11 Effect of quashing commitment. — The primary effect of the order quashing the commitment is to supersede any action taken by the Magistrate under s 210, and his proceedings subsequent thereto In such a case, it is necessary for the Magistrate to go back to the point at which he took cognizance of the complaint The order does not amount to discharge of the accused and no fresh complaint is necessary¹ The accused may be charged again with the offence²

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(1900 '02) 1 Low Bur Rul 88 (88-89) *Crown v Nga Sane Yauk* (Magistrate quashed his own commitment order on ground that evidence to support a charge under S 413, Penal Code, was insufficient)

Note 10

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(26) 13 AIR 1926 Cal 410 (411) 26 Cr L Jour 1560, *Kasem Molla v. Emperor*

Also see S 512 Note 12

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1 (37) 21 AIR 1937 Sind 32 (33) 39 Cr L J 379 318 ILR 403 *Emperor v. ...*
trate who had originally tried the

216. When the accused has given in any list of witnesses under section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed

Provided that, where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly

Provided, also, that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and, if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses

Synopsis

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| 1 Legislative changes | 3 Refusal to summon unnecessary witness |
| 2 Scope and applicability of the section | 4 Expenses of expert witnesses |

NOTE to the Synopsis See the Notes indicated for the following topics

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| Duty of Magistrate is to summon save in excepted cases See Note 2 | Sessions Court to enforce attendance See Note 2 |
| Reasons for refusal should be recorded even if evidence is not material. See Note 3 | Witnesses not included in the list See Note 2 See also S 291 |

1 Legislative changes

Differences between Codes of 1861 and 1872 —

In S. 228 of the Code of 1861 it was provided that if the Magistrate was not satisfied that there were reasonable grounds for believing that a particular witness was material he was not bound to summon the witness 'unless such a sum shall be deposited with the Magistrate as he shall consider necessary to defray the expense of obtaining the attendance of the witness' Hence even if the Magistrate was not satisfied that a witness was a material witness he was bound to summon him if the accused was prepared to pay his expenses and deposited the expenses with the Magistrate¹ This position was altered in the Code of 1872 which left it to the discretion of the Magistrate to summon a witness and empowered him to refuse to summon a witness even though the accused might be willing and prepared to bear the expenses of the witnesses.

Changes made in 1882 —

The provision as to leaving it to the Clerk of the Crown to summon the witnesses in cases of commitment to the High Court was new.

Changes made in 1898 —

The words 'and all other proper expenses' were added at the end of the section.

2 Scope and applicability of the section — It is the duty of the committing Magistrate to see that all the evidence available, whether for the prosecution or for the defence is before the Sessions Court¹ The procedure provided in this section is to summon

¹ 1882 S 216, 1872 Ss 358, 359, 1861 S 228

Section 216 — Note 1

1 (68) 4 Mad H C R 81 (83) *In re Subharaya Mudali*

Note 2

1 (20) 7 AIR 1920 Pat 165 (166) 21 Cri L Jant 718, *Ajodhya Prasad v Emperor*

the witnesses named by the accused to give evidence at the trial in the Sessions Court. This applies to the witnesses named by the accused who have *not* been examined by the Magistrate. The next section applies to the complainant and the witnesses for the prosecution and such of the witnesses for the accused *as have appeared* and given evidence before the committing Magistrate. In their case, that section provides that the Magistrate should require them to *execute bonds* for their appearance and for giving evidence in the Sessions Court at the trial.

Under this section, the Magistrate is *bound* to summon the witnesses who have been named in the list given by the accused under s 211 and who have not appeared before him,² except in the cases mentioned in the two provisos. But this duty arises only in the case of persons named by the accused in the list supplied by him to the Magistrate under s 211³. Hence, where on being asked to give such list the accused declines to do so, the Magistrate is not bound to summon any witnesses that he may desire to be called subsequent to the commitment.⁴

Under s 291, the Sessions Judge is *bound* to enforce the attendance of the witnesses summoned under this section, who fail to appear at the trial.⁵

3. Refusal to summon unnecessary witness. — The Magistrate has no power to refuse to summon a witness on the ground that his evidence will not be material,¹ unless he considers that the witness is included in the list merely for purposes of vexation or delay or of defeating the ends of justice. But where the Magistrate considers that the witness is included in the list for any such purpose, he can require the accused to show how the evidence of the witness will be material. Where he is not satisfied that the evidence of the witness will be material, he may refuse to summon him recording his reasons for doing so.² As to the liability of the accused to pay process fees and other fees for summoning witnesses see Notes on s 544.

4 Expenses of expert witnesses. — See the undermentioned case¹

2 (71) 15 Suth W R Cr 34 (35) 6 Beng L R App 83, *Queen v Ishan Dutt*
 (1865) 2 Suth W R Cr 6 (6) *Queen v Bhobun Isher*
 (70) 13 Suth W R Cr 1 (11) 4 Beng L R App 1, *In the matter of Mahesh Chunder*

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Note 3

Note 4

• (32) 19 A 1 R 1932 Lab 461 (482, 483): 33 Cr L Jour 761, *Rani Narain v Emperor* (In warrant

217.* (1) *Complainants and witnesses for the prosecution and*
Bond of complainants and witnesses *defence, whose attendance before the Court of Session or High Court is necessary and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence, as the case may be.*

(2) *If any complainant or witness refuses to attend before the Court of Session or High Court, or execute the bond above directed, the Magistrate may detain him in custody until he executes such bond, or until his attendance at the Court of Session or High Court is required, when the Magistrate shall send him in custody to the Court of Session or High Court, as the case may be.*

218.* (1) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the [Provincial Government] in this behalf, notifying the commitment, and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge,

and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session or (where the commitment is made to the High Court) to the Clerk of the Crown or other officer appointed in this behalf by the High Court

(2) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record

Substituted by A O for Local Government

219.† (1) The committing Magistrate or, in the absence of such Magistrate, any other Magistrate empowered by or under section 206 may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence

(2) Such examination shall, if possible, be taken in the presence of the accused and, where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall be given to the accused free of cost

Synopsis

- 1 Legislative changes
- 2 Scope of the section
- 3 Free copy of evidence to be given to accused
- 4 Examination if to be in presence of accused

1 Legislative changes

Changes introduced by the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923 —

(1) For the words Magistrate in sub s (1) the words The committing Magistrate .. s 206 were substituted.

(2) For the words if the accused so require be given to him free of cost in sub s (2) the words be given to the accused free of cost were substituted

2 Scope of the section — This section empowers the Magistrate even after a case has been committed to call and examine supplementary witnesses and forward their evidence to the Sessions Court¹ But the power cannot be exercised by any and every Magistrate it is confined to the committing Magistrate or any other Magistrate empowered

* 1882 S 218 1872 S 198 paras 2 3 & 4 and S 202 para 1 1861 Ss 229 231
† 1882 S 219 1872 S 357 para 2 1861 Nil

Section 219 — Note 2

1 (30) 23 AIR 1936 Lah 533 (536) 17 Lah 176 37 Cri L Jour 742 (FB) *Mt Niamat v Emperor*
(35) 22 AIR 1935 All 267 (267) 36 Cri L Jour 446 *Mutial v Emperor* (Magistrate can require complainant as witness under S 219)
(22) 9 AIR 1922 Oudh 109 (109) 23 Cri L Jour 79 *Mahabir v Emperor*
[See (91) 91 Cal 97 (103) *Queen Empress v Suker Kar*]

to commit cases to the Sessions. Moreover, the power exists only till the commencement of the trial in the Sessions Court. Where the trial has actually commenced the Magistrate has no power to add to the record by examining additional witnesses under this section even under the orders of the Sessions Court.² But before the commencement of the trial, the power can be exercised at any time. The Magistrate can exercise the power on his own accord or on being directed to do so by the Sessions Judge who, on examining the record, finds gaps in the evidence which he deems necessary to be filled up.³ Even in cases in which the accused has confessed his guilt the Magistrate is justified in examining supplementary witnesses so as to have on the record all the material evidence.⁴ The additional evidence can be taken either at the request of the prosecution or of the defence, but the Magistrate should be fair to both the sides and if he examines additional witnesses on one side he should allow the other side to let in rebutting evidence if it desires to do so.⁵ Under this section the Magistrate can only supplement the evidence already taken. He has no power to add to or alter the charge after the order of commitment. Similarly, the power to amend or add to the charge under S 226 applies only to cases where the charge is imperfect as at the date of commitment. That section cannot justify the charge being amended or added to on the basis of supplementary evidence taken after commitment.⁶

3 Free copy of evidence to be given to accused — The corresponding provision is that when the Magistrate is not a Presidency Magistrate a copy of the evidence taken and examined under this section should be given to the accused free of cost. Such a copy may

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) In the presidency-towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court.

(7) If the accused ^a[having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence,] the fact, date and place of the previous conviction shall be stated in the charge. If such statement ^b[has been omitted,] the Court may add it at any time before sentence is passed.

Illustrations

(a) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in Ss 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code, and that it did not fall within any of the five exceptions to S 300, or that, if it did fall within Exception I, one or other of the three provisos to that exception applied to it.

(b) A is charged, under S 326 of the Indian Penal Code, with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by S 335 of the Indian Penal Code, and that the general exceptions did not apply to it.

(c) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property-mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code, but the sections under which the offence is punishable must, in each instance, be referred to in the charge.

(d) A is charged, under S 184 of the Indian Penal Code with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

a. These words were substituted by S 61 of the Code of Criminal Procedure (Amendment) Act, 1923 (18 [VIII] of 1923)

b. These words were substituted for the words "is omitted," *ibid*

Synopsis

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|--|--|
| 1. Charge—General | 8 Liability to whipping, if to be stated in the charge |
| 2. "Shall state the offence"—Sub-section (1) | 9 Aggravating circumstances. |
| 3 Description of offence by name—Sub-section (2) | 10 Special exceptions |
| 4 Definition of the offence—Sub-section (3) | 11 Constructive offences. |
| 5 Section of law to be stated—Sub-section (4) | 12 Unnecessary averments in the charge—Surplusage |
| 5a Sub-section (5)—Effect | 13 Defective charge—Effect of See S 225. |
| 6 Previous convictions—Sub-section (7) | 14 Form of charge in various offences. See S 223 |
| 7 Charge for offences one of which is triable as a warrant case and the other as a summons case. | 15. Cases where no charge need be framed. |

NOTE to the Synopsis See the Notes indicated for the following topics

Accused entitled to know exact value of charge made against him See Note 1	For the purpose of affecting the punishment See Note 6
Charge of previous conviction—Time to add See Note 6	Notice of the matter See Note 1
Charge under I P C how to be stated See Note 1	Proof of previous conviction See Ss 310 and 511.
Effect of omission to state previous conviction See Note 6	What is a previous conviction See Note 6
Fact date and place of previous conviction See Note 6	Where the law gives no specific name See Notes 2 and 4
	Words of the statute should be adhered to See Note 4

1 Charge—General — It is a fundamental principle of criminal law that the accused should be informed with certainty and accuracy the exact nature of the charge brought against him¹ Otherwise he may be seriously prejudiced in his defence.² It is, therefore imperative that before a person is convicted of any offence he should (subject to certain exceptions) be *formally charged* with having committed the offence specified and be given an opportunity to defend himself against such charge³ He can be convicted only on proof of the *particular offences so specified* and not for offences not so specified⁴

Section 221 — Note 1

- 1 (36) 23 AIR 1936 Lah 409 (411) 37 Cri L Jour 732, *Indar Pal v Emperor*
 2 (16) 8 AIR 1916 Cal 188 (192) 16 Cri L Jour 497 42 Cal 937, *Anritalal v Emperor*
 (26) 13 AIR 1926 Cal 439 (440) 26 Cri L Jour 567, *Chhakare Shash v Emperor*
 (25) 12 AIR 1925 Cal 160 (160) 25 Cri L Jour 1186, *Balaram Kundu v Emperor*.
 (102) 15 C P L R 112 (113), *Emperor v Vinayak* (Proper charge not drawn up)
 Also see S 223 Note 1 S 235 Note 3 S 286 Note 4 and S 535 Note 3
 3 (26) 13 AIR 1926 Cal 581 (592) 53 Cal 466 27 Cri L Jour 606, *Harun Fashid v Emperor*.
 (Case not covered by except on under S 237)
 (32) 19 AIR 1932 Pat 215 (216) 11 Lat 523 33 Cri L Jour 664, *Ghyasuddin v Emperor*

v *Ram Autar Lal*

12, *Bishambar Nath v Emperor* (Matter 1186-

582 *Parasram Kundraj v Emperor* (Charge

storing cotton)

- (25) 12 AIR 1925 Cal 903 (904) 26 Cri L Jour 594 *Nayanullah v Emperor* (Sect on 238, Cr P C, can have no application in this case)
 (1900) 27 Cal 660 (662) *Jatu Singh v Mahabir Singh* (Charge for theft — Accused cannot be convicted of nothing)
 (01) 5 Cal W N 567 (568) *In the matter of Chumbas* (Charge under S 447, Penal Code—Conviction under Ss 447 and 290 Penal Code is illegal.)
 (2) 9 AIR 1922 Lah 135 (135 136) 23 Cri L Jour 5 *Gurdhara Singh v Emperor* (Conviction for an offence under a section which originally included but scored out by trial Court—Illegal)
 (30) 1930 Mad W N 219 (293) *C K N Sundaresa Iyer v Emperor* (Accused has to defend himself on the charge framed against him and on no other)
 (23) 24 Cri L Jour 119 (119) 71 Ind Cas 247 (Cal), *Hajari Sonar v Emperor* (Charge of house trespass with object of theft—Conviction of house trespass with some other object—Illegal)
 [See also (22) 9 AIR 1932 Oudh 280 (282) 24 Cri L Jour 10 26 Oudh Cas 4 *Sarju Prasad v Emperor*]

conviction obtained before the moment of time when the charge is framed⁸. It may also be noted that for purposes of S 75 of the Penal Code, a person cannot be charged with conviction for an offence committed subsequent to the date of the offence for which he is on trial. Similarly S 75 of the Penal Code does not apply to a case where the offence is committed before the conviction for the former offence⁹.

The word punishment in this section does not include an order of not notifying the address of the offender and consequently it is not a purpose of making this order, that the previous conviction should be men-charge.¹⁰

Where the previous conviction has been omitted from the charge, it is at any time before sentence is passed. A sentence passed already cannot be the subsequent discovery of the fact that the prisoner has been previously convicted. High Court may, however, in revision, add the charge in proper cases and direct to be taken on such charge.¹¹

As to the mode of proof of previous convictions, see S 511 and Notes thereon. sub-section was amended in the year 1923. The sub-section as it stood before the amendment has been quoted in the foot-note appearing under the text of the section given above. The amendment does not affect the mode of proof of previous convictions.¹²

See also the undermentioned case bearing upon S 75 of the Penal Code¹³.

See also Notes on Section 311.

7. Charge for offences one of which is triable as a warrant case and the other as a summons case — Where it is intended to proceed to try a person for two offences one of which is triable as a warrant case (in which a charge is to be framed) and the other as a summons case (in which no charge need be framed), the charge in respect of the former offence should also state the latter offence¹.

8. Liability to whipping, if to be stated in the charge. — It has been

(30) 1920 Mad W N 173 (174) *Syed Khader Sahib v Emperor*. (Conviction in Kolar Mysore State)

(19) 6 AIR 1919 All 63 (63) 42 All 136 21 Cri L Jour 144, *Bhanuvar v Emperor*, (Utharapuri State)

Also see S 348, Note 4

6 (79) 1879 Pun Re No. 21 Cr, p 60 (61), *Empress v Sultani*

7. (75) 1 Weir 39 (39) *High Court Proceedings*, 20th January 1875

8. (26) 13 AIR 1906 Bom 305 (305) 27 Cri L Jour 726, *Sayad Abdul v Emperor*

9 (13) 14 Cri L Jour 390 (390, 391) 9 Nag L R 89 20 Ind Cas 214, *Emperor v Jhagroo*

Also see S 565, Note 2

10 (82) 1899 Rat 458 (458), *Empress v Chimaba*

(89) 1899 Rat 457 (458), *Empress v Nahna* (Sections 454 and 380 Penal Code)

(73) 19 Suth W R Cr 41 (42), *Empress v Rajcoomar Bose* (Conviction under Postal Act, 1866)

11. (79) 1879 Pun Re No 19 Cr p 54 (56) *Kasim v Empress*

(72) 1879 Pun Re No 29 Cr, p 78 (79), *Empress v Yusuf* (Accused escaping detection as an old offender by giving a false name at the trial — High Court set aside conviction and directed new trial with amended charge)

12 (41) 28 AIR 1941 Sind 173 (175) 43 Cri L Jour 12 ILR (1911) Kar 308 197 Ind Cas 98, *Chuhar Mal v Emperor* (The amendment was designed merely to remove doubt as to the competence of certain Courts to impose enhanced sentences. *Prima facie* evidence of previous conviction on commitment to sessions on a charge under S 75, I P C — Mere conviction slip not enough.)

13 (04) 1 Cri L Jour 1061 (1063) 1904 Pun Re No 17 Cr, *King Emperor v Khan M* (Conviction under the Punjab Frontier Crimes Regulation — Not a previous conviction under so as to attract S 75 Penal Code)

Note 7

v. *Kalu Sardar* (Summons case)
379 only — Conviction

v. *Mauing Gale* (Formal

Also see S 254, Note 5

held in the undermentioned case¹ that when a person is tried for an offence which is liable to be punished with whipping, the liability to whipping must be stated in the charge

9 Aggravating circumstances.—Where a person is charged of an offence which provides a certain punishment under certain circumstances and a higher punishment under aggravating circumstances, the existence of such aggravating circumstances should be set forth in the charge¹

10 Special exceptions.—Under ss 235 to 237 of the Code of 1861, the charge had to deny the existence of special exceptions where the section defining the offence charged had exceptions.¹ This is now no longer necessary as those sections have not been repeated in the present Code

11 Constructive offences—Under s 149 of the Penal Code, if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, every person who at the time of committing that offence is a member of the same assembly is guilty of that offence. Where a person is charged with an offence constructively by force of s 149 the charge should specify such fact. Thus, where the accused was only charged with an offence under s 126 of the Railways Act, a conviction for an offence under that section read with s 149 on the basis of constructive liability cannot be sustained where it has prejudiced the accused¹. Where A is charged constructively for an offence, it clearly intimates to him that he did not himself commit the substantive offence but that he is guilty inasmuch as somebody else in prosecution of the common object of the riot did commit such substantive offence. If the person charged with committing the substantive offence is acquitted of such offence, the offence by implication also disappears, and A cannot be convicted of the substantive offence²

A charge under s 149 is not for any specific named offence and the fact that an offence is committed in pursuance of the common object is of the essence of the case. It is, therefore, necessary to mention the same in the charge unless it has already been set out in the main charge³

See also the undermentioned cases⁴

Note 8

1 (62) 5 Mad 156 (158), *Badiya v Queen*

Note 9

1 (71) 1871 Rat 55 (56) *Peg v Mubla* (Section 397, Penal Code)

(97) 1897 Rat 921 (921) *Queen Empress v Punya Sakharan* (Charge under s 393, Penal Code—To justify conviction under s 393, Penal Code, the carrying of arms must be specifically alleged in charge.)

Note 10

1 (1864) 1 Suth W R Cr Letters 9 (9) (Section 300 Penal Code)

(66) 5 Suth W R Cr Cir 2 (2)

(1864) 1 Suth W R Cr Letters 10 (11) (Section 375 Penal Code)

(79) 4 Cal 124 (126, 127) 3 Cal L Rep 122 *In re Shiba Prosad Pandah* (Defamation)

(72) 9 Bom H C R 451 (457), *Reg v Kikabha Parbhudas* (Do)

(69) 1869 Rat 20 (20) (Hurt)

(67) 8 Suth W R Cr Cir 3 (3)

Note 11

1 (12) 13 Cr L Jour 502 (503)

(12) 13 Cr L Jour 502 (503) 15 Ind Cas 616 (Cal), *Pezsuddi v Emperor* (Section 325 read with s 149, Penal Code.)

3 (12) 13 Cr L Jour 502 (503)

4 (12) 13 Cr L Jour 502 (503)

accused with particular acts committed by him — Evidence showing that accused knew what acts they were alleged to have done — Held, conviction could not be set aside as there was no miscarriage of justice.)

12 Unnecessary averments in the charge—Surplusage — As has been seen in Note 1 a charge should never contain more than what is necessary for the prosecution to prove.¹ Allegations in the charge which are not necessary to be proved to constitute an offence and which might be entirely omitted without affecting the charge against the prisoner and without detriment to the indictment are however considered as mere surplusage and may be disregarded in evidence.²

13 Defective charge—Effect of — See Section 225

14 Form of charge in various offences — See Section 223

15 Cases where no charge need be framed — No charge is necessary to be framed in the following cases

(1) in inquiries under s 117

(2) trials of summons cases (see s 212) and

(3) summary cases where no appeal lies (s 263)

There is a difference of opinion as to whether there should be a definite charge in prosecutions under the Insolvency Acts. According to the Judicial Commissioner's Court of Nagpur it is not essential that there should be a definite charge and finding and a conviction as a foundation for a sentence under the said provisions. All that the law requires is that the principles underlying a criminal trial should be observed. So where an insolvent proceeded against under that Act was informed of the nature of the proceedings and the offence with which he was charged it was held that the essentials of criminal trial were sufficiently complied with.³ The High Court of Calcutta⁴ and the Chief Court of the Punjab⁵ have however, taken a contrary view.

222. (1) The charge shall contain such particulars as to the time

Particulars as to time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been com-

* Code of 1852 S 222 Same as sub s (1) Sub-section (2) was added in 1893

Code of 1872 S 440. Code of 1861—Nil

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Note 12

1 (26) 13 AIR 1926 Oudh 245 (247, 248) 27 Cr L Jour 57 *Bhulan v Emperor* (For a charge under S 396 it is not necessary for the prosecution to prove that the murder was committed jointly by all the accused)

2 (28) 15 AIR 1929 Cal 675 (676-677) 55 Cal 858 29 Cr L Jour 1022 *Satya Narain v Emperor* (Quoting Russell on Crimes Book 6 Ch 2, § 3)

(67) 4 Bom H C R Cr Cas 17 (22) *Peg v Francis Cassul*

Note 15

1 (18) 5 AIR 1918 Nag 214 (214-215) 19 Cr L Jour 627 *Ganpat v Chinnaji*

2 (15) 2 AIR 1915 Cal 117 (117) 16 Cr L Jour 135 *Harshar Singh v Maheshwar*

(20) 7 AIR 1920 Cal 624 (625) 21 Cr L Jour 481 *J M Lucas v Official Assignee of Dengal* (Charge not framed in pursuance of notice which did not set forth the substance of offence — Conviction under that charge set aside)

3 (16) 3 AIR 1916 Lab 187 (183) 17 Cr L Jour 318 (319) 1916 Pun Re No. 110 Cr *Nawab v Topan Ram* (No charge of any specific offence under S 43 Provincial Insolvency Act — Proceedings held wholly irregular)

mitted, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234.

Provided that the time included between the first and last of such dates shall not exceed one year.

Synopsis

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|---|--|
| 1 Legislative changes | 6. Sub-section (2)—Charge of criminal breach of trust or dishonest misappropriation |
| 2 Scope of the section | 7. Applicability of sub-section (2) to cases where there are two or more accused persons |
| 3 Time of offence | 8. Charge under sub-section (2) — Whether trial for another item misappropriated during same period is barred. |
| 4 Person against whom offence was committed | 9 Charge of criminal conspiracy |
| 5 Thing in respect of which offence was committed | |

NOTE to the Synopsis See the Notes indicated for the following topics

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|--|---|
| Charge and proof See Note 2 | General deficiency in accounts See Note 6 |
| Charge to be definite—Elke bad See Notes 2 and 6 | Joining of other offences See Note 6 |
| Cheating a corporat on See Note 4 | Specification of different items See Note 6 |
| Dates extending for more than a year — Illegal See Note 6 | Sub-section (2) — Scope, object and effect See Note 6 |
| Definite charges even in specification of gross sum See Note 6 | Sufficiency of particulars See Notes 2 and 3 |
| Different offences not to be clubbed See Note 6 | Sufficient notice See Notes 2 and 3 |
| Finding as to definite sum misappropriated need ed See Note 6 | Within the meaning of S 234 and not other sections See Note 6 |

1 Legislative changes.

Differences between the Codes of 1861 and 1872

There was no corresponding section in the Code of 1861 The section was first enacted in the Code of 1872 as s 410

Changes introduced in 1882

The thing in respect of which the offence was committed was made one of the matters in respect of which particulars were to be given in the charge

Changes made in 1898

Sub-section (2) was added See Note 6

2. Scope of the section.—In addition to the particulars specified in s 221 it is necessary, as provided by this section, that the charge should contain particulars as to the time and place of the alleged offence and the person (if any) against whom and the thing (if any) in respect of which the offence is alleged to have been committed¹ Such par-

Section 222 — Note 2

or (Charge

(16) 3 All 1916 Mad 571 (572) 16 Cr L Jour 298 (299) *In re Melalafatu Subbadu* (Vagueness of

noting should set out

(81) 6 All 201 (207) *Impress v Khairati* (Charge under s 377, Penal Code, should allege the time when, the place where and any known or unknown person with whom the particular act charged as offence under s 377 was committed)

(12) 13 Cr L Jour 504 (504) 15 Ind Cas 643 (Mad), *Govinda Reddy v Emperor* (Charge under Rule 8 of s 26 of the Madras Forest Act should state that the place from where the tree was cut was reserved forest.)

particulars of the above point must be given as are reasonably sufficient to give the accused notice of the matter with which he is charged.² But the charge is not necessarily invalidated by the giving of more particulars than are absolutely necessary.³

As to the effect of an omission to state or of an error in the statement of the particulars required by this section see Ss 225 and 232. As to when the manner of the commission of the offence should be given in the charge see S 223 and Notes thereon.

3 Time of offence — The time of the alleged offence should be given in the charge with as much particularity as is necessary to give the accused sufficient notice of the matter of which he is charged.¹ Where it is impossible to specify the particular date on which the offence was committed it will be sufficient to state two dates between which the offence was committed.²

As to the effect of error or omission in regard to this particular, see sections 225 and 232.

4 Person against whom offence was committed — The charge should also state with sufficient clearness the person if any against whom the alleged offence was committed. Thus in a case of theft the charge should state the person whose property was

(94) 1934 Rat 710 (713) *Queen-Empress v Abdul Razak* (Place of the rioting should be stated)

(74) 1574 Rat 60 (40 81) *Reg v Gokaldas* (Charge under Ss. 193 194 Penal Code should specify before what Court the alleged false statement was made)

2 (02) 15 C I L R 112 (113) *Emperor v Vinayak Jageshwar* (Charge of house-trespass at Nagpur is too vague)

(91) 15 Bom 491 (403 504) *Queen-Empress v Fakirappa*

[See (79) 1979 Pun Re No 19 Cr p 45 (53) *Sher Ali v Empress* (Charge of criminal conspiracy with intent of determinate area (e.g. a village) is not too vague)]

3 (44) 31 AIB 1944 Cal 399 (399) 46 Cr L Jour 151 ILR (1944) 1 Cal 109 216 Ind Cas 243, *Rabindra Nath v Patiya Urban Cooperative Bank* (Magistrate giving more details as to particular items defalcated in order to enable accused to know precisely the case which he had to meet — *Held*, charge was proper)

(8) 2 We r 267 (269) (Charge of breaking into a house with intent to commit theft — Mention of house-owner's name proper though not quite necessary)

(47) 4 Bom H C R Cr 17 (22 24) *Reg v Francis Cassidy* (Unnecessary allegations in charge may be rejected as surplusage and it is not necessary to prove them in order to sustain the charge)

Note 3

1 (03) 30 Cal 402 (404) 7 Cal W N 74 *Bishwanath Das v Kesheb Gandhabanik* (The charge for defamation should contain the particular occasion on which the defamation was committed)

(39) 17 AIB 1930 Sind 67 (63 64) 30 Cr L Jour 1073 *Ali Mahomed v Emperor* (Number of instances in which the accused defamed the complainant — Charge should make clear which particular incident is being alluded to)

(69) 10 Suth W R Cr 37 (38) 1 Beng L R A Cr 13 *Queen v Futteah Biswas* (Charge under S 193 Penal Code — The judicial proceedings and the particular stage of the judicial proceeding should be stated)

(71) 16 Suth W R Cr 47 (47 48) 7 Beng L R App 66 *Queen v Moharaj Misser* (Charge of giving false evidence — The exact date in which the Court or officer before whom and the stage at which the evidence was given should be alleged)

(25) 12 AIR 1975 Mad 690 (691) 26 Cr L Jour 1513 49 Mad 74 *In re Mallu Dora* (Offence of waging war against the King — Single general charge without giving date held bad)

2 (43) 30 AIR 1943 1 at 212 (17) 41 Cr L Jour 690 23 Pat 263 207 Ind Cas 470 (DB) *Dana Nath Tirupathy v Emperor* (Month and not actual dates of offences given in charge — Particulars given sufficient to give notice to accused — *Held*, no irregularity)

(24) 11 AIR 1974 Cal 616 (617) 25 Cr L Jour 997 51 Cal 498 *Bhola Nath Muller v Emperor* (Intercourse took place — It is sufficient)

(8) 1915 Pun Re No 17 Cr *Bal Mohand v Emperor* (Conspiracy — Specification of exact date of inauguration not necessary as in most

at 909 *Farrand Ali v Emperor* (Charge held by S 637)]

the offences in respect of all the three gross sums are alleged to have been committed within a space of twelve months⁴

Though the sub section dispenses with the specification of particular items or the dates on which they were misappropriated, it requires the gross sum alleged to have been misappropriated and the dates between which the offence is alleged to have been committed to be specified in the charge a charge which does not specify even these particulars will be bad⁵ Similarly, the sub section does not in any way affect the principle that the accused must have a definite charge to answer, a charge which contains the gross sum and the dates as mentioned in this sub section may yet be bad as being too vague⁶ Nor does the section dispense with the necessity of a finding as to a definite sum having been misappropriated *before the accused can be convicted*⁷

The sub section does not *prohibit* the specification of particular items misappropriated where a gross sum is given as the subject matter of the offence⁸ So also, where a charge is laid under this section for a gross sum embezzled, the Court is not precluded from examining the evidence in respect of each item which went to make up the total amount entered in the charge sheet⁹ Nor does the fact that particular items are specified in the charge detract from its character as a charge for a single offence and convert it into a charge for as many offences as there are items particularised¹⁰

The sub section only provides that if and when a charge is laid for a gross sum instead of for particular items, the charge is to be treated as a charge for a single offence irrespective of the number of items of which the gross sum is composed It does not prohibit the framing of different charges in respect of different items¹¹ nor permit such charges when framed to be treated as a charge for a single offence¹² It applies not only to

- 4 (40) 44 Cal WN 175 (176 177) *Madhusudan Mukherjee v Emperor*
 5 (36) 23 AIR 1936 Bom 379 (383) 38 Cri L Jour 9 *Baburao Tatyarao v Emperor* (Charge of criminal breach of trust not unfolding even approximately the dates between which accused dishonestly converted to his own use the property in question and referring only to the date on which the conversion was discovered is bad for vagueness)
 6 (28) 14 AIR 1927 Lah 109 (103) 28 Cri L Jour 170 *Emperor v Abdur Rahman*
 7 (33) 22 AIR 1935 Oudh 273 (275) 36 Cri L Jour 518 *Priy Lal v Emperor*
 8 (36) 37 Cri L Jour 439 (440) 63 Cal 18 161 Ind Cas 280 *Abinash Chandra v Emperor*
 9 (07) 6 Cri L Jour 137 (138 139) (Lah) *Mahommed Shah v Emperor*
 10 (20) 7 AIR 1920 All 274 (275) 22 Cri L Jour 84 42 All 529 *Mohan Singh v Emperor*
 11 (2a) 12 AIR 1925 Cal 260 (261) 26 Cri L Jour 532 *Khuroo Kumar v Emperor*
 [But see (28) 15 AIR 1928 Bom 148 (149) 29 Cri L Jour 407 52 Bom 280 *Emperor v Byramji Jamsaji* (Accused can be convicted where prosecution establishes that some of the money mentioned in the charge has been misappropriated by him even though it may be uncertain what is the exact amount so misappropriated)]
 12 (04) 1 Cri L Jour 791 (793) 31 Cal 928 8 Cal WN 807 *Samsuddin v Nibaran*
 (03) 2 Cri L Jour 578 (580) 30 Bom 49 7 Bom LR 633 *Emperor v Datto Hanmant*
 (30) 17 AIR 1930 Cal 717 (718) 32 Cri L Jour 321 *Rahim Bux Sarkar v Emperor* (Giving of
 (Emperor
 10 (01) 27 All 69 (70) 1904 All WN 165 *Emperor v Ishtiaq Ahmad*
 (02) 24 All 254 (255) 1902 All WN 44 *Emperor v Gulzar Lal*
 11 (30) 17 AIR 1930 Mad 978 (980) 32 Cri L Jour 273 *Kanakayya v Emperor*
 (10) 11 Cri L Jour 337 (338) 5 Ind Cas 970 (Bom) *Emperor v Kashinath Bagaji*
 12 (33) 20 AIR 1933 Nag 397 (327) 34 Cri L Jour 673 *Rameshwar Brammohan v Emperor*
 (26) 13 AIR 1926 Bom 110 (113) 49 Bom 892 27 Cri L Jour 305 *Emperor v Manant*
 (07) 5 Cri L Jour 341 (342) 30 Mad 392 17 Mad L Jour 141 *Kasi Viswanathan v Emperor*
 [See (42) 29 AIR 1942 Oudh 89 (92) 43 Cri L Jour 153 17 Luck 353 197 Ind Cas 255 *Wazir Singh v King Emperor* (Six items embezzled and all six items mentioned — Gross sum not mentioned — Charge is bad under S 234 read with this section and defect is not curable under S 225 or
 (31) 18 AIR 1931 Rang 161 (162) 32 Cri L Jour 1068 *Sita Subramonian v Emperor*
 (31) 18 AIR 1931 Oudh 86 (87, 88) 6 Luck 411 32 Cri L Jour 510, *Dubri Misser v Emperor*]

cases where there is a general deficiency and the prosecution is not able to specify particular items but also to cases where the particular items might have been, but are not, specified¹³

The said section only applies to cases of criminal breach of trust or dishonest misappropriation in respect of money. Where the offence has been committed in respect of any other property, the said section does not apply¹⁴

The said section applies only to offences of criminal breach of trust or dishonest misappropriation¹⁵. Thus, where the accused is alleged to have obtained on different occasions several sums from the complainant by false pretences, a single charge of cheating in respect of all the items is not tenable¹⁶. So also, this sub-section does not apply to cases where the accused is charged with criminal breach of trust or criminal misappropriation and some other offence such as falsification of accounts, cheating, etc. The provision enabling different items to be lumped together and be charged as a single offence in the

See however (44) 31 AIR 1944 Cal 388 (3-9) 46 Cri L Jour 151 I L R (1944) 1 Cal 109 216 Ind Cas 243 *Tabandra Nath Majumdar v Pabna Urban Co-operative Bank* (Different items mentioned and period during which defalcation was committed also mentioned.—Gross sum not mentioned.—Charge is of one offence.—The gross sum though not mentioned in the charge could be ascertained by addition of the items mentioned.)

13 (07) 5 Cri L Jour 133 (135) 29 Mal 552 *Thomas v Emperor*

14 (44) 31 AIR 1944 1st 135 (137) 45 Cri L Jour 633 212 Ind Cas 384 *Ramdeyal Prasad v Sayed Hasan* (Criminal breach of trust in respect of ornaments pledged on different dates.—One charge under this sub-section cannot be framed)

(33) 26 AIR 1939 Mal 575 (576) 40 Cri L Jour 851 *Public Prosecutor v N S Sharma* (Section 222 (2) applies to criminal breach of trust or dishonest misappropriation of money and not of goods.—Single charge cannot be framed in respect of total cash and total value of goods misappropriated)

(22) 9 AIR 1922 Oudh 240 (240) 26 Oudh Cas 4 24 Cri L Jour 10 *Sarju Prasad v Emperor* (Charge for criminal breach of trust of some ornaments.—Particular acts of breach of trust must be set out)

(11) 12 Cri L Jour 567 (567) 12 Ind Cas 655 (Mad) *Raghavendra Rao v Emperor* (Does not apply to criminal appropriation of timber)

(18) 5 AIR 1918 Cal 233 (234) 18 Cri L Jour 310 (311) *Israfulla Sarkar v Emperor* (Misappropriation of specific articles)

(27) 14 AIR 1927 All 223 (224) 43 All 312 28 Cri L Jour 171, *Raman Lal v Emperor* (Criminal breach of trust of ornaments)

(See (24) 15 AIR 1928 Bom 521 (521) 30 Cri L Jour 323 *Duarladas v Emperor* (Criminal breach of trust in respect of money — What is — Agent entrusted with goods for sale misappropriating the sale proceeds is within the section))

(See also (05) 7 Cri L Jour 372 (374) 12 Cal W N 577, *Dipra Das Giri v Niradamon Bewa* (Charge under S 406 I P C in respect of some deeds not good))

15 (44) 31 AIR 1944 Cal 224 (227) 45 Cri L Jour 666 I L R (1944) 1 Cal 398 213 Ind Cas 401, *Becharan Mukherjee v Emperor* (Sub-section (2) does not apply to an offence of theft)

(44) 31 AIR 1944 Oudh 122 (124 126 129) 19 Luck 493 45 Cri L Jour 538 212 Ind Cas 130 (DB) *Debi Prasad v King-Emperor* (While S 222 (2) clearly does not provide for combination of acts of falsifying of accounts into one charge under S 477A itself a number of falsifications can be included in a single charge provided they are connected with the same fraud)

(42) 29 AIR 1942 Pat 401 (405) 43 Cri L Jour 625 21 Pat 113 200 Ind Cas 390 *Emperor v Pannu Lal* (Sub-section does not apply to an offence of falsification of accounts under S 477A, Penal Code though the offence is committed for the purpose of concealing defalcations of money)

(31) 18 AIR 1931 Pat 102 (103) 32 Cri L Jour 611, *Abdur Rahman v Emperor* (Section 222, sub-s (2),

it (Does not

(Do)

(99) 26 Cal 560 (564) 3 Cal W N 412 *Queen Empress v Math Lal Lahari* (Do)

(02) 4 Bom L R 433 (434) *Queen Empress v Math Lal Lahari* (Do)

Empress, (Sub-s (2) does not apply to the

Aja Khan v Emperor
ur Rahman v Emperor

case of a criminal breach of trust or dishonest misappropriation cannot be made use of to justify a joint trial of such offence with an offence of a different character¹⁷

The sub-section requires that the period during which the offence is alleged to have been committed should not exceed *one year*. Thus where the dates of misappropriation of the various items extend over a period of more than one year, they cannot all be lumped together in the same charge¹⁸

The provision enabling it to be stated that the offence was committed *between* certain dates (instead of *on* a certain date) applies not only to cases where different items are alleged to have been misappropriated on different occasions and a charge is framed in respect of the gross sum made up of the different items but also to cases where a *specific sum* is alleged to have been the subject of the offence¹⁹

Where a single charge is framed under this section in respect of the embezzlement of different sums it is only a *single sentence* that can be passed on the accused a separate sentence cannot be passed in respect of each of the items included in the charge²⁰

Under S 181 sub s. (2) a charge of criminal misappropriation or criminal breach of trust can be tried or inquired into either at the place where the offence was committed or at the place where any part of the property was received or retained by the accused. As this sub-section (of S 222) enables any number of acts of misappropriation committed in the course of the same year to be combined in the same charge jurisdiction to try the

17 (42) 29 AIR 1942 Pat 401 (405) 21 Pat 113 43 Cr L Jour 625 200 Ind Cas 380 (DB) *Emperor v Pamaular Lal* (Criminal breach of trust and falsification of accounts)

(39) 26 AIR 1939 Bom 129 (143) 40 Cr L Jour 579 *Ramchandra Rango v Emperor* (The section only says that the charge is to be treated as charge of one offence and not that there is only one offence in such a case—Hence not necessarily same transaction within S 235 A I R 1935 Cal 312 62 Cal 808, d sented from)

(36) 23 AIR 1936 Bom 154 (159) 60 Bom 148 37 Cr L Jour 688 *Shapurji Sorabji v Emperor* (Charge of misappropriation can be joined at one trial with charges of forgery and cheating only if the offences have been committed in course of same transaction)

(07) 5 Cr L Jour 341 (342) 30 Mad 393 17 Mad L Jour 141 2 Mad L Tim 177 *Kasi Viswanathan v Emperor*

(13) 2 AIR 1915 All 462 (462) 38 All 42 16 Cr L Jour 813 *Kaila Prasad v Emperor* (Offences under S 477A Penal Code)

S 490 Penal Code)

ence under

(08) 8 Cr L Jour 4 (5) 30 All 351 5 All L Jour 400 1908 All W N 150 *Emperor v Mata Prasad* (Offence of forgery)

(17) 4 AIR 1917 Mad 612 (610) 17 Cr L Jour 569 (369) *In re Krishnamurthi Ayyar*

[See however (41) 31 AIR 1944 Oudh 122 (128 129) 19 Luck 493 45 Cr L Jour 538 219 Ind Cas 100 (DB) *Debi Prasad v King Emperor* (A charge under S 408 I P C framed in accordance with the provisions of S 222 (2) of the Cr P C combining a number of offences of criminal breach of trust can be combined with a charge under S 477A I P C of falsification of account and covering a number of false entries in account books if the offence under S 477A can be said to have been committed in the course of the same transaction as the offence under S 408)]

(35) 22 AIR 1935 Oudh 241 (244) 36 Cr L Jour 477 *Munoo Lal v Emperor* (Accused prejudiced—Convict on set aside)

(34) 21 AIR 1934 Pat 132 (133) 35 Cr L Jour 693 *Deenarain Singh v Emperor* (Convict on set aside as period exceeded one year)

[See (24) 11 AIR 1924 Cal 908 (909) 25 Cr L Jour 1033 *Harry Jones v Emperor* (Quare—Whether a charge under Penal Code S 409 is altogether bad as alleging an offence between two

charge arises at any place where the offence was committed in respect of any of the items included in the charge or at any place where the money involved in the misappropriation of any of the items was received or retained by the accused²¹

See also Note 9

7 Applicability of sub section (2) to cases where there are two or more accused persons — There is a conflict of decisions as to the applicability of sub s. (2) to cases where two or more persons are accused of criminal breach of trust or dishonest misappropriation so as to enable a single charge being framed in respect of the total sum misappropriated in a given period where such sum is made up of several items misappropriated on different occasions. On the one hand it has been held by the Calcutta High Court²² that the sub section contemplates only cases in which there is only *one* accused person and that where there are two or more accused persons in a case, separate charges must be framed in respect of the several items as for different offences¹. The Madras High Court has on the other hand held that there is no reason to restrict the scope of the sub section in this way and even in cases where there are two or more accused persons in a case it is open to the Court to lump together the different items misappropriated on different occasions and frame a single charge in respect of the total sum composed of the different items.² The Bombay High Court³ and the Oudh Chief Court⁴ have also accepted the same view. But where the charge alleges that some of the accused took part in the misappropriation only in respect of *some* of the items of which the total sum is composed, the sub section has no application and a single charge cannot be framed so as to cover the acts of all the accused⁵.

8 Charge under sub section (2)—Whether trial for another item misappropriated during same period is barred — Where an accused is charged under sub s. (2) with criminal breach of trust in respect of a gross sum alleged to have been misappropriated by him between two given dates and is convicted or acquitted of such charge, he can be tried *again* in respect of another sum of money alleged to have been misappropriated by him during the same period but not included in the sum which was the subject matter of the previous trial¹. Such a trial is not barred under s. 403. The reason is that in such a case the subsequent trial is not for the same offence as formed the subject of previous trial. *A fortiori* where the previous trial was not for a gross sum misappropriated between two dates but was for misappropriation of specific sums of money received

²¹ (32) 19 AIR 1932 All 26 (27-28) 33 Cr L Jour 127, *Sunder Lal v Emperor*

Note 7

1

tried separately))

² (17) 4 AIR 1917 Mad 521 (525) 17 Cr L Jour 30 (31) *In re Appadurai Ayyar*

2

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⁵ (31) 18 AIR 1931 Rang 90 (93-94) 8 Rang 632 30 Cr L Jour 930 *Meeriah v Emperor*

Note 8

¹ (23) 10 AIR 1923 Cal 654 (656) 50 Cal 632 25 Cr L Jour 156 *Nageidra v Emperor*

(31) 18 AIR 1931 All 209 (209) 53 All 411 32 Cr L Jour 376 *Brijwan Das v Emperor*

(10) 11 Cr L Jour 337 (339) 6 Ind Cas 970 (Dom) *Emperor v Kashinath Bagaj Sahi*

[See also (29) 16 AIR 1923 Cal 457 (459) 57 Cal 17 31 Cr L Jour 747, *Sidd Nath v Emperor* (If a person misappropriates different sums of money he commits so many offences — But it is not proper that he should be tried as many times when he could have been tried for all of them at one trial.)]

[But see (17) 4 AIR 1917 Mad 521 (525) 17 Cr L Jour 30 (30) *In re Appadurai Ayyar*]

on specific dates a fresh trial for another offence in respect of a different sum of money said to have been misappropriated about the same time is not barred²

9 Charge of criminal conspiracy — In a charge of criminal conspiracy to commit an offence the same certainty is not required in stating the object of the conspiracy as in a charge for the offence conspired to be committed. Thus a charge of criminal conspiracy to commit a criminal breach of trust or criminal misappropriation is not bad for want of particulars as to dates etc. of the alleged misappropriation¹. Nor is such a charge bad because the period of the conspiracy is said to exceed one year².

223.* When the nature of the case is such that the particulars

When manner of committing offence must be stated

mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose

Illustrations

(a) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(d) A is accused of obstructing B a public servant in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

Synopsis

- | | |
|---|--|
| 1 Scope of the section | 10 Hurt grievous hurt etc |
| 2 Mode of framing charge in various cases
See Notes 3 to 8 | 11 Forgery, etc |
| 3 Offence of giving false evidence | 12 Culpable homicide and murder |
| 4 Rioting | 13 Receiving stolen property |
| 5 House breaking criminal trespass etc | 14 Kidnapping and abduction |
| 6 Sedition promoting class hatred etc | 15 Extortion |
| 7 Cheating | 16 Unlawful assembly |
| 8 Defamation | 17 Other offences |
| 9 Falsification of accounts | 18 Act done by several persons in furtherance
of a common intention |

NOTE to the Synopsis See the Notes indicated for the following topics

Notice of the charge See Note 1

Particulars as to the manner of commission See Note 1

Vague charges See Note 1

1 Scope of the section —

of necessity be expressed in abstract
whether particular acts or omissions

* 1882 S 223, 1872 S 441 1861 Nil

2 (30) 17 AIR 1930 Mad 978 (980) 32 Cr L Jour 223 *Kanakayya v Emperor*
Also see S 403 Note 5

Note 9

1 (38) 25

2 (38) 25

(38) 25 All

Holchand

or v Balumal

in the charge⁶ No general rule, however, can be laid down as to in what cases such particulars will be necessary, the matter depending on the circumstances of each case⁷

As to the extent to which particulars of the manner of commission of an offence should be given in a charge, no hard and fast rule can be laid down Each case must depend on its own circumstances, regard being had to the question whether the particulars given are such as to give the accused *sufficient notice of the matter he has to meet*⁸ Besides, the charge must allege all facts which are essential factors of the offence in question see S 221⁹ But a charge should not be prolix and rambling and should not contain unnecessary allegations¹⁰

6 (16) 3 AIR 1916 All 60 (60) : 17 Cr L Jour 411 (411), *Ram Chandar v Emperor*. (Where a person by a single act of arson sets fire and destroys several sticks of several persons no particulars are necessary but it is otherwise in case of extortion practised on several persons)

7. ('12) 13 Cr L Jour 218 (219) : 14 Ind Cas 314 : 39 Cal 781, *Kudrutullah v Emperor*.

8. ('25) 12 AIR 1925 Cal 603 (604) : 26 Cr L Jour 849, *Kedarnath v Emperor*

(70) 14 Suth W R Cr L 13 (13), *Queen v Parbutty Churn* (Prisoner could be little prejudiced by the informal character of the charge if offence is stated in such a way that it cannot reasonably be mistaken) (1864) 1 Suth W R Cr L 13 (13, 14) (Charge should not be abbreviated by the use of words 'et cetera'—Explicit and full statements such as can easily be intelligible to an accused are always requisite in charges)

(1865) 2 Suth W R Cr L 5 (5) (Mere mention of section under which accused is charged is not enough)

(1865) 2 Suth W R Cr L 11 (11) (Do)

(33) 20 AIR 1933 Cal 676 (677) : 60 Cal 1394 : 34 Cr L Jour 1219, *Rajabuddin Mondal v Emperor*.

(If it is certain on the evidence, provisions to enable a charge of such offence to be framed and does not require the prosecution to furnish for such charge more particulars than under the circumstances it can reasonably be expected to know)

9. (36) 23 AIR 1936 Nag 275 (276) : 38 Cr L Jour 380 (391), *Vithal Sonaji v Emperor*. (Offence Court

(1864) 1 Suth W R Cr L 13 (13) (Do)

(1865) 2 Suth W R Cr L 11 (11) (Do)

(the document forged should have been one in the charge)

(Code, read with another section—Charge in prosecution of the common object," and not while the

then nothing remains but a charge for house-trespass)—If this is omitted

(67) 8 Suth W R Cr 30 (30), *Queen v Durbarro Polie* (Charge under S 436, Penal Code, charge of mischief by fire, with intent to cause destruction of dwelling house, should state the intent as an intent to cause the destruction, not of a house simply, but of a house used as a human dwelling)

(11) 12 Cr L Jour 483 (483) : 12 Ind Cas 91 (Lah), *Lala v Emperor*. (Charge did not set out the motive of the house breaking—Charge does not come within the provisions of S 457)

(1865) 67) 3 Bom II C R App I (25), *Vithoba Malhar v A K Corfield* (Charge under Bombay Regulation I [I] of 1814 against servant absconding himself should set out that the accused left his employer's service without giving the required warning and without lawful excuse)

10. ('26) 13 AIR 1926 Oudh 245 (247, 248) : 27 Cr L Jour 57, *Bhulan v Emperor*

As to the effect of error or omission in regard to the statement of the particulars required by this section see Ss 223, 222 and 537 and Notes thereon

2 Mode of framing charge in various cases — See Notes 3 to 9

3 Offence of giving false evidence — A charge of giving false evidence should be very carefully drawn up and must contain full particulars of the manner in which the offence was committed¹. It should specify the particular statements which are alleged to be false². Merely setting out the entire deposition without specifying what portions thereof

(65-67) 4 Bom H C R 17 (22) *Pej v Francis Cassidy* (Unnecessary allegations in a charge may be rejected as surplusage)

Note 3

1 (66) 4 Cr L Jour 227 (229) 10 Cal W N 1099 1 Cal L Jour 558 *Hiranand Ojha v Emperor*. (Charge should not be vague)

(6-10) 10 Ind L R Cr 37 (39) 1 Beng L R App Cr 13 *Empress v Fakir Bishwas*

(6-9) 9 Ind L R Cr 51 (56) *Queen v Kashi Churn*

(06) 3 All L Jour 110n (110n 111n) *Nauranj v Emperor*

(11) 3 N W I H C R 314 (314 315) *Queen v Sheo Churn*

2 (24) 11 AIR 1924 Cal 104 (109) 25 Cr L Jour 177, *Oates v Emperor*

(17) 4 AIR 1917 Pat 619 (639) 18 Cr L Jour 1039 *Binn Pandu v Emperor* (Contradictory statements which the accused was alleged to have made must be set out in the charge)

(06) 5 Ind W R Cr Cr 3 p 2

(1865) 4 Ind W R Cr L 3 (4)

(67) 6 Ind W R Cr 95 (96) *In re Doucet Moonshie*

(75) 7 N W I H C R 137 (145) *Queen v Jamurha* (The alleged false evidence, and not its assumed substance and import should be set out in the charge)

(06) 3 All L Jour 110n (110n 111n) *Nauranj v Emperor*.

(69) 1869 Pun R N 36 Cr p 65 *Mewar Singh v Crown*

(1900-02) 1 Law Bur Bul 264 (265) *Crown v M. Shree Ke* (Exact words recorded to have been spoken by the accused should be set forth and not a paraphrase)

(71) 16 Ind W R Cr 47 (47) 7 Beng L R App 66, *Queen v Maharaj Misser*

(72) 17 Ind W R Cr 32 (32 33) *Queen v Doodhun Ahir* (Precise words spoken by the accused and not their effect is to be set out in the charge-sheet)

(90) 1890 Lat 511 (514) *Queen-Empress v Bhikaji Rao*

(93) 21 All 159 (162) 1893 All W N 5 *Queen-Empress v Zakir Hussain*

(97) 1897 Rat 925 (926) *Queen Empress v Daulata Dhond*

(65) 2 Ind W R Cr 61 (61) *Queen v Bhuttoo Laljee* (Omission to specify the statement alleged to be false is not material if the accused were aware what statements they were charged with having made falsely)

Order

sanctioning did not but charge did specify particular statements alleged to be false — Conviction was not set aside]

(71) 3 N W P H C R 314 (314 315) *Queen v Sheo Churn* (Charge that accused 'on or about 15th April 1871 gave false evidence' is not enough)

(01) 5 Cal W N 615 (616) *Moham Chunder v Emperor*

(1900) 23 Cal 319 (352) 5 Cal W N 65, *Isab Mandat v Queen-Empress*

[See (23) 10 AIR 1913 All 325 (326) 24 Cr L Jour 197, *Abdul Wahid Khan v Abdullah Khan* (Order purporting to be under S 476, Cr P C, is bad in law if it does not contain arrangements of perjury)

(18) 5 AIR 1918 Pat 448 (450 451) 19 Cr L Jour 169, *Ramadhari Singh v Emperor* (Order under S 476 should specify the statements alleged to be false)

(94) 19 Bom 382 (383) 1891 Rat 693 *In re Juan Ambaldas* (Sanction to prosecute for giving false evidence should specify clearly the statement alleged to be false)

are false is not enough³ Where a person is accused of giving false evidence on several occasions, each occasion should form the subject of a distinct head of the charge⁴ The offence of giving false evidence is one with a specific name within the meaning of S 221 it is therefore not necessary to state that the charge falls within a particular part of the section⁵ Nor is it necessary to state that the subject of the false statement is material to the result of the inquiry⁶ Where there are several false statements in the same deposition, there should only be a single charge for all such statements⁷

As to the mode of framing a charge where the accused has made two contradictory statements but it is doubtful which of them is false, see Note 5 on S 235

4 **Rioting** — 'Rioting' is an offence with a specific name and, under sub s (2) of S 221 may be described by its name only¹ When a person is charged with 'rioting' it means that the prosecution alleges that all the necessary ingredients constituting the offence of rioting are present it is not necessary to set out what those ingredients are² There is, however a conflict of opinions as to whether the common object of the unlawful assembly is necessary to be mentioned in the charge On the one hand it has been held that the common object does not come within the particulars mentioned in Ss 221 and 222 nor within S 223 as a manner in which the offence is committed and that therefore, it is not necessary to be stated in the charge though it would be desirable to do so³ In *Kudratullah v Emperor*⁴ it was held that the offence of rioting 'can be legally described by its specific name and the question whether any further particulars are necessary under section 223, Criminal Procedure Code must be a question of discretion according to the circumstances of each case This seems to suggest that the common object may be considered as the manner in which the offence was committed It is apparently in this view that it has been held in a number of cases that the common object must be stated in a charge of rioting⁵

(84) 6 All 105 (106 107) *In the matter of Har Dial* (Sanction to prosecute)

(96) 18 All 203 (205) 1896 All WN 31 *Balwant Singh v United Singh* (Application for sanction to prosecute)

1896 All WN 31

5 (21) 8 AIR 1921 Bom 3 (13) 45 Bom 834 22 Cr L Jour 241 (FB) *Purshottam v Emperor*

6 (1862) 1 Weir 146 (151) 1 Mad H C R 33 *Queen v Andrus Sahib*

7 (71) 1 Weir 160 (161)

Note 4

1 (12) 13 C -

(29) 15 All

2 (86) 23

include the

rioting)

(29) 15 All -

idra (Alleg

v Emperor

(15) 2 AIR 1915 Lah 418 (422) 16 Cr L Jour 689 (693) 1915 Pun Re No 16 Cr

Emperor (Do)

4 (12) 13 Cr L Jour 218 (219) 39 Cal 781 14 Ind Cas 314

5 (85) 11 Cal 106 (108) *Behari Mahalon v Emperor*

5 House-breaking, criminal trespass, etc — A charge of house breaking by night or lurking house trespass under s 457, Penal Code or an offence under s 451, *id.*, is not an offence with a *specific name*, therefore, so much of the definition of the offence as is necessary to give notice to the accused of the matter charged must be set out under s 221. Thus, it must specify the intention with which the accused is alleged to have committed the trespass.¹ Where the charge does not specify any intention of the kind mentioned in the section, the accused cannot be convicted under it² unless it is quite certain that he has not in any way been misled or prejudiced in his defence by the defect in the charge — see s 225. Similarly, it is not open to a Court to convict an accused under s 457, Penal Code when the intention found to have been entertained by him is different from that specified in the charge,³ unless the accused has not been misled by the defect in the charge.⁴ But where the intention specified in the charge under s 457 is not established, it is open to the Court to convict him under s 456⁵ — see s 233 Note 1.

See also the undermentioned case.⁶

For a conviction under s 417 (criminal trespass) which is an offence with a specific name, it is not necessary to specify the ulterior offence the accused intended to commit.⁷

6 Sedition, promoting class hatred, etc — In a charge under s 124A, Penal Code (sedition) or s 133A, Penal Code (promoting class-hatred) it has been held that it is not necessary to set out the offending passages of the speech or writing in question where

- (05) 2 Cr L Jour 275 (277) 9 Cal W N 599 *Budhu v Mt Lachmina*
 (07) 6 Cr L Jour 440 (448-449) (Lab) *Gowardhan Das v Emperor* (But omission to state common object is not fatal to conviction if accused is not prejudiced)
 (1865) 4 Suth W R Cr 9 (3-10) *Queen v Harpaul*
 (94) 21 Cal 827 (831) *Danredji v Empress*
 (16) 3 AIR 1916 Mad 834 (834) 10 Cr L Jour 809 (809) *In re Ramaswamy Naidu*
 (21) 8 AIR 1921 Cal 605 (606) 25 Cr L Jour 524 *Kashi v Danu*
 (25) 12 AIR 1925 Cal 913 (913) 26 Cr L Jour 827 *Anuruddha Mana v Emperor*
 (34) 21 AIR 1934 Sind 164 (169) 30 Cr L Jour 231 *Allahra'hio v Emperor* (Charge under s 149.)
 (24) 11 AIR 1924 Lah 667 (668) 25 Cr L Jour 43, *Allah Dad v Emperor*
 (23) 15 AIR 1928 Pat 403 (408) 29 Cr L Jour 390 *Aktu v Emperor* (Charge should mention the principal and prominent common object and not incidental happenings)
 (08) 8 Cr L Jour 41 (46) (Kathuwar) *In re Koli Moli Hari*
 [See (24) 11 AIR 1924 Mad 584 (584-585) 25 Cr L Jour 396 *In re Kolloora Thetan* (Offence under s 399 read with s 149 — Charge should contain count that common object was to commit dacoity)
 (08) 8 Cr L Jour 129 (130-131) 36 Cal 158 1 Ind Cas 784 *Dasarathi v Raghu* (Where the common object is set out in the charge the conviction is not bad merely because there is no express finding as to the common object)]

Note 5

- 1 (94) 22 Cal 391 (403) *Balmakand Ram v Ghansaman*
 (1864) 1 Suth W R Cr L 13 (13)
 (71) 16 Suth W R Cr 59 (54) *Queen v Mehar* (Charge under s 451)
 [See also (16) 3 AIR 1910 Mad 571 (572) 16 Cr L Jour 298 (299) *In re Mala Mehala Kati Subladu*.
 (A charge under s 457 is defective if it does not mention the article stolen or the name of person

(Conviction for different

- intent e.g. to commit adultery on a complaint alleging an intent to commit theft)
 5 (17) 4 AIR 1917 Cal 824 (826) 17 Cr L Jour 421 44 Cal 358 *Karali v Emperor*
 6 (03) 16 O P L B 182 (183) *Emperor v Mullu Telu* (Charge under s 451—It is not necessary that the
 shall bring a specific charge of adultery)
 L Jour 453 (454) 11 Ind Cas 797 (798) (Mad) *In re Kurnam Seshayya*
 L Jour 293 (328) 1906 Pan Be No 12 Cr Rasi Saran v Emperor]
 28 Mad 240 (241) 1 Weir *Empress v Rayapadayachi* (Intention should be

the case for the prosecution is that the speech or writing in question taken as a whole comes within the mischief of the law¹ The requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably sufficient to enable the accused to know the matter with which he is charged²

7 Cheating—As the illustration (b) to this section shows in a case of cheating the charge must set out the manner in which the offence was committed so as to give the accused sufficient notice of the matter with which he is charged¹ Whether the manner set out is reasonably sufficient to give the accused such notice depends upon the facts and circumstances of each case Where the manner was described in the charge as follows by deceiving with false representations and promises as well as by conduct it was held that the expression used was too vague and indefinite² Where the charge is for an offence under the first portion of S 415 Penal Code it is not necessary to state that any loss was caused by the inducement³ though it should be stated that the property induced to be delivered was that of the prosecutor⁴ But where the charge is under the second portion of S 415 it is necessary to state in what way the complainant would be a loser as a result of the inducement⁵ The reason is that the term manner in this section includes with reference to an offence of cheating every ingredient by virtue of which the act ceases to be one of mere non criminal deception and becomes one of cheating within the meaning of S 415 Penal Code and the effect of the deception upon the victim's body mind reputation or property would thus be a part of the manner of cheating⁶ A charge of an attempt to cheat should state the persons upon whom the attempt was made and the manner in which he was induced⁷

8 Defamation—A charge of defamation should set out the words alleged to be defamatory¹ But where the charge is clear and unambiguous and such that the accused

Note 6

- 1 (08) 8 Cr L Jour 270 (979) 33 Bom 77 1 Ind Cas 641 *Emperor v Tributandas*
- (09) 9 Cr L Jour 140 (141) 1 Ind Cas 42 (Mad) *In re Chidambaram Pillai*
- (10) 11 Cr L Jour 583 (587) 4 Sind L R 55 8 Ind Cas 203 *Emperor v Virumal* (Case under S 153A)
- (09) 9 Cr L Jour 456 (460) 82 Mad 881 2 Ind Cas 33 *In re Krishnaswami*
[See also (81) 18 AIR 1931 Lah 186 (187) 32 Cr L Jour 1200 *Chint Ram v Emperor* (Charge under S 124A Penal Code substance of the speech should be specified)]
- (But see (09) 9 Cr L Jour 108 (112) 37 Mad 3 3 Ind Cas 99 *In re S. S. S. S. S.*
of sedition is de
scent on alleges
- 2 See cases in fo

Note 7

- 1 (25) 12 AIR 1905 Cal 603 (604) 26 Cr L Jour 819 *Kedar Nath v Emperor*
- (04) 1 Cr L Jour 121 (129) 8 Cal W N 278 (FB) *Hirjee Mull v Inam Ali Sirkar* (Charge of attempt to cheat)
- (33) 20 AIR 1933 Sind 169 (171) 34 Cr L Jour 1049 *Varumal Isahrumal v Emperor* (Charge should contain allegation that accused acted dishonestly or that he deceived the complainant.)
- (18) 5 AIR 1918 Nag 22 (26) 19 Cr L Jour 657 *Jangul v Emperor* (Omission to state the manner

Meghraj v Emperor

Khat v Emperor Charge should con-

Note 8

- 1 (43) 30 AIR 1914 Cal 401 20

Agarwalla

cannot be misled in any way the mere fact that the exact defamatory words are not reproduced does not vitiate the charge.² Where defamatory words are alleged to have been uttered by the accused on several occasions the charge must give particulars of the various occasions.³

9 Falsification of accounts — A charge of falsification of accounts under s 47A Penal Code must specify the entries alleged to be falsified.¹

10 Hurt grievous hurt, etc — A charge under s 324 Penal Code should follow the wording of the definition of the offence inasmuch as it is not an offence with a specific name but it need not deny that the hurt was caused on grave and sudden provocation.² Where two persons commit an affray and also cause hurt to each other the charge must be for the more serious offence of hurt.³ Where the accused is alleged to have caused several hurts a general charge covering all the hurts without particularising the details will be bad.⁴

11 Forgery, etc — A charge of forgery should contain a description of the document forged. It is not sufficient to say merely that the accused committed forgery by signing the name of a certain person (specified) on a document.¹ See also the undermentioned cases.

12 Culpable homicide and murder — Illustration (e) to this section shows that the charge for murder need not set out the manner in which A murdered B. But as has been seen in the Notes on s 291 where the charge does give details it must be fully and correctly given. Thus it should follow the definition and language of s 300 Penal Code.¹ Where the murder is alleged to have been effected by blows it should set out that the blows were inflicted with the intention of causing death or that they were sufficient in the ordinary course of nature to cause death and that they were intentionally inflicted.² It

2 (39) 19 AIR 1939 Nag 159 (159) 34 Cri L Jour 154 *Samrathmal v Emperor*

3 (30) 17 AIR 1930 Sind 69 (63 64) 30 Cri L Jour 1073 *Ab Mahomed v Emperor*

Note 9

1 (12) 13 Cri L Jour 251 (251) 14 Ind Cas 603 (Mad) *At jagiri Venkataramiah v Emperor* (Accused had no doubt about the substance of the charge against him—Conviction was therefore upheld.)

[See also (99) 26 Cal 580 (563) 3 Cal W N 419 *Express v Mats Lai Lahiri* (Particular registers and returns alleged to be falsified)]

Note 10

1 (97-01) 1 Upp Sur Rul 318 (318) *Queen Empress v Nya Seik*

2 (68) 4 Mad H C R App V (V) (Where Leg. Statute provides an example of the indictment to be used that form must be held to be sufficient.)

3 (08) 7 Cri L Jour 498 (499) 4 Low Sur Rul 237 *Emperor v Nya Seik*

4 (90) 15 Bom 491 (503 504) *Queen-Empress v Fakirappa*

Note 11

1 1885-86 M D C R 1

12 v Emperor (Charge

—If sentence is to be on charge should specify the

nature of the document.)

(1864) 1 South W R Cr L 9 (9)

(1865) 2 South W R Cr L 19 (19 20)

(66) 3 South W R Cr L 8 (8)

(1864) 1 South W R Cr L 10 (10)

Note 12

1 (26) 13 AIR 1926 Oudh 148 (149) 27 Cri L Jour 67 *Sheo Shankar v Emperor*

2 (26) 13 AIR 1926 Oudh 148 (149) 27 Cri L Jour 67 *Sheo Shankar v Emperor*

and defective if the words

attention or knowledge

in s 299 Penal Code should be specified.)

should mention the fact of death having been caused³ and in cases of wilful murder the words "culpable homicide amounting to murder" must be used⁴ Section 34 of the Penal Code cannot be used in a charge under the second part of S 301 of that Code⁵ See also the undermentioned cases⁶

13. Receiving stolen property.—A charge of *receiving stolen property* should state that the accused dishonestly retained or received stolen property knowing or having reason to believe that it had been stolen¹ It should also mention the name of the person to whom the property belonged²

14. Kidnapping and abduction.—In a charge of *kidnapping* under S 366, Penal Code, it should appear clearly whether the accused persons are being charged with kidnapping or with abduction, and similarly whether the intent alleged was an intent to compel the victim to marry against her will or whether the kidnapping or abduction was with the knowledge that it was likely that the victim would be forced or seduced to illicit intercourse¹ It is always wise where a charge is made, in respect of the same occurrence, both of kidnapping and abducting, that two heads should be made But it is not illegal to make the two charges under one head The point to be seen in each case is whether the accused person was prejudiced thereby² See also the case cited below³

15. Extortion—Where the offence charged involves consequences which may be stated in a general form such as may arise in a case of arson, where a man may by one act of arson set fire and destroy several stacks of several persons, no particulars are required, the nature of the offence being sufficiently stated by the date, time and place of setting of fire, but a charge for extortion or for obtaining money from persons by unlawful means should state with accuracy the approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person¹ See also the undermentioned cases²

(66) 5 Suth W R (Recorders' References) 1 (2), *Government v Ramaswamy* (Objections to charges on the ground of want of specification of details should be taken before conclusion of trial)

3 (1865) 2 Suth W R Cr L 17 (17)

4 (1864) 1 Suth W R Cr L 9 (9) (This decision under Code of 1861 says that the charge should deny the special exceptions in S 300, Penal Code—But now sub s (5) removes that necessity)

(1864) 1 Suth W R Cr L 10 (12) (Do)

(1864) 1 Suth W R Cr L 13 (13) (Do)

5 ('25) 12 AIR 1925 Cal 913 (915) 26 Cr L Jour 827, *Anurudha Mana v. Emperor*. (This is so

Emperor. (The question

under S 304, Penal Code, should indicate under which part of the section accused is charged)

Note 13

1 (98) 1898 All W N 70 (70), *Empress v Gadka* (Charge under S. 411, Penal Code)

(65) 4 Suth W R Cr L 11 (11)

2 (1863) 1 Bom H C R 95 (96), *Reg v Siddu Bainath*

Note 14

same section)

2 ('38) 25 AIR 1938 Cal 460 (462) 39 Cr L Jour 674, *Ebad, Khan v Emperor* (AIR 1927 Cal 644 - 28 Cr L Jour 805 dissented from)

3 ('19) 6 AIR 1919 Pat 27 (30) 20 Cr L Jour 161 : 4 Pat L Jour 74 (FB), *Mt Kesar v Emperor*. (Charge under S 366, Penal Code, must specify that the kidnapping was from custody of some mentioned persons So also charge under S 368)

Note 15

1 ('16) 3 AIR 1916 All 60 (60) 17 Cr L Jour 411 (411), *Ram Chander v Emperor*

2 (16) 3 AIR 1916 All 60 (60) - 17 Cr L Jour 411, *Ram Chander v Emperor*. (Extortion—Approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person should be specified)

Notice of charge of
abduction under the

(25) 12 AIR 1925 Lah 337 (337) : 6 Lah 24 : 26 Cr L Jour 1153, *Labh Singh v. Emperor*. (If a dacoit commits murder during the dacoity, he should be charged under S 396, Penal Code, and not under Ss 304, 395, Penal Code)

(77) 1 Weir 447 (448), *In re Muttirulappan* (Proper charge—'That you committed dacoity and that, in committed by one of the members, and that you have thereby

uldan v. Emperor. (Dacoity with murder— for the prosecution to prove)

an Huk v. Emperor. (Robbery — Substan-

tion S 393 should be mentioned in the charge)

(S 393)
weapons
as that

section creates no substantive offence)

(66) 2 Sath WR Cr L 1 (1) (In a charge of dacoity the words 'conjointly with five or more persons' are redundant)

(24) 11 AIR 1924 Mad 591 (591) : 25 Cr L Jour 396, *In re Kolloora Thetian* (Conviction for dacoity founded on a common object not charged is not sustainable)

[See also (24) 11 AIR 1924 Cal 643 (644), 51 Cal 265 : 25 Cr L Jour 1024, *Emperor v. Al, Mirza* 'punishment which may

cror. (Conviction in case

Theft

(69) 5 Mad H C R App xxxvii (xxxvii) (Charge did not allege the essential ingredient of taking out of possession of some person dishonestly—Charge held defective)

(21) 8 AIR 1921 Cal 605 (606) : 25 Cr L Jour 524, *Kashi Pramanik v. Damu Pramanik* (Charge of stealing paddy from a certain land must contain an accurate description of the land from which the paddy was stolen)

Criminal conspiracy :

(18) 3 AIR 1916 Cal 189 (191) : 16 Cr L Jour 497 (502) : 42 Cal 957, *Amritlal Hazra v. Emperor*. (Indictment must in the first place charge the conspiracy)

(33) 20 AIR 1933 All 499 (501) : 35 Cr L Jour 768, *Manabendra Nath v. Emperor*. (Charge need not contain names of all other conspirators)

(11) 12 Cr L Jour 2 (2) : 8 Ind Cas 1059 (Cal), *Emperor v. Lalit Mohan Chakravarti* (In a conspiracy case the accused can be charged with conspiracy with persons unknown, but if they are charged with conspiring with persons known then such persons must be named in the charge)

(26) 13 AIR 1926 Oudh 161 (165) : 26 Cr L Jour 1602, *Bishambar Nath v. Emperor*. (In the nature of things a charge of conspiracy would be vague if the defence expects the proof of the conspiracy to be included in the charge)

(26) 13 AIR 1926 Sind 171 (173) : 20 Sind L R 18 : 27 Cr L Jour 243, *Kishan Chand v. Emperor*. (Charge of conspiracy in respect of an agreement between several accused persons to cheat such members of the public as they could defraud by deceitful means is not bad)

(24) 26 Cr L Jour 33 (40) : 83 Ind Cas 513 (Cal), *Kali Das v. Emperor*. (Accused may legally be charged merely with the offence of criminal conspiracy)

Emperor (Charge to have agreed to conspirators is of a

general nature)

(27) 14 AIR 1927 Sind 161 (163) : 28 Cr L Jour 426 : 22 Sind L R 91, *Han Samo v. Emperor* (Gist of the offence of criminal conspiracy is the agreement itself and where the object of the agreement is to do an unlawful act and not to do a lawful act by an unlawful means, it is sufficient to specify the unlawful object without specifying the means adopted by all or any of the conspirators to gain that object)

(99) 10 Cr L Jour 125 (127) : 2 Ind Cas 681 (Cal), *Jeyjiban Ghose v. Emperor* (Statement only that 'A conspired' is defective)

(15) 2 AIR 1915 Lah 16 (47, 48) : 16 Cr L Jour 354 (357) : 1915 Pun Re No 17 Cr, *Balmokand v. Emperor*. (Charge need not mention the exact date on which conspirators entered into conspiracy)

(34) 21 AIR 1934 Sind 57 (59, 61) : 28 Sind L R 119 : 35 Cr L Jour 1347, *Dur Mahomed v. Emperor*. (Approximate dates as to when the conspiracy began and ended will be enough—Exact dates not necessary—No objection to acts done by conspirators in pursuance of the conspiracy being enumerated)

[See (12) 13 Cr L Jour 609 (650) : 16 Ind Cas 257 (Cal), *Patin Behary Das v. Emperor* (Indictment or information for conspiracy must contain concise statement of facts relied upon as constituting the offence)]

Offences relating to coins

- (1865) 3 Suth W R Cr L 13 (13) (Under S 239, Penal Code, the nature of the counterfeit coin delivered as genuine should be mentioned)
- (1865) 2 Suth W R Cr L 11 (11) (Under Ss 243, 249, Penal Code, the precise offence committed as to the coin viz that an operation was performed on the coin altering its appearance should be stated)
- (1865) 2 Suth W R Cr L 5 (5) (Offence which had been committed in respect of the coin of which the accused was said to be in possession should be expressly stated)

Offences against public justice

- (66) 5 Suth W R Cr L 6 (6) (Charge under S 205, Penal Code—Nature of the admission or statement made by the accused in the assumed character should be fully stated)
- (66) 5 Suth W R Cr L 8 (8) (Section 202 Penal Code—The nature of the office held by the accused so as to make them public servants should be stated in a charge for knowing commission of offence and negligent omission to give any information)
- (66) 5 Suth W R Cr L 1 (1) (Under S 224, Penal Code, the charge should state the offence for which the prisoner was lawfully detained when he escaped from custody)
- (92) 16 Bom 414 (424) *Empress v Tajiram* (Under S 206, Penal Code, the specification of the fraudulent transfer is necessary)
- (77) 2 Bom 142 (144-145) *Imperatrix v Baban Khan* (Charge under S 217, Penal Code, that accused being a public servant knowingly disobeyed the direction of law as to the way in which he had to conduct himself as such public servant with respect to the property found in an investigation of theft—What the direction was and what the conduct was which contravened it the accused was not informed—*Held*, the charge was bad)
- (67) 5 Suth W R Cr 37 (38) *Queen v Moosubro* (Sections 202, 203, Penal Code—A charge in a case of omission to give information of offence should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which he knew to be false, and it should appear precisely what his duty was in the matter)
- (74) 22 Suth W R Cr 42 (42), *Queen v Ahmad Ali* (Do)

Miscellaneous

- (32) 19 AIR 1932 Cal 651 (652, 653) 33 Cr L Jour 771-60 Cal 201, *Kastash Chandra v Emperor*. (Charge under S 292, I P C—Some attempt should be made to indicate in the charge in what respect exactly the book was obscene)
- (26) 13 AIR 1926 Rang 188 (190) 4 Rang 257: 27 Cr L Jour 1211, *Ebrahim Mammojee v Emperor*. (Contempt of Court—Formal charge is necessary)

should be made specific in

the office held by the

accused so as to make him liable as a public servant)

- (72-92) 1872 92 Low Bur Rul 262 (262), *Queen Empress v. M. M. S.* (Charge under Ss 292 and 294, Penal Code—Obscene words or representations used must be set out)
- (91) 15 Bom 189 (194), *Queen-Empress v. Abaji Ramchandra* (Charge under S. 475, Penal Code, should distinctly specify the particular papers bearing a counterfeit mark or device which it was alleged the accused had in his possession with the intent mentioned in the section)
- (20) 7 AIR 1920 Cal 624 (629): 21 Cr L Jour 481, *Lucas v. Official Assignee of Bengal* (Charge of preferring a creditor under the Presidency Towns Insolvency Act—The fraud practised and the name of the creditor preferred must be alleged)
- (1865) 3 Suth W R Cr L 5 (5) (Under s 312, Penal Code, the description of the act by which the accused intended to prevent the child being born alive, and further that it was not caused in good faith to save

public servant to be influenced in the exercise of his public functions)

- (16) 3 AIR 1916 Cal 188 (192) 16 Cr L Jour 497 (501): 42 Cal 957, *Amritlal Hasra v Emperor*. (Charge under S 4 (b) of Act 6 [VI] of 1908 (Explosive Substances Act) omitted to state that the accused were in possession of explosive substances or had them under their control "unlawfully and maliciously" and secondly that it was the intent of the accused to endanger life in British India—*Held*, defect did not vitiate trial)
- (92) 5 C P L R Cr 18 (19), *Empress v Jhengria*. (Mischief by fire—Charge of an offence under the Penal Code should be drawn up in the words of the section defining the offence)
- (67) 8 Suth W R Cr 30 (30), *Queen v. Durbaroo Pote*. (Do)
- (70) 14 Suth W R Cr 13 (13), *Queen v. Parbatty Churn Chuckerbutty* (Criminal misappropriation—Charge should specify the person whose property was converted or appropriated)

18 Act done by several persons in furtherance of a common intention — See the undermentioned case¹

Words in charge taken in sense of law under which offence is punishable which such offence is punishable

224. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under

225.[†] No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice

Illustrations

(a) A is charged under section 242 of the Indian Penal Code with 'having been in possession of counterfeit coin having known at the time when he became possessed thereof that such coin was counterfeit, the word 'fraudulently' being omitted in the charge. Unless it appears that A was in fact misled by this omission the error shall not be regarded as material.

(b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge or is set out incorrectly. A defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in the case, a material error.

(d) A is charged with the murder of Khoda Baksh on the 21st January 1882. In fact the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(e) A was charged with murdering Haidar Baksh on the 20th January 1882 and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haidar Baksh he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled and that the error was material.

1 Scope of the section — This section and S 537 deal with cases where a charge is framed but there are errors, omissions or irregularities in the charge. This section provides that no error or omission in the statement of the offence or the particulars required to be stated in the charge is to be regarded as material at any stage unless the accused¹

* Code of 1882 S 224 — Same as above
Codes of 1872 and 1861 — Nil

† Code of 1882 S 225

225 No error in stating either the offence or the particulars required to be stated in the charge, nor . . . be regarded at any

has been misled thereby and it has in fact, occasioned a failure of justice¹ while S 537 provides that no finding sentence or order in the case shall be reversed or altered under chapter 27 or on appeal or revision on account of any error omission or irregularity in a charge unless it has occasioned a failure of justice. Section 535 deals with cases where no charge has been framed at all, and provides that no finding or sentence in the case should be deemed invalid in appeal or revision unless the Court considers that a failure of justice has been occasioned thereby.

In *Babulal Chaulhansi v King Emperor*² their Lordships of the Privy Council

Section 225 — Note 1

- 1 Where accused is not misled defect in charge not material
- (42) 29 AIR 1919 Oudh 394 (395) 43 Cri L Jour 721 200 Ind Cas 806 *Barsati v Emperor* (Error of date in charge-sheet—Absence of prejudice—Conviction cannot be quashed)
- (41) 28 AIR 1941 Lah 214 (215) 1 L R (1941) Lah 423 195 Ind Cas 58 42 Cri L Jour 660 (DB) *Waryam Singh Arur Singh v Emperor* (Person present and acting in furtherance of common intention to commit offence—Mere omission to specify S 34 Penal Code in charge does not make conviction of that person for the offence illegal)
- (38) 25 AIR 1938 Cal 195 (200) 39 Cri L Jour 417 *Pam Krishna v Emperor* (Accused charged with conspiracy for agreeing with each other or with others unknown—Use of word or cannot make charge one in alternative—Defect if any in charge is not material and accused held could not have been misled)
- (38) 25 AIR 1938 Nag 445 (446) 39 Cri L Jour 895 11 R (1939) Nag 180 *Provincial Government v Shankar Gopal* (Criminal misappropriation—Charge erroneous in respect of date and place of payment—Correct date mentioned to accused in examination under S 364—Accused not raising any dispute as to place—No prejudice to accused resulting—Held trial was not vitiated by omission)
- (37) 1937 Vad W N 1331 (1334) *Palani Goundan v Emperor*
- (35) 22 AIR 1935 Oudh 488 (489) 36 Cri L Jour 1198 11 Luck 343 *Bishnath v Emperor* (Charge under S 147 Penal Code—Failure to specify common object—Accused not misled by omission—Omission held not fatal)
- (1900) 27 Cal 776 (779) 4 Cal W N 423 *Anookool Chundar Nundy v Queen Empress*
- (94) 1894 Rat 710 (713) *Queen Empress v Abdul Pasa*
- (93) 7 Cal W N 663 (665) *Shoshu Bhushan v Gobind Chandra*
- (99) 8 Cri L Jour 272 (276) 33 Bom 77 1 Ind Cas 641 *Emperor v Tribhuvandas*
- (97) 5 Cri L Jour 309 (321) 31 Bom 330 9 Bom L R 331 *Emperor v Bhagwardas*
- (99) 9 Cri L Jour 108 (112) 32 Mad 3 8 Ind Cas 22 *In re Subramania Siva*
- (99) 9 Cri L Jour 456 (469) 2 Ind Cas 33 32 Mad 384 *In re Krishnaswamy* (Per Wallis J—Offence under S 124A 1 P C—It is enough if the substance of the words used is set out in the charge and it is enough if the substance of the words proved to have been used is the same as that of the words set out in the charge)
- (10) 11 Cri L Jour 597 (598) 8 Ind Cas 229 (Lab) *Wasata Singh v Emperor*
- (15) 2 AIR 1915 Lah 16 (47 48) 16 Cri L Jour 354 (357) 1915 Pun Re No 17 Cri *Balmohand v Emperor*
- v Emperor
- v Emperor
- v Emperor
- (30) 17 AIR 1930 Rang 114 (117) 7 Rang 821 31 Cri L Jour 387 *Maung Ba v Emperor*
- (25) 12 AIR 1925 Nag 147 (149) 25 Cri L Jour 1159 *Gangadhar v Bhagat Rao*
- Where accused is prejudiced defect is material
- (38) 25 AIR 1938 Lah 828 (832) 40 Cri L Jour 371 *Ghan Singh v Emperor* (P charged and convicted under S 419 Penal Code—Charge not making clear as to by virtue of which of the consequences referred to in S 415 Penal Code P was guilty of offence of cheating—Held that charge was defective and defect in charge was material irregularity which could not be cured by S 225)

76 ILR (193)

2 Cal 220 (IL)

L Jour 573 *Candra v Emperor* (Lampin together Penal Code — But no prejudice caused to accused by

18 Act done by several persons in furtherance of a common intention — See the undermentioned case¹

Words in charge taken in sense of law under which offence is punishable which such offence is punishable

224. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under

225. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice

Illustrations

(a) A is charged under section 242 of the Indian Penal Code, with 'having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, the word 'fraudulently' being omitted in the charge. Unless it appears that A was in fact misled by this omission the error shall not be regarded as material

(b) A is charged with cheating B and the manner in which he cheated B is not set out in the charge or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was in the case, a material error

(d) A is charged with the murder of Khoda Baksh on the 21st January 1882. In fact the murdered person's name was Haidar Baksh and the date of the murder was the 20th January 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial

(e) A was charged with murdering Haidar Baksh on the 20th January 1882 and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haidar Baksh he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled and that the error was material

1 Scope of the section — This section and S 537 deal with cases where a charge is framed but there are errors omissions or irregularities in the charge. This section provides that no error or omission in the statement of the offence or the particulars required to be stated in the charge is to be regarded as material at any stage unless the accused

* Code of 1882 S 224 — Same as above
Codes of 1872 and 1861 — Nil.

† Code of 1882 S 225

225 No error in stating either the offence or the particulars required to be stated in the charge. Effect of errors and no omission to state the offence or those particulars shall be regarded at any stage of the case as material unless the accused was misled by such error or omission

(Illustrations — Same as in 1898 Code)

Code of 1872 S 443 — Substantially the same as 1882 Code
Code of 1861 — Nil

has been misled thereby and it has, in fact, occasioned a failure of justice,¹ while S 537 provides that no finding sentence or order in the case shall be reversed or altered under chapter 27 or on appeal or revision on account of any error, omission or irregularity in a charge unless it has occasioned a failure of justice. Section 535 deals with cases where no charge has been framed at all and provides that no finding or sentence in the case should be deemed invalid in appeal or revision unless the Court considers that a failure of justice has been occasioned thereby.

In *Babulal Chaulhanki v King Emperor*² their Lordships of the Privy Council

Section 225 — Note 1

sati v Emperor (Error

42 Cri L Jour 660 (DB),

Waryam Singh Arur Singh v Emperor (Person present and acting in furtherance of common intention to commit offence—Mere omission to specify S 34 Penal Code in charge does not make conviction of that person for the offence illegal)

(38) 25 AIR 1939 Cal 195 (200) 39 Cri L Jour 417 *Rani Krishna v Emperor* (Accused charged with conspiracy for agreeing with each other or with others unknown—Use of word or cannot make charge one in alternative—Defect if any in charge is not material and accused held could not have been misled)

(35) 25 AIR 1939 Nag 445 (446) 39 Cri L Jour 895 ILR (1939) Nag 180 *Provincial Government v Shanfar Gopal* (Criminal misappropriation—Charge erroneous in respect of date and place of payment—Correct date mentioned to accused in examination under S 364—Accused not raising any dispute as to place—No prejudice to accused resulting—Held trial was not vitiated by omission)

(37) 1937 Mad W N 1331 (1334) *Palani Goundan v Emperor*

(35) 22 AIR 1935 Oudh 489 (489) 36 Cri L Jour 1198 11 Luck 343 *Bishnath v Emperor* (Charge under S 147 Penal Code—Failure to specify common object—Accused not misled by omission—Omission held not fatal)

(1900) 27 Cal 776 (779) 4 Cal W N 423 *Anookool Chundar Nundy v Queen Empress*

(94) 1894 Rat 710 (713) *Queen Empress v Abdul Pasa*

(03) 7 Cal W N 663 (665) *Shashi Bhushan v Gobind Chandra*

(09) 8 Cri L Jour 272 (276) 33 Bom 77 1 Ind Cas 641 *Emperor v Tribhuvandas*

(07) 6 Cri L Jour 309 (321) 31 Bom 335 9 Bom L R 331 *Emperor v Bhagwardas*

(09) 9 Cri L Jour 108 (112) 32 Mad 3 3 Ind Cas 22 *In re Subramania Siva*

(09) 9 Cri L Jour 456 (489) 2 Ind Cas 33 32 Mad 384 *In re Krishnaswamy* (Per Wallis, J—Offence under S 124A I P C—It is enough if the substance of the words used is set out in the charge and it is enough if the substance of the words proved to have been used is the same as that of the words set out in the charge)

(10) 11 Cri L Jour 597 (598) 8 Ind Cas 229 (Lab) *Wasava Singh v Emperor*

(15) 2 AIR 1915 Lah 16 (47, 48) 16 Cri L Jour 354 (357) 1915 Pan Re No 17 Cri, *Dalmol and v Emperor*

or
for

for

Where accused is prejudiced, defect is material

(38) 25 AIR 1938 Lah 628 (832) 40 Cri L Jour 371 *Gian Singh v Emperor* (P charged and convicted under S 419, Penal Code—Charge not making clear as to by virtue of which of the consequences referred to in S 415 Penal Code P was guilty of offence of cheating—Held that not be cured by S 225)

2 (38) 25 AIR 1939 IC 189 (135) 39 Cri L Jour 452 65 Ind App 158 33 Sind L R 476 ILR (1938) 2 Cal 295 (PC)

[See also (40) 27 AIR 1910 Pat 603 (604) 41 Cri L Jour 513 *Chandra v Emperor* (Lumping together of three cases of cheating in charge under S 420 Penal Code — But no prejudice caused to accused by irregularity—Sections 225 and 537 cure defect)]

held that the irregularity of charging together different offences instead of charging them separately was curable under this section and S 537 if the accused was not prejudiced³ This seems to suggest that joining together in the same charge several offences which must be separately charged is an error in stating the offence

It is for the Court to decide in each case whether the defect in the charge has misled the accused⁴ In considering the question whether the accused has been prejudiced in his defence by the defect in the charge, regard must be had to the fact that the objection to the frame of the charge was not raised till a late stage in the proceedings⁵ See also S 537, Explanation

The section is aimed, among other things, at objections on the ground of variance between the charge and the evidence⁶ But the fundamental principle in all criminal charges is that the accused should not be prejudiced in his defence and, therefore, where a charge expressed in vague terms has been understood in a certain sense and proceedings have gone on, on such basis, it is not thereafter open to the prosecution to contend that the charge means something else⁷ The object of the section is that technical defects in the charge should not be allowed to defeat the ends of justice Hence, where the guilt of the accused has been proved, he can be convicted notwithstanding that the charge contains unnecessary allegations which the prosecution has not proved⁸

This section lays down what errors and omissions in the charge should be regarded as material Section 232 provides for the procedure to be followed in cases where an appellate or revisional Court considers that the defect in the charge is a material one See also Notes on sections 535 and 537

2 Charge in cases of rioting, unlawful assembly, etc — Under S 223, a charge of an offence of rioting (or connected offences) should specify the common object of the unlawful assembly An error or omission in this respect will vitiate the trial if the

³ See also (42) 29 AIR 1912 Mad 417 (418) 43 Cri L Jour 807 202 Ind Cas 802, *In re Ganpatishubramanya Iyer* (Incidents on four charges drawn primarily to incident on powder of charges as more than 1

taken in lower Courts — Difference in fact discovered at the time of revision — Held no prejudice was caused)

(42) 29 AIR 1912 Oudh 391 (395) 43 Cri L Jour 721 200 Ind Cas 805 *Barsati v King Emperor* (Error as to date of occurrence—Objection taken at stage of revision — No prejudice)

(88) 1 Weir 471 (476) 1 Mad H C R 31, *Queen Empress v Williams* (Case bearing on S 41 of Act 18 [XVIII] of 1862 — Held that the indictment for cheating, which was defective for uncertainty was one to be objected to if at all, before the jury was sworn)

Charge has been understood at the trial

⁸ (67) 4 Bom H C R Cr 17 (22), *Reg v Francis Cassidy*

accused has been prejudiced in his defence by reason of such defect in the charge¹ But if the accused has not been prejudiced by reason of such error or omission, the defect is not a material one* Even in cases where the charge is to the effect that the accused is liable *cons ructively* under s 147 of the Penal Code for the acts of his companions, the trial is not necessarily vitiated because the charge does not specify, or states erroneously the common object in pursuance of which the act is alleged to have been done²

3 Charges in other cases —The undermentioned cases¹ are instances in which

Note 2

- 1 { 85) 22 Cal 276 (2-5) *Sabir v Queen Empress*
{ 85) 11 Cal 106 (109) *Echani Mehton v Queen Empress*
{ 07) 6 Cr L Jour 440 (444 449) (Lab) *Gowardhan Das v Emperor*
{ 06) 3 Cr L Jour 153 (159) 33 Cal 295 2 Cr L Jour 516 *Paresnath Sirkar v Emperor*
{ 22) 9 AIR 1912 Cal 191 (191) 24 Cr L Jour 355 *Aminulla v Emperor*
See (24) 11 AIR 1914 Mad 541 (584) 25 Cr L Jour 396 *In re Kottoora Thevan* (Conviction for daco is founded on a common object not charged is not sustainable))
- 2 { 35) 22 AIR 1935 Oudh 488 (488) 36 Cr L Jour 1193 11 Luck 343 *Bishnath v Emperor* (Omission to specify common object—Accused not misled by such omission—Omission is cured by S 225)
{ 94) 21 Cal 827 (831 832) *Bisi Reddi v Queen Empress*
{ 06) 4 Cal W N 196 (199) *Rahamat Ali v Empress*
{ 05) 2 Cr L Jour 275 (277 278) 9 Cal W N 599 *Buddhu v Mt Lachumia*
{ 16) 3 AIR 1916 Cal 693 (703 706) 16 Cr L Jour 641 (646) *Ram Subhag v Emperor*
{ 26) 13 AIR 1926 Bom 314 (314 315) 27 Cr L Jour 741 *Emperor v Yashwanth*
{ 15) 5 AIR 1918 Mad 350 (350) 19 Cr L Jour 200 *Dakshinamurti v Emperor*
{ 17) 4 AIR 1917 Cal 453 (453) 2 Pat L Jour 511 18 Cr L Jour 911 *Harinder Singh v Emperor*
(Want of specific allegation of common object in the charge does not vitiate conviction if from the evidence it is clear what the common object is)
{ 26) 13 AIR 1926 Cal 439 (439 440) 26 Cr L Jour 567, *Chhakari Shaikh v Emperor*
{ 18) 5 AIR 1918 Pat 257 (259) 3 Pat L Jour 665 19 Cr L Jour 735 *Mahangu v Emperor*
{ 27) 14 AIR 1927 Pat 398 (400) 6 Pat 832 28 Cr L Jour 769 *Chhanka Dhanuk v Emperor* (Charge of being a member of an unlawful assembly with the common object of committing assault is the usual form of charge when the common object is to do violence to some person—It is immaterial whether the

charge has been framed after the whole prosecution evidence is recorded and the accused are fully cognizant of the case against them)

- { 35) 22 AIR 1935 Oudh 488 (488) 11 Luck 343 36 Cr L Jour 1198 *Bishnath v Emperor*
{ 08) 7 Cr L Jour 374 (377) 35 Cal 384 12 Cal W N 679 *Maniruddin v Emperor*
{ 09) 10 Cr L Jour 471 (472) 36 Cal 865 4 Ind Cas 19, *Sitajit Mahota v Emperor* (Charge under S 147 — Question in each case is whether common object established agrees in essential particulars with common object as stated in charge—In this case there was no such agreement—Conviction under S 147 quashed)
- { 10) 11 Cr L Jour 121 (122) 37 Cal 310 5 Ind Cas 365 *Babbon Shaikh v Emperor*
{ 16) 3 AIR 1916 Cal 355 (355) 17 Cr L Jour 92 (93) *Abdul Shaikh v Emperor*
{ 30) 17 AIR 1930 Mad 188 (189) 31 Cr L Jour 317 *Venkada v Emperor*
{ 28) 15 AIR 1928 Bom 286 (287) 30 Cr L Jour 467 *Hasan Ali v Emperor*
{ 31) 18 AIR 1931 Bom 520 (524) 55 Bom 725 33 Cr L Jour 64 *Ramachandra v Emperor*
- 3 { 15) 2 AIR 1915 Lah 418 (422) 16 Cr L Jour 689 (693) 1915 Pun Re No 18 *Dhyan v Emperor*
{ But see (12) 13 Cr L Jour 218 (219) 33 Cal 781 14 Ind Cas 314 *Kudrullullah v Emperor* (Submitted not correct))

Note 3

- 1 { 38) 25 AIR 1938 Lah 828 (832) 40 Cr L Jour 371, *Gyan Singh v Emperor* (Charge of cheating defective by reason of Magistrate's failure to set out particular consequences by virtue of which the deception became offence—Defect being material irregularly not curable under S 225)
- { 35) 22 AIR 1935 1st 431 (432 433) 36 Cr L Jour 1508 *Sat Narain Lal v Emperor* (Accused charged under S 304 Penal Code but tried under S 302 — Held, illegality could not be cured under S 537, Cr P C)
- { 67) 8 Suth W R Cr 95 (96) *In re Dowlat Moonshee* (Section 193 Penal Code—Charge under—Exact words not stated)
- { 63) 9 Suth W R Cr 14 (14 15) *Queen v Feojdar Roy* (Do)

the error or omission in the charge was considered material. For cases in which the defect in the charge was considered not material, see the undermentioned decisions²

- (68) 9 Suth W R Cr 25 (26 27), *Empress v Soonder Mohoorce* (Do)
 (16) 3 AIR 1916 All 60 (60) 17 Cr L Jour 411 *Ramachandra v Emperor* (Extortion — Charge of — Charge must state the amount alleged to have been obtained from each person and the nature of the extortion used against each — Conviction quashed)
 (25) 12 AIR 1925 Mad 690 (691) 49 Mad 74 26 Cr L Jour 1513 *In re Mallu Dora* (Charges under Ss 397 and 395 — Held that the charges did not give the accused sufficient particulars of what they had to meet)
 (12) 13 Cr L Jour 504 (504) 15 Ind Cas 648 (Mad) *Gowinda Reddi v Emperor* (Charge framed under Rule 8, S 26 Madras Forest Act must clearly state that the place from where the accused cut a tree was a reserved forest — Omission to state this is material defect which vitiates the trial)
 (13) 14 Cr L Jour 213 (213) 19 Ind Cas 308 (Cal), *Sital Chandra v Emperor* (In one charge two persons were charged with causing hurt to three others with a dao but there was no case of hurt with a dao by one of the accused and he was convicted under S 352 for using lathi against two of the complainants — Held that this was an irregularity which might have prejudiced the accused in their trial)
 (24) 11 AIR 1924 Lah 616 (617) 25 Cr L Jour 471 *Jalaluddin v Emperor* (Where accused is charged with having beaten the complainant at a particular place and at a particular time and the prosecution fails to establish that charge the accused cannot on that evidence be convicted of having beaten the complainant at a different place on a different occasion)
 (25) 12 AIR 1925 Cal 603 (604) 26 Cr L Jour 849 *Kedar Nath v Emperor* (In the charge framed the manner of cheating was set out as follows: By deceiving with false representations and promises as well as by conduct)
 (61) 2 Weir 266 (266) *In re Yippaka Daligadu* (Accused charged with previous convictions — It is not sufficient to state in the charge that the accused is an old offender — Charge held irregular)
 [See also (85) 22 AIR 1935 Pat 431 (431 432) 36 Cr L Jour 1506 *Sainarain Lal v Emperor*. (Accused charged under S 304 but tried under S 302 Penal Code — Trial is illegal — S 537, Cr P C, cannot cure illegality — Charge for minor offence and conviction for major offence are illegal)]
 2 (42) 29 AIR 1942 Mad 417 (418) 43 Cr L Jour 807 202 Ind Cas 802 *In re Ganapatisubramanya Iyer* (Charge sheet filed by police relating to offence on 18th May 1941 — Charge itself relating

to offence under S 304 but charge sheet relating to offence under S 302)

- (38) 25 AIR 1938 P C 130 (135) 39 Cr L Jour 452 63 Ind App 158 32 Sind L R 476 1 L R (1938) 9 Cal 299 (PC) *Roh Lal v Emperor*

Held accused could not have been misled and defect if any was not such as could not be sufficiently met by S 225 or S 537)

- (38) 25 AIR 1938 Nag 445 (446) 39 Cr L Jour 895 1 L R (1938) Nag 180 *Provincial Government v Shankar Gopal* (Charge under S 409, Penal Code erroneous in respect of the date as well as place of payment — No error in charge — Accused error in trial resulted to the
 (37) 1937 Mad W as to particular

Conviction for lesser offence instead of

8. 211, Penal Code committed at two places but only one stated — Accused not misled in defence — This conviction is unaffected)

- (35) 22 AIR 1935 Oudh 475 (475 476) 36 Cr L Jour 1206 *Shakur v Emperor* (Charge under S 411, Penal Code not specifying particular articles possessed — But accused not prejudiced by this — Defect is cured by S 537)
 (73) 10 Bom H C R 373 (374) *Queen v Rakhma* (Omission of the word dishonestly in a charge under S 411 Penal Code is not a ground for reversing conviction when the accused has not been prejudiced by the omission)
 (1865) 2 Suth W R Cr 51 (51) *Queen v Bhuttoo Laljee* (Though charge does not distinctly specify the false statement on which the evidence of perjury is attempted to be established the omission is not material if the accused has not been prejudiced thereby)

226. When any person is committed for trial without a charge, or

Proceedings on complaint with a charge or with an imperfect charge, as the case may be, with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown, may frame a charge or add to or otherwise alter the charge, having regard to the rules contained in this Code as to the form of charges.

* Code of 1882 S. 226—See above illustrations were added in 1898

Code of 1872 S 446

446 I r o n l i d C o u r t o f S e s s i o n e t h e r w i t h o u t a n y c h a r g e a t a l l o r u p o n
H e r e S e s s i o n s J u r y v i l l C o m m i s s i o n e r s r e f e r r e e t o t h e p r o c e e d i n g s b e f o r e t h e c o m m i s s i o n e r s
e n d o c e a d o r M a t t r o n n e r u n p r o p e r t h e C o u r t o f S e s s i o n m a y d r a w u p a
c l a r i f i c a t i o n o f t h e c o n t e n t s o f t h e e v i d e n c e t a k e n b e f o r e t h e c o m m i t t i n g
M a t t r o n A t t o r n e y G e n e r a l h a s s e n t t o t h e a u d i e n c e p e r o n

Code of 1861 — Nil

(7) As to WIC 30-10-1 Impres & Parture The (Charge under S 436 Penal Code should state that the defendant is a woman, he is and it is not enough if the charge merely refers to a he. — But see and that it is not in times of the case)

(01) 2 Cr 1 1 381 381 15 Mar 1 1 n 224 2 Wen 231 Anantha Goundan v Emperor (Imputation of unbelief in marriage) - 1 n 1 item that the definition was of the complainant, the husband in the case - Held that there was no error or irregularity in the charge which had been put before the jury.

(10) 11 Cr L 1159 (1938) 8 Ind Cr 229 (Lohi) *Wasant Singh v Emperor* (Charge under S 411, P and C of A. It was found that the accused had been found in possession of 2 boxes and some cloth etc. It was proved that the accused had no right to the property. It was urged that there was no evidence to show that the accused was dishonest in the sense defined in the Code being one of dishonest receipt etc. — *Held* that though the plea was correct the accused was not misled and the conviction was not vitiated.)

(12) 13 Cr 117 (51-21) 14 Cr 161 603 (M1) *Iyagiri Venkataraniiah v Emperor* (Charge under s 47-A Penal Code — No justification of alibi — Entries in the charge did not vitiate the trial as the accused knew the subject of the charge and was not prejudiced in his defence and did not object to it in the Court below.)

(16) 3 AIR 1316 Cal 693 (1938) 16 Cr L Jour 641 (646) *Ram Subhag Singh v Emperor* (Charge under s. 147 and 323, Penal Code — Omission to state the name of the person against whom the offence was committed or to specify the common object — Defects are cured by Ss. 537 and 225 — *See* *Beachcroft J*)

(24) 11 AIR 1924 C11 14 (41). 25 Cr L J or 1313 *Billinghurst v Emperor* (Charge under s 420, Penal Code should contain an allegation of the person or persons who were alleged to have been deceived and induced to use a cheque — The omission cannot however be regarded as fatal if the accused is not misled).

(16) 3 Allr 1916 Cal 189 (192) 16 Cr I Jour 497 (201) 42 Cal 937 *Investal Hara v Emperor*
(Charge under S. 4 (b) Explosive Substances Act (6 [VI] of 1908)—Omission to make mention of possession
of explosive and of intent on endan. crim. life does not vitiate charge)

(15) 2 AIR 1915 Lah 16 (19) 16 Cr L Jour 354 (357) 1915 Fm Re No 17 Cr Dalmoland v Emperor (Charge of criminal conspiracy to commit murder — Held that omission to specify in charge the date agreed upon to commit murder the places where the accused were said to have met and the persons whom they were alleged to have agreed to murder did not prejudice the accused.)

[32] 19 AIR 1932 Cal 651 (651-652) 33 Cr L Jour 771 60 Cal 201, *Kantash Chandra v Emperor* (Charge under s 292 Penal Code—It is better to indicate exactly in what respects the book is obscene—But if the accused is not prejudiced in his defence and the prosecution maintains that the whole book is obscene mere failure to mention particular passages is not sufficient reason to interfere in revision) [33] 20 AIR 1933 Cal 481 (482) 34 Cr L Jour 626 *Montajaddin v Emperor* (Registration Act (16 [XVI] of 1908) s 82—Charge not specifying abatement—No failure of justice—Accused not misled—

* *Lal v Emperor* (In pro-
complained of but the M.L.A.

(rate does not specifically mention the objectionable words in the charge the accused not being misled by the technical defect in the charge his conviction is not vitiated)

(21) 18 AIR 1931 Lah 186 (187) 32 Cr L Jour 120^o *Chint Ram v Emperor* (Opinion to state the substance of speeches in a charge under S. 124A held not to have prejudiced accused.)

(27) 14 AIR 1927 Lah 431 (43-2) 23 Cri L Jour 419 *Allah Din v Emperor* (In a charge under S 498 if the accused are not charged with knowledge that abducted woman was married one but the accused knew what they were charged with, the defect is not fatal)

Illustrations.

1 *A* is charged with the murder of *C*. A charge of abetting the murder of *C* may be added or substituted

2 *A* is charged with forging a valuable security under S 467 of the Indian Penal Code A charge of fabricating false evidence under S 193 may be added.

3. *A* is charged with receiving stolen property knowing it to be stolen During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin A charge under S 235 of the Indian Penal Code cannot be added

Synopsis

- 1 Legislative changes
- 2 Scope of the section
- 3 "Without a charge "
- 4 "With an imperfect or erroneous charge "

NOTE to the Synopsis See the Notes indicated for the following topics :

Altogether different offence See Note 2	New charge need not be related to original charge. See Note 2
Amendment of charges See Note 2	Prior dismissal by Magistrate for offence See Note 2
Charge from original evidence itself See Note 2	Quashing conviction See S 232
Charges not to be based on additional evidence See Note 2	Stages in which charges are to be amended See Note 2
New charges at re trials See Note 2	

'or' by mistake used for word "and" between two charges framed under Ss 221 and 342, Penal Code—Accused not prejudiced—*Held*, conviction in respect of both charges was not bad)
(1922) 19 AIR 1932 Cal 461 (462) 59 Cal 113 33 Cr L Jour 549, *H B Spiers v Johnuddin* (Wrong sections quoted in charge — Mistake held not to have prejudiced the accused as he knew full well what charge he had to meet)

details of the charges in one comprehensive sentence instead of stating the substance in separate sentences held not to have prejudiced accused)

of justice)

not to have caused any prejudice

1A,
ter

1. Legislative changes.

Difference between the Codes of 1861 and 1872

There was no corresponding section in the Code of 1861. This section was first enacted in the Code of 1872 as S. 416. But even under the Code of 1861 it was held that the Sessions Court had power under S. 211 (now S. 227) to amend the charge framed by the committing Magistrate¹.

Changes made in 1882

- (1) The words 'at all' which occurred after the words "without any charge" in S. 416 of the Code of 1872 were omitted.
- (2) The words "or with an imperfect or erroneous charge" were substituted for the words "or upon a charge which the Court, upon reference to the proceedings before the committing Magistrate considers improper" which occurred in the Code of 1872.
- (3) The words 'may draw up a charge' which occurred in the Code of 1872, were substituted by the words 'may frame a charge or add to or otherwise alter the charge.'²
- (4) The words requiring a copy of the new charge to be given to the accused were omitted.

Changes made in 1898

The illustrations to the section were added.

2 Scope of the section — Section 193, sub s (1) provides that except as other-

wise expressly provided by the Code or by any other law for the time being in force, no Court of Session can take cognizance of a case as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf. Similarly, under S. 194 the High Court is empowered to take cognizance of offences as a Court of original jurisdiction upon a commitment made to it in manner hereinafter provided. The present section is by way of an exception to these sections¹. It enables the High Court or the Sessions Court to amend or add to the charge on which an accused has been committed to it for trial. It also enables the High Court or the Sessions Court to frame a suitable charge in cases in which an accused has been committed without a charge. But the power is strictly limited to the cases specified in the section, viz., cases in which a person is committed for trial without a charge or with an imperfect or erroneous charge².

It is competent to the Sessions Judge to amend the charge even after the commencement of the trial (see S. 227). But it is his duty before the commencement of the trial to scrutinize the charges and to amend them if necessary under this section³. When the

Section 226 — Note 1

1. (67) 7 Buth W R Cr 8 (8) *In re Kalaram Singh*
- (70) 7 Bom H C R Cr 81 (82), *Ileg v Bapu Parbat* (Ordering new commitment on corrected charge is illegal.)
- (1864) 1 Buth W R Cr L 2 (2)
2. (81) 7 Cal L Rep 143 (143) *Empress v Poresholla Sheikh* (Case under Code of 1872—Held that the Sessions Judge had no power to expunge the charge framed by the committing Magistrate.)

Note 2

1. (15) 2 AIR 1915 Sind 50 (50-51) 16 Cr L Jour 573 (573) 9 Sind L R 37, *Doda v Emperor* (The combined effect of Ss. 226 to 231 is to confer a very wide jurisdiction upon the Court of Session.)
2. (25) 12 AIR 1925 Oudh 158 (160) 25 Cr L Jour 1162, *Surat Bahadur v Emperor* (Committing Magistrate framing charge under S. 471 Penal Code—As sanction of Court was necessary under Criminal Procedure Code Sessions Judge converting it into charge under S. 474 though charge was not imperfect in form and though offence committed by accused fell under S. 471 and not S. 474—Held that he acted without jurisdiction.)

Emperor
{Any amendment which is
rids of the section}

Sessions Judge finds the charges framed by the committing Magistrate imperfect in any way, it is his duty to amend them under this section and not acquit the accused⁴

The Sessions Judge has power under the section to "frame a charge or add to or otherwise alter the charge as the case may be" He can totally reject a charge framed by the Magistrate and substitute a new charge in its place⁵ (see illustration 1) He can also add a charge to that framed by the committing Magistrate⁶ (see illustration 2) However, an Assistant Sessions Judge, while cancelling the charge framed by the committing Magistrate and framing a new charge, is not entitled to omit framing a charge for a more serious offence, such as murder, and to frame the charge for a less serious offence, such as abduction under s 361, Penal Code, in order to acquire jurisdiction, and if he does so through a misapprehension of the evidence, he fails to exercise a proper discretion in the matter⁷

The added charge need not be related to the original charge⁸ But it is on the facts disclosed on the evidence before the committing Magistrate and on those facts alone that any action under this section can be taken⁹ Further, the section refers to a case where the

[See (92) 16 Bom 414 (426) *Queen v Vajiram* (Application for framing additional charge in respect of another offence)]

in, to amend the second charge of abetment of rape by omitting S 114 Penal Code, and by substituting in its place S 109 Penal Code — Leave to amend the charge was refused on the ground that the proposed amendment would materially alter the nature of the stage of the case

5 (82) 1882 All to have committed on charge of rape and not adultery — Sessions Judge can substitute a charge of rape) [See however (37) 66 Cal L Jour 575 (576 577) *Khair v Emperor* (Depriving accused of right to trial by jury)]

6 (16) 33 All

(15) 2 AIR 10

means a whole

gives power to add ~~many~~ counts to the charge)

(Application for inclusion of charge e.g. abetment charge is to be made to trial Court)

(84) 8 Bom 200 (210)

often

cover

think

[But see (186) 8 All 665 (667) 1886 All W N 254 *Queen Empress v Kharga* (Submitted not good law)]

7. (45) 32 AIR 1915 Cal 42 (41) ILR (1914) 1 Cal 280 46 Cr L Jour 557 219 Ind Cas 235 (DB),

d charge need not

S 147 and S 148 altered to one under S 390 read with S 397 Penal Code)

[But see (04) 1 Cr L Jour 794 (797) 32 Cal 22 8 Cal W N 741 *R v ...*]

charge is defective at the time of commitment. Hence, an amendment or addition cannot be made under this section on the basis of additional evidence taken by the committing Magistrate under S 219 after commitment¹¹

In an offence involving several persons some of them are first committed to the sessions the others having absconded. But before the trial in the Sessions Court commences, the remaining persons are also arrested and committed to the same Sessions Court by a different Magistrate for the same offence committed in the course of the same transaction. In such a case it is open to the Court of Session to club together the separate charges framed against the two sets of accused and frame a single charge against them under this section so as to try them jointly under S 239 (a). The fact that in framing a single charge against all the accused the Court of Session would be acting on evidence taken in the course of two different commitment enquiries is no bar to such a course¹². But where the accused are tried jointly without the charge being re framed under this section but after the separate charges are read out and explained to the accused the omission to frame a single charge is only an irregularity which is curable under S 537¹³.

The power of the Sessions Judge to frame a charge under this section is not fettered by the fact that a complaint in respect of the offence for which he proposes to frame a charge has been dismissed by the Magistrate¹⁴. But he cannot substitute a charge of adultery for one of rape framed by the Magistrate the reason being that under S 193 a charge of adultery cannot be taken cognizance of by any Court except upon a complaint of the husband or other persons mentioned therein¹⁵ (Compare S 230). The Sessions Judge has no power under the section to order the Magistrate to re draw the charges¹⁶.

Where a case was remanded to a Court of Session by the High Court for trial on certain charges it was held that the High Court did not intend to fetter the discretion of the Sessions Judge to amend the charges in any way he might think necessary¹⁸.

The fact that additional charges are framed by the Sessions Court does not make the questions at issue in the sessions trial and in the preliminary inquiry substantially different and under S 33 of the Evidence Act the evidence of witnesses who gave evidence in the preliminary inquiry and subsequently died may be admitted in the sessions trial¹⁷.

The section gives the widest possible powers to the Clerk of the Crown to revise or re-draft charges but he has no power to withdraw a charge on the ground that there is no evidence to go to the jury and that therefore the charge would fail. That is a judicial act which can only be performed by the Court¹⁸ (See S 273).

3 "Without a charge" — This section applies *inter alia* to cases in which a person is committed for trial without a charge. For instance a commitment under S 437 or S 506 may be made without framing a charge¹. In such cases the Court of Session may

(81) 3 Mad 351 (353). 2 Weir 269. *Rama Varma Raja v Queen*.

[See also (31) 18 AIR 1931 Cal 524 (526). 32 Cri L Jour 1135. *Abdul Aziz Shah v Emperor* (Illustrations to the section show that the only new charges or additions or alterations which may be made are those which can be supported by the evidence which is relevant to the charge already made)]

10 (31) 20 AIR 1933 Mad 247 (250). 31 Cri L Jour 278. *In re Elogi Peddy Ankamma*. Also see S 219 Note 2.

11 (45) 32 AIR 1945 Lah 236 (233, 239) (FB). *Sardara Qasim v Emperor*.

12 (45) 32 AIR 1945 Lah 246 (233) (FB). *Sardara Qasim v Emperor*.

13 (92) 16 Bom 414 (424, 427). *Queen v Vaji Ram*.

14 (02) 29 Cal 415 (416). 6 Cal W N 677. *Chemon Gara v Emperor* (Husband's appearance as a witness for prosecution cannot be regarded as amounting to complaint for adultery).

Also see S 227 Note 4.

15 (76) 25 Bom W R Cr 17 (17). *In re Ramdhone Acharye*.

16 (01) 1 Cri L Jour 794 (796). 32 Cal 22. 8 Cal W N 784. *Barendra Lal v Emperor*.

17 (81) 7 Cal 42 (44). 8 Cal L Rep 273. *Empress v Bochia Mohato*.

18 (42) 29 AIR 1942 Bom 212 (214). 43 Cri L Jour 773. 1LR (1919) Dom 534. 201 Ind Cas 735. *Emperor v Hussaini Vilayatalli*.

Note 3

1 (01) 1 Cri L Jour 275 (277). 27 Mid 54. 2 Weir 227. *In re Kalagala Bapiah*.

itself frame a charge. It has been held that the expression applies not only to cases in which no charge has been framed *at all* by the committing Magistrate but also to cases in which a charge has been framed by him but there is no charge in respect of the offence which the *Sessions Judge* may think the prisoner ought to be tried for.²

4 "With an imperfect or erroneous charge" — The word 'imperfect' implies defect in form.¹ The expression covers an imperfection due to a misjoinder of charges.³ In the undermentioned case³ it was held by the Allahabad High Court that the fact that the evidence recorded by the committing Magistrate is such as to justify an additional head of charge being included does not make the charge as framed imperfect or erroneous and that the Sessions Court has no power under the section to add a charge. But this view, it is submitted, is not correct. See under Note 2.

227.* (1) Any Court may alter or add to any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the jury is returned or the opinions of the assessors are expressed.

(2) Every such alteration or addition shall be read and explained to the accused.

Synopsis

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| 1 Legislative changes | 8 Application for alteration of charges |
| 2 Scope of the section | 9 Amendment—How made |
| 3 Or add to | 10 Examination of accused after amendment |
| 4 'May'—Discretion of Court | 11 Sub section (2) |
| 5 Record of reasons | 12 Appeal |
| 6 Time for alteration of or addition to charge | 13 Revision |
| 7 Amendment of charge after remand | 14 Accused when can be convicted without charge. See S 237 |
| 7a Amendment by Court of Session | |

NOTE to the Synopsis. See the Notes indicated for the following topics.

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| 'Alter' whether includes withdrawal. See Notes 2 and 4 | Curing illegality. See Note 4 |
| Alteration after compromise petition. See Note 4 | Limits of power of amendment. See Note 4 |
| Alteration after verdict. See Note 6 | Omission to read and explain effect of Section 11 |
| Amendment should not prejudice the accused. See Note 4 | Powers of Sessions Court. See Note 2 |

1 Legislative changes — The words 'or add to' in sub s (1) were for the first time introduced in the present Code.

2 Scope of the section — Section 226 applies to *Sessions Courts and High Courts* and is intended to apply to alterations or additions to the charge at the *commencement of the trial*. This section applies to *all Courts* and is intended to apply to alterations or additions to the charge *during the course of the trial*.¹ In either case however, the alterations or additions must be based on the facts disclosed by the evidence re-

* Code of 1882 S 227 — Same except the addition noted in Note 1
1872 Ss 444 and 445, 1861 S 244

- 2 (81) 8 Bom 200 (210) *Queen-Empress v Appa Subhana*
[But see (86) 8 All 66 (667) 1886 All W N 254 *Queen-Empress v Klarga*]
Note 4

- 1 (25) 12 AIR 1925 Oudh 158 (160) 25 Cr L Jour 1182 *Surat Baladur v Emperor*
2 (87) 8 Cal 400 (453) 10 Cal L Rep 421 *Empress v Sreenath Kur*
3 (86) 8 All 665 (667) 1886 All W N 254 *Queen-Empress v Aharga*

- Section 227 — Note 2
1 (33) 20 AIR 1933 Mad 247 (250) 34 Cr L Jour 278 *In re Bhogi Redde Anilamma* (Section 227 read with S 237 can only apply after some evidence has been taken at the trial)

*recorded*² the materials on which the Court acts under S 226 being the evidence recorded before the committing Magistrate and the one on which the Court acts under this section being the evidence *recorded before itself*³

There are certain cases in which it is not necessary to amend the charge and the accused can be convicted of an offence though he was not charged with it⁴ See Ss 237 and 2 8.

The word *alter* in the section includes a power to *withdraw* a charge⁵

3 "Or add to"—These words were absent in the corresponding sections of the old Codes and there was a conflict of opinions as to whether the word *alter* included the addition of a new charge¹ It is now clear that a new charge may be added to the original charge even if it be unconnected in any way with the latter² In the latter case however, the trial cannot proceed forthwith but the Court should proceed under S 229

4 "May"—Discretion of Court—The word *may* shows that the Court has a large discretion to alter or add to a charge framed under the Code¹ In fact the Magistrate must be ever ready, as the facts of the case are disclosed to either alter or add to the charge or to refer the case under S 317² It often happens that in the course of the

2 See foot note (3)

3 (15) 2 AIR 1915 Snd 50 (51) 16 Cri L Jour 573 9 Snd L R 37 *Dodo v Emperor*

4 (30) 27 AIR 1935 All 935 (937) 37 Cri L Jour 217 *Samuel John v Emperor* (Case under S 239 (2) Criminal Procedure Code)

5 (90) 1890 All W N 178 (178) *Pam Das v Parbati*

Also see S 227 Note 4

Note 3

1 (91) 8 Bom 900 (910 911) *Queen Empress v Appa Subhana* (New charge cannot be framed)
(79) 1879 Pun Ho No 91 Cr p 60 (64) *Empress v Sultans* (Alteration does not include addition)
(71) 3 N W P H C B 337 (337 338) *Queen v Waris Ali* (Cannot add an entirely new charge which is not even cognate to the charge on which the accused was committed)

(91) 21 Cal 97 (103) *Empress v Sukee Raur* (In a case committed under S 379 I P C Court refused to add a charge of abetment of rape on the evidence recorded in the Sessions Court)

(87) 10 All 58 (60) 1887 All W N 271 *Empress v Wazir Jan* (New charges may be added)

(87) 9 All 595 (597) 1887 All W N 155 *Queen Empress v Gordon* (Alter includes addition of new charge)

(97-01) 1 Upp Bur Rul 64 (65) *Nga O v Queen Empress* (Cancelling of charge under one section and substitution of another not warranted by law)

[See also (97) 10 C P L R Cr 13 (14) *Empress v Dalaram* (Alter does not include expunging a charge and framing another in its place)]

2 (15) 2 AIR 1915 Snd 50 (51) 16 Cri L Jour 573 9 Snd L R 37 *Dodo v Emperor*

(24) 11 AIR 1924 Cal 625 (626) 26 Cri L Jour 5 *Hassanulla Sheikh v Emperor*

[But see (27) 14 AIR 1927 Sind 29 (34) 21 Snd L R 55 27 Cri L Jour 1917 *Emperor v Stewart* (The doubt expressed in this case based on J Mad 351 a decision under the old Code does not seem to have any basis)]

Note 4

1 See the following cases

(37) 21 AIR 1937 Bom 260 (261) ILR (1937) Bom 369 38 Cri L Jour 850 *Emperor v Yeshwant Vithu* (There is nothing in the Code or in the Bombay High Court Rules that limits the powers of the

Emperor (A charge under Section 122 Penal Code)

(12) 4 B

(93) 17

(31) 18

Section 341 I P C can be converted to one under Ss 341 and 508 I P C)

(14) 1 AIR 1914 Low Bur 65 (123) 15 Cri L Jour 80 7 Low Bur Rul 143 (FB) *G S Clifford v Emperor* (A charge of cheating by issuing false balance sheet was altered by adding words regarding

an v Suppan
the Prosecutor v Thavasilind Theras
al Code)

evidence an offence more aggravated than the one complained of is discovered, and in such cases it is the duty of the Court to charge the accused with the more aggravated offence³. The discretion is however, a *judicial* one and must not be exercised *arbitrarily*.

The powers of the Court under this section are very wide and can be exercised even if the alteration of the charge leads necessarily to the discharge of the jury which has already been sworn in and empanelled⁴.

The section does not warrant the striking out of a charge for the purpose of *curing an illegality which had already been committed* and does not enable the Court to proceed on those charges only that have been legally joined⁵. Thus where the accused was charged with more than three offences committed in the course of a year, it was held that the trial was in contravention of S 234 and that the illegality could not be cured by striking out the charges so as to reduce the number to three⁶.

Where however a charge is *properly* framed but it is found after taking evidence that it is groundless it has been held that the Court is not prevented from striking out such charge⁷.

The alteration or addition of a charge must be for an offence made out *by the evidence recorded in the course of the trial before the Court*⁸. In *Brendra Lal Bhaduri v Emperor*⁹ it was observed

The Sessions Court is not a Court of original jurisdiction and, though vested with large powers of amending and adding to charges can only do so with reference

(24) 11 AIR 1904 Lah 718 (718) 26 Cr L Jour 490 *Gopal v Ptuman Singh* (Case under S 383 Penal Code of kidnapping from lawful guardianship a minor girl — On finding that the girl was not under 16 years of age Magistrate must examine and decide the question whether the accused could be charged with—

3 (29) 16

4 (37) 24

Vithu

v Veshwant

5 (14) 31 AIR 1914 Bom 306 (309 310) 11 LR (1914) Bom 728 (DB) *Keshavlal Tribhuvandas v Emperor* (07) 5 Cr L Jour 94 (95 96) 29 Mad 569 1 Mad L Tim 409 *Manavala Chetty v Emperor* (Accused charged and tried under four offences—Magistrate striking out one charge)

(25) 10 AIR 1905 Mad 1065 (1066) 26 Cr L Jour 1618 *Krishnamurthi Aiyar v Narayanaswami Aiyar* (Charge under Ss 332 and 304 Penal Code—Discovery at the time of indictment of the offences de)

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v Md

6 (44) 31 AIR 1914 Bom 306 (310) 11 LR (1914) Bom 728 (DB) *Keshavlal Tribhuvandas v Emperor* (22) 9 AIR 1922 Cal 401 (401) 49 Cal 555 24 Cr L Jour 86 *Chetty v Emperor* (26) 13 AIR 1926 Lah 193 (194) 27 Cr L Jour 793 *Fitzmaurice v Emperor*

Also see S 234 Note 7

7 (90) 10 AH 551 (552) 1890 AH WN 178 *Dwarika Lal v Maladeo Bai* (Worl alter includes with

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a power to

(29) 16 AIR 1929 Pat 270 (284) 8 Pat 289 30 Cr L Jour 675 *Kunja Subhuddhi v Emperor* (Once a charge has been framed it should not be dropped until the conclusion of the trial unless on the face of it it is wholly inappropriate or the trial is open to attack on the ground of misjoinder or multifariousness of charges)]

Also see Note 7

8 (29) 16 AIR 1929 Sind 250 (251 252) 30 Cr L Jour 1121 *Walid Dux v Emperor* (Fact that prosecutor might have examined witness is no ground to add charge of conspiracy to a charge under S 314 Penal Code)

(25) 12 AIR 1925 Cal 579 (580) 26 Cr L Jour 302 *Baroo Sardar v A* (Summons to accused

to the immediate subject of the prosecution and committal and not with regard to a matter not covered by the indictment"

See also the undermentioned cases.¹⁰

Where an offence cannot be taken cognizance of without a complaint as required by s. 175 and 179 of the Code, the Court cannot under s. 238 convict a person for such offence where there is no such complaint. It follows that in the absence of a complaint a charge cannot be altered into a charge for an offence which requires such complaint.¹¹

It will not be a sound exercise of discretion under this section to add a serious charge after the defence evidence is heard and proceed with the case without allowing further time to the accused.¹² Again where the charge is of a compoundable offence and the parties file a compromise the Court should stay further proceedings and not frame charges subsequent to the application for leave to compromise.¹³

5 Record of reasons.—Where a Sessions Judge altered a charge under s. 395, Penal Code to one of robbery, without assigning any reason it was held by the High Court of Calcutta that this should not have been done.¹

6 Time for alteration of or addition to charge—A charge can be amended or altered or added to at any time—

(1) before judgment is pronounced and

(2) in trials before the Court of Session or High Court before the verdict of the jury is returned or the opinion of the assessors is expressed.¹

10 (20) 7 AIR 1920 Mad 131 (132) 21 Cr L Jour 57 *Muthu Goundan v Emperor*
(10) 11 Cr L Jour 131 (133) 4 Ind Cas 993 (Lah) *Shah Din v Emperor* (Persons committed for murder of A—Sessions Judge acquitting them cannot add and convict on a charge of causing grievous hurt to B)

(69) 5 Mad H C R App 211 (xiv)

11 (02) 29 Cal 415 (416) 6 Cal W N 677 *Chemon Garo v Emperor* (Original charge of rape—A charge of adultery was added—Held, addition was illegal)

[See also (25) 12 AIR 1925 Lah 631 (632) 6 Lah 373 27 Cr L Jour 769 *Mt Naurati v Emperor* (Condition of Sect on 195 satisfied—Charge can be added)]

Also see S 226 Note 2

12 (00) 6 Cal W N 72 (76) *King Emperor v Mathura Thakur*

(07) 5 Cr L Jour 164 (167) 31 Bom 218 *Emperor v Isap Mahmud*

(09) 9 Cr L Jour 226 (231) 33 Bom 221 2 Ind Cas 277 *In re Bal Gangadhar Tilak* (Addition of a charge of previous conviction on after the close of the case is not contemplated by the Code)

[See also (71) 3 N W P H C R 271 (272) *Queen v Chotey Lal*]

13 (14) 1 AIR 1914 Lah 561 (563) 16 Cr L Jour 81 (82) 1914 Lun Re No 29 Cr (TD) *Hasta v Emperor*

(39) 3 Cal W N 518 (550) *Mahomed Ismail v Faisudda*

Note 5

1 (10) 13 Cr I Jour 127 (129) 13 Ind Cas 783 (Cal) *Paimullah v Emperor*

Note 6

1 (06) 13 AIR 1920 Oudh 161 (163) 26 Cr L Jour 1602 *Bishambhar Nath v Emperor*

(38) 25 AIR 1938 Oudh 247 (248) 39 Cr L Jour 819 *Gajju v Emperor* (Magistrate to whom case is transferred can add to charge)

(37) 24 AIR 1937 Sind I (2) 30 Sind L R 391 38 Cr L Jour 374 *Emperor v Md Ismail* (Section not confined in its operation to any particular stage of the case before the pronouncement of judgment by Court or in turn of verdict by jury)

(41) 18 AIR 1902

756 *Subramania Aiyar v Emperor*

Balsh

Williams

narasu

No power to alter after verdict)

1 (455) 1916 Pun Re No 33 Cr *Ila bans v Emperor*.

(1864) 1 South W R Cr 40 (10 41) *Queen v Dyce Bhola* (Do)

[See however (07) 5 Cr I Jour 91 (95 96) 29 Mad 569 1 Mad L Tim 409 *Manavala Chetty v Emperor* (Accused charged with four offences. After close of case and before judgment Magistrate

The words 'return of the verdict in the section mean the return of the final verdict which the Judge is finally bound to record² The Judge has a discretion under s 303 to question the jury as to the grounds of their verdict and no verdict can be said to be returned and finally recorded until the last of the questions has been answered³ See also s 301 Note 3

7 Amendment of charge after remand — It was held in the undermentioned cases⁴ that the Court could after remand by the superior Court amend the charge, and that the remand order could not be intended to fetter this power

7a Amendment by Court of Session — A Sessions Court is not a Court of original jurisdiction and though it is vested with large powers for amending and adding to charges it can only do so with reference to the immediate subject of the prosecution and committal and not with regard to a matter not covered by the indictment¹ See also the undermentioned cases² See also Notes on s 296

8 Application for alteration of charges — An application for the alteration of or addition to the charge should be made as early as possible¹ and in jury cases before the jury is chosen² Orders on such applications should be passed at the same time and not be postponed³ The Court may refuse to entertain an application for amendment of a charge if made at a very late stage of the case⁴ It may also be noted that in determining whether any error or omission in a charge has occasioned a failure of justice within the meaning of s 587, the Court should have regard to the fact whether the objection could or should have been taken at an earlier stage in the proceedings

9 Amendment—How made — Amendments in a charge ought to be made formally, and should appear on the face of the record¹ When a Magistrate amends a charge he should not write over the original charge but should leave it on the file for reference if necessary and should write the new charge separately and correctly date it²

10 Examination of accused after amendment — It is not incumbent on the Court to re-examine the accused after the alteration of the charge under this section since the trial does not commence *de novo* so that if the accused has already been called

striking out charge relating to one offence—Held Magistrate could not at that stage strike out the charge in respect of one offence in order to cure an illegality which had already been committed¹)

2 (84) 8 Bom 200 (211) *Queen-Empress v Appa Subhana*

(74) 21 Suth W R Cr 1 (9) *Queen v Sustiram Mandal*

3 See cases cited in foot note (2)

Note 7

1 (04) 1 Cri L Jour 794 (796) 32 Cal 2^d 8 Cal W N 781 *Birendra Lal v Emperor*

(99) 26 Cal 560 (563) *Queen-Empress v Mata Lal Lahari*

Note 7a

1 (04) 1 Cri L Jour 794 (797) 32 Cal 22 8 Cal W N 781 *Birendra Lal v Emperor*

Also see Note 4

2 (45) 32 AIR 1945 Mad 421 (425) *In re Thirupulu*

to hold further inquiry into more serious offence than the closed in course of examination of witness during trial—C

(26) 13 AIR 1906 Pat 253 (254) 5 Pat 238 27 Cri L Jour 512 *Hamsunder Isser v Emperor* (It is not a proper exercise of discretion to withdraw the charge which the committing Magistrate thought to be proved and put the accused under a disadvantage by substituting another (triable with aid of assessors) so that he might be deprived of the right of trial by jury)

Note 8

1 (33) 1 AIR 1914 1915 Bom 414 (16) *Empress v Vajiram*

2 (186) 1 AIR 1915 Bom 475 (476) 30 Cri L Jour 191 *Emperor v Moha ilal Aditram*

3 (24) 15 AIR 1903 Bom 475 (476) 30 Cri L Jour 191 *Emperor v Moha ilal Aditram*

Note 9

1 (68) 9 Suth W R Cr 14 (15) *Queen v Fejdar Roy*

2 (10) 2 AIR 1915 Low Bur 102 (103) 16 Cri L Jour 2 (3) *Nga Pan Hlaing v Emperor*

on to enter on his defence there is no further obligation to examine him,¹ although some of the witnesses have been recalled under S 231 subsequent to the alteration of the charge.²

11. Sub section (2) — For similar provisions requiring the charge to be read and explained, see Ss. 210, 235 and 274.

This section deals with the alteration and addition of charges. The alterations must be read and explained to the accused who must know what he is charged with and what offence he has to answer. If the alteration is not read and explained to the accused and he is prejudiced in his defence, the conviction is illegal.¹ But where the accused was defended by a counsel who was asked whether he wanted a new trial and the latter did not want it, it was held that the accused was not prejudiced by the omission of the Judge to read and explain the alteration in the charge.² Since the object of the provision is that the accused should have notice of any charge that he has to meet, he should not be called upon to meet additional charges without notice nor should he be convicted under charges different from those which he was called upon to meet.³

12. Appeal. — As to whether it is open to the Government to prefer an appeal against an order of the Sessions Judge refusing to amend or add new charges see S 417, Note 7.

13. Revision — As has been seen already the section confers a discretion on the Court to allow amendment of a charge. A Court of appeal or revision would always be slow to interfere with the exercise of such discretion unless it has been exercised perversely or arbitrarily. Thus where the trial Court refused to alter the charge on the ground that the re-casting of charges would embarrass the jury and possibly prejudice the accused in his trial, it was held that it could not be said that such reason was capricious or involved any disregard of legal principles and that therefore the High Court would refuse to interfere.

Note 10

- 1 (23) 10 AIR 1923 Mad 609 (615) 46 Mad 419 24 Cri L Jour 547 (FD) *Varisai Rowther v Emperor*
 (22) 9 AIR 1922 Pat 393 (394) 1 Pat 54 23 Cri L Jour 146 *Shamlat v Emperor*
 2 (22) 9 AIR 1922 Pat 393 (394) 1 Pat 54 23 Cri L Jour 146 *Shamlat v Emperor*

Note 11

- 1 (26) 13 AIR 1926 All 227 (227) 27 Cri L Jour 152 *Raghunath Kandu v Emperor* (A Court can-

Bengal Act 7 [VII]

of 1876))

1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 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2741, 2742, 2743, 2744, 2745, 2746, 2747, 2748, 2749, 2750, 2751, 2752, 2753, 2754, 2755, 2756, 2757, 2758, 2759, 2760, 2761, 2762, 2763, 2764, 2765, 2766, 2767, 2768, 2769, 2770, 2771, 2772, 2773, 2774, 2775, 2776, 2777, 2778, 2779, 2780, 2781, 2782, 2783, 2784, 2785, 2786, 2787, 2788, 2789, 2790, 2791, 2792, 2793, 2794, 2795, 2796, 2797, 2798, 2799, 2800, 2801, 2802, 2803, 2804, 2805, 2806, 2807, 2808, 2809, 2810, 2811, 2812, 2813, 2814, 2815, 2816, 2817, 2818, 2819, 2820, 2821, 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 3062, 3063, 3064, 3065, 3066, 3067, 3068, 3069, 3070, 3071, 3072, 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3571, 3572, 3573, 3574, 3575, 3576, 3577, 3578, 3579, 3580, 3581, 3582, 3583, 3584, 3585, 3586, 3587, 3588, 3589, 3590, 3591, 3592, 3593, 3594, 3595, 3596, 3597, 3598, 3599, 3600, 3601, 3602, 3603, 3604, 3605, 3606, 3607, 3608, 3609, 3610, 3611, 3612, 3613, 3614, 3615, 3616, 3617, 3618, 3619, 3620, 3621, 3622, 3623, 3624, 3625, 3626, 3627, 3628, 3629, 3630, 3631, 3632, 3633, 3634, 3635, 3636, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644, 3645, 3646, 3647, 3648, 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, 3659, 3660, 3661, 3662, 3663, 3664, 3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, 3673, 3674, 3675, 3676, 3677, 3678, 3679, 3680, 3681, 3682, 3683, 3684, 3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694, 3695, 3696, 3697, 3698, 3699, 3700, 3701, 3702, 3703, 3704, 3705, 3706, 3707, 3708, 3709, 3710, 3711, 3712, 3713, 3714, 3715, 3716, 3717, 3718, 3719, 3720, 3721, 3722, 3723, 3724, 3725, 3726, 3727, 3728, 3729, 3730, 3731, 3732, 3733, 3734, 3735, 3736, 3737, 3738, 3739, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3747, 3748, 3749, 3750, 3751, 3752, 3753, 3754, 3755, 3756, 3757, 3758, 3759, 3760, 3761, 3762, 3763, 3764, 3765, 3766, 3767, 3768, 3769, 3770, 3771, 3772, 3773, 377

The words "return of the verdict" in the section mean the return of the *final* verdict which the Judge is finally bound to record.² The Judge has a discretion under S 803 to question the jury as to the grounds of their verdict and no verdict can be said to be returned and finally recorded until the last of the questions has been answered.³ See also S. 301, Note 3

7. Amendment of charge after remand. — It was held in the undermentioned cases¹ that the Court could, after remand by the superior Court, amend the charge, and that the remand order could not be intended to fetter this power.

7a. Amendment by Court of Session. — A Sessions Court is not a Court of original jurisdiction, and though it is vested with large powers for amending and adding to charges, it can only do so with reference to the immediate subject of the prosecution and committal and not with regard to a matter not covered by the indictment.¹ See also the undermentioned cases.² See also Notes on S 226.

8. Application for alteration of charges — An application for the alteration of or addition to the charge should be made as early as possible¹ and, in jury cases, before the jury is chosen.² Orders on such applications should be passed at the same time and not be postponed.³ The Court may refuse to entertain an application for amendment of a charge if made at a very late stage of the case.⁴ It may also be noted that in determining whether any error or omission in a charge has occasioned a failure of justice within the meaning of S 537, the Court should have regard to the fact whether the objection could or should have been taken at an earlier stage in the proceedings.

9. Amendment—How made. — Amendments in a charge ought to be made formally, and should appear on the face of the record.¹ When a Magistrate amends a charge, he should not write over the original charge but should leave it on the file for reference if necessary and should write the new charge separately and correctly date it.²

10. Examination of accused after amendment. — It is not incumbent on the Court to re-examine the accused after the alteration of the charge under this section since the trial does not commence *de novo* so that if the accused has already been called

striking out charge relating to one offence—*Held* Magistrate could not at that stage strike out the charge in respect of one offence in order to cure an illegality which had already been committed.)

2 (184) 8 Bom 200 (211) *Queen Empress v. Appa Subhara*.

(74) 21 Suth W R Cr 1 (2), *Queen v. Sustaram Mandal*.

3 See cases cited in foot note (2)

Note 7

1. (104) 1 Cri L Jour 794 (796) : 32 Cal 22 8 Cal W N 784, *Birendra Lal v. Emperor*.

(79) 26 Cal 560 (563), *Queen-Empress v. Mats Lal Lakura*.

Note 7a

1. (84) 1 Cri L Jour 794 (797) : 32 Cal 22 8 Cal W N 784, *Birendra Lal v. Emperor*.

Also see Note 4

2 (45) 32 AIR 1945 Mad 424 (425), *In re Thirupetu* (Order of Sessions Judge directing Magistrate to hold further inquiry into more serious offence than that for which accused was charged)

(26) 15 Suth W R Cr 1 (2), *Queen v. Sustaram Mandal*.
to be proven and put the accused under disadvantage by substituting another (triable with aid of assessors) so that he might be deprived of the right of trial by jury)

Note 8

1. (104) 1 Cri L Jour 794 (796) : 32 Cal 22 8 Cal W N 784, *Birendra Lal v. Emperor*.
2. (104) 1 Cri L Jour 794 (797) : 32 Cal 22 8 Cal W N 784, *Birendra Lal v. Emperor*.
3. (104) 1 Cri L Jour 794 (797) : 32 Cal 22 8 Cal W N 784, *Birendra Lal v. Emperor*.
4. (104) 1 Cri L Jour 794 (797) : 32 Cal 22 8 Cal W N 784, *Birendra Lal v. Emperor*.
(Application)

Note 9

1 (68) 9 Suth W R Cr 14 (15), *Queen v. Frejdar Roy*

2. (15) 2 AIR 1915 Low Dur 102 (103) : 16 Cri L Jour 2 (3), *Nga Pan Hlaing v. Emperor*.

on to enter on his defence there is no further obligation to examine him,¹ although some of the witnesses have been recalled under S 231 subsequent to the alteration of the charge²

11. Sub section (2) — For similar provisions requiring the charge to be read and explained, see ss. 210, 255 and 271

This section deals with the alteration and addition of charges. The alterations must be read and explained to the accused who must know what he is charged with and what offence he has to answer. If the alteration is not read and explained to the accused and he is prejudiced in his defence, the conviction is illegal.¹ But where the accused was defended by a counsel who was asked whether he wanted a new trial and the latter did not want it, it was held that the accused was not prejudiced by the omission of the Judge to read and explain the alteration in the charge.² Since the object of the provision is that the accused should have notice of any charge that he has to meet, he should not be called upon to meet additional charges without notice nor should he be convicted under charges different from those which he was called upon to meet.³

12. Appeal. — As to whether it is open to the Government to prefer an appeal against an order of the Sessions Judge refusing to amend or add new charges see S 417, Note 7

13. Revision — As has been seen already, the section confers a discretion on the Court to allow amendment of a charge. A Court of appeal or revision would always be slow to interfere with the exercise of such discretion unless it has been exercised perversely or arbitrarily. Thus where the trial Court refused to alter the charge on the ground that the re-casting of charges would embarrass the jury and possibly prejudice the accused in his trial, it was held that it could not be said that such reason was capricious or involved any disregard of legal principles and that therefore the High Court would refuse to interfere

Note 10

- 1 (23) 10 AIR 1923 Mad 609 (615) 46 Mad 449 24 Cri L Jour 547 (TB) *Varisat Fowther v Emperor*
 (23) 9 AIR 1922 Pat 393 (394) 1 Pat 51 23 Cri L Jour 146 *Shamlal v Emperor*
 2 (22) 9 AIR 1922 1st 393 (394) 1 Pat 51 23 Cri L Jour 146 *Shamlal v Emperor*

Note 11

- 1 (26) 13 AIR 1926 All 227 (227) 27 Cri L Jour 153 *Raghunath Kandu v Emperor* (A Court can not convict an accused person of an offence of which he has not been told anything)
 (75) 23 Suth W R Cr 59 (59) *Queen v Salamat Ali*
 2 (84) 6 Bom 200 (212) *Queen Empress v Appa Subhana*
 3 (82) 6 Cal 195 (197) *Empress v Padomath Shaha* (Case under Excise Act (Bengal Act 7 [VII] of 1878))

¹ *Fonseca*

² (Person charged of theft cannot be convicted)

Jour 190 *Mahomed Hossein v Emperor*

(Notice must be given of the amendment of charge as to the intention with which the offence of house-

thief was

confirmed

(Conviction under S 30 (a) of Burma Excise Act cannot be altered to one under S 37 if accused is not called to answer)

(23) 24 Cri L Jour 119 (119, 120) 71 Ind Cas 247 (Cal) *Hajari v Emperor* (There cannot be a conviction under Section 456 Penal Code where the charge was only under Section 457)
 (21) 8 AIR 1921 Pat 436 (497) 22 Cri L Jour 485 *Mayadhar Mahant v Danardan Kund* (Conviction of theft cannot be changed by appellate Court into one of assault on theft not being proved.)
 [See (32) 19 AIR 1932 Pat 215 (216) 33 Cri L Jour 864 11 Pat 523, *Ghyasuddin Ahmad v Emperor* (The Court should see if the accused has notice)
 (1900) 3 Oudh Cas 314 (315, 316) *Girnar v Empress* (Person charged and convicted of a non-compoundable offence cannot in appeal be convicted of a compoundable offence without giving him an opportunity to compound the offence)]

with such discretion in appeal or revision¹ Where an alteration in the charges occasions a failure of justice, the Court of revision may interfere²

14 Accused, when can be convicted without charge — See S 237

228.⁴ If the charge framed or alteration or addition made under section 226 or section 227 is such that proceeding immediately after alteration immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

1. Scope of the section.—Sections 228 to 231 provide that the accused or the prosecution shall not be embarrassed or prejudiced by the alteration of the charge under the previous section¹ This section provides that if the amendment of the charge is of such a nature that proceeding immediately with the case is not likely to prejudice the prosecution or the defence, the trial may be proceeded with immediately For instance, where the amended charge is closely related to the original charge, there is no objection to proceeding with the trial immediately² In such a case, the section provides that the trial may be proceeded with 'as if the new or altered charge had been the original charge' Hence, where originally different charges were laid against the two accused in a case and subsequently the charges were amended so that the two accused were charged with the same offence, it was held that the two accused could be said to be tried for the same offence within S 30 of the Evidence Act and that, under that section, the confession of one of the co accused could be taken into consideration against the other³

Where the amended charge merely repeats in more appropriate words the substance of the original charge, no question of prejudice to the accused can arise⁴

229.[†] If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary

1 Scope of the section — The previous section provides for the procedure to be followed when the amendment of a charge is of such a nature that proceeding with the

* Code of 1882 S 228 — The words 'or addition' were inserted after the word 'alteration' in 1898 Otherwise the section was the same

Code of 1872 S 447 and Code of 1861 S. 245 — Materially the same

† Code of 1882 S 229 — The words 'or added' were inserted after the word 'altered' in 1898 Otherwise the section was the same

1672 S 448, 1861 S 246

Note 13

1. (23) 14 AIR 1927 Sind 23 (30 35) 21 Sind L R 55 27 Cri L Jour 1217, *Emperor v Stewart*
2 (31) 19 AIR 1931 Mad 439 (410) 32 Cri L Jour 756 *Subramania Ayyar v Emperor*

Section 228 — Note 1

- 1 (37) 21 AIR 1937 Sind 1 (2) 30 Sind L R 391 38 Cri L Jour 321, *Emperor v Muhammad Ismail*
2 (74) 11 Bom H C R 278 (279 280) *Peg v Gobind Dabhi Raul* (Joint trial—A for murder, B against A altered to abetment of

2 .1
4

11 AIR 1931 *Lucanmanas v Emperor*

38 Cri L Jour 471 212 Ind Cas 56 (FB),

trial immediately will not prejudice the accused or the prosecution. This section provides for the procedure to be followed in cases in which the amendment of the charge is of such a nature that proceeding immediately with the trial of the case will prejudice the prosecution or the accused. It provides that in such a case the trial should be adjourned or a retrial should be held¹. Such retrial can be directed by the trying Court itself and there is no need to refer the case to the High Court for this purpose². Where it is doubtful whether proceeding immediately with the trial will prejudice the accused the Court must lean in favour of holding that such procedure will prejudice the accused³. Where the accused has not been given a proper opportunity of defending himself against the altered charge the proceedings can be set aside and a retrial ordered⁴.

230. If the offence stated in the new or altered or added charge

is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded

1 Scope of the section — There are some cases in which before an offence can be taken cognizance of by a Court it is necessary to obtain the sanction of the Provincial Government or of some other authority (See for instance ss 196 196A and 197). Hence where a charge is amended or a new charge is framed and the new or altered charge relates to an offence for the prosecution of which previous sanction is necessary the trial cannot be proceeded with till such sanction is obtained¹. But if sanction has already been obtained for a prosecution on the same facts as those on which the new or altered charge is founded fresh sanction is not necessary². If however the facts on which

* Code of 1882 S 230 — The words or added were inserted after the word altered in 1898. Otherwise the section was the same

1872 S 430, 1861 ~ Nil

Section 229 — Note 1

- 1 (1865) 3 Suth W R Cr 40 (41) *Queen v Mahomed Elim* (Charge of culpable homicide not amounting to murder—Proof of offence of murder—Retrial ordered after amending the charge)
- (02) 6 Cal W N 72 (76) *Emperor v Mathura Thakur* (Grave charge of dacoity added at a late stage of the trial after conclusion of the case for defence and trial continued without adjournment)
- 2 (37) 24 AIR 1937 Sind 1 (2) 30 Sind L R 391 38 Cri L Jour 324 *Emperor v Muhammad Ismail* (Where evidence relating to six charges has gone on the record while there should be evidence only as to three the Magistrate will be exercising a wise and just discretion in directing a new trial under S 229)
- [See also (38) 25 AIR 1938 Cal 258 (261) 1 L R (1938) 1 Cal 588 39 Cri L Jour 596 *Akhil Bandhu Raj v Emperor*]
- 3 (69) 6 Bom H C R Cr Cas 76 (81) *Reg v Corundas Haridas* (Case bearing on S 1 of Criminal Law Amendment Act 18 [XVIII] of 1862)
- 4 (39) 1893 All W N 39 (40) *Queen Empress v Puran* (Alternative charge under second part of S 193 Penal Code)

Section 230 — Note 1

- 1 (23) 10 AIR 1923 Lah 260 (261) 3 Lah 440 23 Cri L Jour 709 *Arjan Mal v Emperor* (Original charge under S 189 Penal Code—Altered charge under S 176 read with S 109 Penal Code—Case under S 195 Cr P C before amendment of 1973)
- 2 (03) 30 Cal 905 (908) 7 Cal W N 494 *Profulla Chandra Sen v Emperor* (Sanction to prosecute for a substantive offence under S 468 Penal Code—No fresh sanction necessary to prosecute on charge of abetting the offence as the latter charge was founded on the same facts as those on which the original sanction was given)
- (20) 7 AIR 1920 Lah 367 (369 370) 1919 Pun Re No 31 Cr 21 Cri L Jour 230 *Amar Singh v Emperor* (Explosive Substances Act 1908 S 7 — Proper course to adopt under S 7 is to state briefly facts constituting offence and to give consent to trial upon those facts as constituting offence under one or other of sections—Court may alter charge but fresh consent is not necessary—Section 230 Cr P C, makes full provision for such contingency)

the new or altered charge is founded are not the same as those on which the sanction was based, a fresh sanction is necessary³

231. Whenever a charge is altered or added to by the Court after

Recall of witnesses
when charge altered

the commencement of the trial, the prosecutor and the accused shall be allowed to re call or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material

1 Scope of the section — This section provides that when a charge is altered or added to after the commencement of a trial the prosecution and the accused should be allowed to re-call and examine with reference to such alteration or addition any witness who may have been already examined and also to call any further witness whom the Court may think material¹ The section is *mandatory* and the Court is *bound* to allow the prosecution and the accused to re call and examine any witness who may have been already examined² The prosecution and the accused are entitled to re call and examine any witness who may have been examined the right is not confined to the witnesses on whose evidence the alteration in or addition to the charge may be based³ The right of the prosecution and the accused in this respect is an *absolute* one and does not depend on the question whether the examination of the witnesses is necessary to avoid prejudice in the conduct of the case⁴ But the Court is not bound to ask the accused or the prosecution if it is desired to re call and examine any witness If no application is made for the re calling of any witnesses and their examination it cannot be subsequently complained that the examination contemplated by the section was not allowed⁵

1862 S 231 1872 S 449, 1861 S 247

{ 79 } & Ord 712 (713) *Empress v Nipoha* (Sections 211 192 Penal Code—Case before the amendment of 1928)

3 (2u) 13 AIR 1926 Rang 169 (171) 4 Rang 131 27 Cri L Jour 1075 *U Nyan Nain Da r*
Emperor (Sanction to prosecute for conspiracy to wage war against King (S 121A Penal Code)—
 Order of sanction not referring to facts on which it is based but merely stating that the accused at
 diverse times had conspired to wage war against the King—Conversion of charge into one of sedition
 —Fresh sanction necessary)

(24) 11 AIR 1924 Pat 377 (379) 24 Cri L Jour 478 *Rahatu v Emperor* (Bengal Municipal Act 1884 Dye law No 80 — Where sanction was given to prosecute for the offence of singing with a high sounding instrument a conviction for the offence of playing on a drum was held illegal.)

Section 231 -- Note 1

1. 2. 3. 4. 5.

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(35)

Alford v. (Accused is entitled to have his new witnesses examined unless for reasons mentioned in § 257 the Magistrate thinks that application for the examination of such witnesses is made for the purpose of vexatious or delay or for defeating the ends of justice in which case it is essential that he must record the grounds.)

2 (37) 19 AIR 1952 Cal 486 (4th)

(27) 14 AIR 1927 Pm 378 (400)

(21) 11 AIR 1974 All 665 166

under § 3-1 Penal Code—Cha

3 { 7C } 13 AIR 1976 Lah 60

Court can do is to restrict the

charge)

4 (22) 16 AIR 1973 Mad 200 (201) 52 Mad 316 30 Cn L Jour 223 Ramalinga v Emperor

(30) 19 AIR 1030 Cal 486 (490 481) 23 Cr L Jour 265 *Agenda Nath v Emperor* (Sect on 231 is mandatory and as Magistrate had acted in violation of S 231 the trial was illegal irrespective of the question whether the accused was (r) induced or not)

3 (40) 27 AIR 1910 Pat 355 (55) 41 Cr L Jour 932 190 Ind Cas 517 19 Pat 418 Afusahru
v Emperor (In such a case no prejudice is caused to the accused)

A request to summon a *fresh witness* under this section can only be refused on the ground that the evidence of the witness is not thought by the Court to be material⁶

The section applies to all cases where a charge is altered or added to after the commencement of a *trial*. Thus even where a charge is amended under the directions of the High Court, the Court is bound to allow the examination mentioned in the section⁷. But where in the course of a trial the Magistrate alters the charge and decides to commit the case to the sessions under s 317 the proceedings before the Magistrate should be only treated as commitment proceedings and not as a *trial* and the provisions of this section do not apply to them⁸.

232. (1) If any Appellate Court, or the High Court in the exercise

of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction

Illustration

A is convicted of an offence, under s 196 of the Indian Penal Code upon a charge which omits to state that he knew the evidence which he corruptly used or attempted to use as true or genuine was false or fabricated. If the Court thinks it probable that A had such knowledge and that he was misled in his defence by the omission from the charge of the statement that he had it it shall direct a new trial upon an amended charge, but, if it appears probable from the proceedings that A had no such knowledge it shall quash the conviction

1 Scope of the section — This section provides for the procedure to be followed in cases where a person is convicted of an offence and the Appellate Court or the High Court is of the opinion that he has been misled in his defence by the absence of a charge or by an error in the charge. The section provides that in such cases a re-trial may be ordered on an amended charge¹. Thus where an accused is charged with one offence

* Code of 1882 S 232 — Same
Code of 1872 S 451 — Materially the same
Code of 1861 — Nil

(30) 17 AIR 1930 All 215 (316) 52 All 454 32 Cr L Jour 22 *Komal v Emperor* (Committal & Cr P C)

6 (40) 27 AIR 1910 Pat 355 (359) 41 Cr L Jour 931 190 Ind Cas 517 19 Pat 419 *Mun v Emperor*

7 (21) 8 AIR 1921 Cal 604 (606) 25 Cr L Jour 524 *Kash Pramanick v Dima Pr* (Sections 141 379 Penal Code)

8 (31) 18 AIR 1931 All 434 (435) 53 All 692 32 Cr L Jour 849 *Ram Ghulam v* (Offence under s 363 Penal Code)

Section 232 — Note 1

1 (42) 29 AIR 1942 Pat 143 (144) 43 Cr L Jour 131 197 Ind Cas 213 *Bhola P v Jendran Nath Mukherji*

(16) 3 AIR 1916 Lah 52 (53) 17 Cr L Jour 451 (455) 1916 Pun Re No 33 *Emperor* (In this case however High Court upheld conviction of the original charge Penal Code)

(02) 7 Cal W N 301 (303 304) *Sarat Chandra Shah v Emperor* (Error in the charging

(22) 9 AIR 1922 Lah 135 (136 137) 23 Cr L Jour 5 *Girdhara Singh v* (scored out by the trial Court—Conviction on such charge—Illegality)

(02) 29 Cal 481 (482) 6 Cal W N 599 *Hossain Sardar v Kalu Sardar* (Off 143 Penal Code—Charge framed under s 379 only—Conviction of offence on any charge thereunder—Illegality)

and convicted of a different offence without a charge being framed in respect of it, a re trial can be ordered if it is found that he has been misled in his defence by the absence of a charge.² Similarly, where a charge is framed in the alternative form in a case in which the Code does not authorize the charge to be framed in such a form and the accused is thereby misled into pleading guilty to one of the offences instead of pleading not guilty to both the charges, a re trial may be ordered.³ So also, S 221, sub section (7) requires that where a previous conviction of the accused is intended to be used for the purpose of enhancing the sentence, the charge should specifically allege the previous conviction. If the charge omits to do so and, notwithstanding the omission, the accused, on conviction, is awarded higher punishment, the sentence is liable to be reduced on appeal.⁴

But where the accused has not been misled in his defence by the absence of the charge or the error in the charge, this section does not apply and the defect in the proceedings does not afford sufficient ground for ordering a re trial.⁵ The fact that the accused

[See (16) 3 AIR 1916 Mad 1222 (1222) 16 Cr L Jour 737 (738) *In re Mukla Mutharian*. (A charge under S 143, Penal Code cannot be added by the Appellate Court to charges under Ss. 426, 451, Penal Code)]

[See also (23) 10 AIR 1923 Pat 1 (4) 23 Cr L Jour 625 2 Pat 134 (SB), *Emperor v Abdul Hamid* (Common object of unlawful assembly)]

2 (10) 44 Cal W N 400 (401) *Surajmull v Sheo Pujan* (Charge under Ss. 427 and 417, Penal Code—Conviction under S 323 without charge being framed—Accused is not entitled to acquittal on appeal merely on the ground that no charge had been framed—Appellate Court should order new trial on charge properly framed)

(1900) 5 Cal W N 567 (568) *In the matter of Chimbai Pal* (Absence of charge)

(11) 98 Cal 63 (64) 65) 5 Cal W N 519 (519) 10 Cal 63 (64) 65) G L Garth

(1) of noting—Acquittal on appeal

(1) accused charged with dacoity and not and acquitted cannot be convicted of house trespass without reading out or explaining the charge thereunder)

(01) 6 Cal W N 296 (297) *Rameshwar v Jogi Sahoo* (Conviction of an offence which did not form the subject matter of the complaint is illegal)

(15) 2 AIR 1916 Cal 181 (182) 16 Cr L Jour 42 (43) *Harnaram Sardar v Emperor* (Appellate not convict under S 353, Penal

v Emperor

persons charged with causing hurt to three—One charge—No case of hurt by one of the accused
De Maistra v Emperor (Two

accused charged with causing hurt to three—One charge—No case of hurt by one of the accused)

(14) 1 AIR 1914 Cal 663 (663) 41 Cal 743 15 Cr L Jour 190 *Mahomed Hossein v. Emperor*. (Charge of house-breaking with intent to commit theft — Proof of different intent must be

icted of

Emperor. (Conviction under

accused charged with causing hurt to three—One charge—No case of hurt by one of the accused)

(90) 1890 Rat 529 (530), *Empress v. Nathoo Lalaj* (Offence under S 391, Bombay Municipal Act, 1888)

(88) 1888 Rat 386 (386) *Queen-Empress v Sarcel*

3 (86) 10 Bom 121 (129, 130) *Queen-Empress v Ramaj* (Accused was 'entangled in a logical snare'—Per Jackson, J)

4 (11) 12 Cr L Jour 233 (231) 10 Ind Cas 241 (Lah) *Dungra v Emperor*

5 (42) 29 AIR 1912 Sind 102 (102) 43 Cr L Jour 799 ILR (1912) Kar 112 202 Ind Cas 206 *Mhagurandas v Emperor*

(17) 4 AIR 1917 Mad 687 (688) 17 Cr L Jour 391 (386), *In re Mannar Krishnan*

was defended by a pleader who did not raise any objection to the proceedings is a factor to be considered while determining the question of prejudice to the accused.⁶

Where a re trial is ordered under this section, it must be from the point at which the irregularity occurred and not from the very beginning.⁷

The power of ordering a re trial is not confined to this section. Such a power is also conferred by S 423. This section refers to cases in which the accused has been *convicted*, while under S 423 a re trial can be ordered even in cases where the accused has been *acquitted*.⁸ Similarly, under S 423 a re trial can be ordered on grounds wider than those mentioned in this section. Thus under S 423 a re trial can be ordered on the ground that the accused had no proper opportunity of defending himself⁹ (though the charge may be unexceptionable).

Sub section (2) provides that the Appellate Court or the High Court as the case may be shall quash the conviction when it comes to the conclusion that on the facts proved, no criminal charge can be laid against the accused.¹⁰ See also the undermentioned case¹¹ where the Court declined to make an order for re trial on the ground that the punishment already suffered by the accused was sufficient.

See also Ss. 225, 423, 535 and 537 and Notes thereon.

(29) 16 AIR 1929 Pat 712 (714) 9 Pat 642 30 Cri L Jour 891 *Mallu Gope v Emperor* (Accused misled in defence — Retrial should be ordered even where conviction is in compliance with law as well as when irregular)

(32) 19 AIR 1932 Pat 215 (216) 11 Pat 523 33 Cri L Jour 884 *Ghyasuddin v Emperor*

(24) 11 AIR 1924 Bom 502 (503) 49 Bom 84 28 Cri L Jour 1000 *Emperor v Ranchhod Sursang* (Accused charged with substantive offence can be rightly convicted of that offence read with S 114, Penal Code although not charged with it)

(29) 16 AIR 1929 Lah 867 (867) 30 Cri L Jour 702 *Mohamad Sadiq v Delhi Electric Supply & Traction Co* (Error in charge but no prejudice)

(32) 19 AIR 1932 Cal 481 (482) 59 Cal 113 33 Cri L Jour 549 *Spiera v Johnuddin* (Motor Vehicles Act 1914—Wrong reference to sections but accused not misled in defence)

(18) 5 AIR 1918 Lah 397 (400) 1917 Pun Re No 29 Cr 18 Cri L Jour 875 *Bwahhi v Emperor* (Defect is enurable under Ss 535 and 537, where the accused has not been prejudiced or misled)

(31) 18 AIR 1931 Mad 225 (227) 32 Cri L Jour 703 *Sambasiva Mudali v Emperor* (Defects in form of charge are immaterial unless they lead to failure of justice)

(14) 1 AIR 1914 Lah 101 (101) 15 Cri L Jour 524, *Lal Khan v Emperor* (Defect in charge not prejudicial)

(31) 18 AIR 1931 Cal 410 (413) 58 Cal 1303 32 Cri L Jour 844, *Ramendra v Emperor*

(75) 24 Soth W R Cr 3 (3) *Queen v Digambar Shaha*

(82) 8 Cal 450 (454 455) 10 Cal L Rep 421 *Empress v Sreenath Kur*

Also see S 535, Note 3

v Emperor

202 Ind Cas 206

Bhagwandas v Emperor (Misrepresentations and manner of cheating by accused not set out with precision in charge — Nor accused questioned under S 342, Cr P C as to misrepresentation of charge and not from before

ngi Sao

(07) 5 Cri L Jour 164 (167) 31 Bom 218 9 Bom L R 148 *Emperor v Isap Mahamad*

10 (12) 13 Cri L Jour 127 (128) 13 Ind Cas 783 (Cal) *Paumullah v Emperor*

(30) 17 AIR 1930 Cal 138 (139) 31 Cri L Jour 697 *Sunnat Mandal v Makar Sheikh* (Very scanty nature of evidence against accused—Retrial not ordered on amended charge)

(11) 12 Cri L Jour 66 (67) 9 Ind Cas 361 (Cal) *Lal Behary Singh v Emperor*

(75) 23 Soth W R Cr 59 (59) *Queen v Salamut Ali*

(01) 28 Cal 63 (65) *Govinda Pershad v Garth*

(85) 10 Bom 124 (130) *Empress v Ramji Sajoba Rao*

11 (02) 29 Cal 481 (482) *Hossein Sardar v Kaku Sardar*

233 For every distinct offence of which any person is accused

Separate charges for distinct offences there shall be a separate charge, and every such charge shall be tried separately, except, in the cases mentioned in sections 234, 235, 236 and 239.

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

- | | |
|---------------------------------------|------------------------------------|
| 1 Joinder of charges and joint trials | 4 Separate charges |
| 2 Scope and object of the section | 5 Non-compliance with the section. |
| 3 Distinct offences — Illustration | 6 Counter-cases |

NOTE to the Synopsis. See the Notes indicated for the following topics:

Applicability to appeals See Note 2

Applicability to summons cases. See Note 1

Bnberg See Note 3

Cases and counter-cases. See Note 6

Charges in the alternative See Note 3 See also
S 230

Defects whether cured by S 537 See Note 6

General rule—Exceptions to the section See Notes 1 and 2

Joint committal not prohibited See Note 1

Joint enquiry under S 107 not prohibited See Note 1

Misappropriation of distinct sums of money See
 Note 3

Objection even in appeal. See Note 5.

Offences against several persons. See Note 3

Offences not distinct See Note 3

Offences of same kind. See Note 3

Offences under different sections See Note 3

Offences under same section on different occasions.
See Note 3

Powers of Appellate Courts in joint trials. See Note 2

Receiving of stolen properties of several persons.
See Note 3

Separate trial See Note 1

Several daconities See S 235, Note 2

Theft See Note 3

Two false statements in a single deposition. See Note 3

Using forged documents -- Only one user See Note 3

1. Joinder of charges and joint trials — The law on the subject of joinder of charges and joint trials is contained in ss. 233 to 239. Before the Code of 1872 there were no provisions corresponding to these, and the strict rules of the English Common Law as to the joinder of charges and joint trials were being followed. By ss. 452 to 453 of the Code of 1872, which are reproduced with slight modifications in the present Code as sections 233 to 239, the Legislature considerably widened the powers of the Court as regards joinder of charges and joinder of defendants.¹

Section 233 lays down a general rule, viz that for every distinct offence, of which any person is accused, there shall be a separate charge, and that every such charge shall be tried separately. To this rule ss 234, 235, 236 and 239 are exceptions.

*Code of 1882 S 233 — Same as that of 1898 Code

Code of 1972 S 452 — Substantially same

Code of 1861 S 241

charging such offences respectively

Section 233 — Note 1

1 (08) 8 Cr L Jour 191 (194, 195) 1 Sind L R 73, Emperor v. Ghulam

2. See cases in foot note (3)

3 (45) 32 AIR 1945 Lah 236 (249) (FB) *Sardara Qasam v Emperor*

(44) 31 AIR 1914 All 137 (143) 16 Cr L Jour 39 ILR (1914) All 403 215 Ind Cas 213 (FD).

ILR (1944) 1 Cal 398 - 213 Ind Cas 401 (DB)
with three offences of theft and three offences of

The object of making such exceptions is to avoid the necessity of the same witnesses giving the same evidence two or three times over in different trials, and to join in one trial those offences with regard to which the evidence would overlap.⁴ The sections are, however, so framed as to minimise the danger of prejudice to the accused by the joining together of more than one offence in the same trial.⁵ Of these exceptions ss 231,

dishonest in appropriation in alternative — All six offences tried at one and same trial — Joinder of charges held illegal and not curable under Section 537)

(41) 98 AIR 1941 Bom 156 (156 157) 42 Cr L Jour 571 191 Ind Cas 345 (DB) *Emperor v Cham*

Yakkal Chumilal (Criminal cases cannot like civil suits, be consolidated and tried together on the same evidence except within the limits as to the joinder of charges laid down in the Criminal Procedure Code)

(10) 11 Cr L Jour 337 (334) 5 Ind Cas 970 (Bom) *Emperor v Kashinath Bagaj Sal*

(84) 7 All 174 (177) 1884 All W \ 371 (FB) *Queen Empress v Juala Prasad*

(86) 9 All 452 (457) 1897 All W \ 111 *Queen-Empress v Abdul Kadir*

(98) 1899 All W \ 203 (207) 21 All 127 *Queen Empress v Mathura Prasad*

(10) 11 Cr L Jour 285 (286) 32 All 219 5 Ind Cas 896 *Shoo Saran Lal v Emperor*

(13) 14 Cr L Jour 116 (117) 18 Ind Cas 676 (All) *Shanker v Emperor*

(17) 4 AIR 1917 All 404 (404) 38 All 457 18 Cr L Jour 47 *Emperor v Bechan Pande*

(21) 8 AIR 1921 All 19 (21 22) 27 Cr L Jour 611 *Sanuman v Emperor*

(21) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657 *Ram Prasad v Emperor* (Three offences within 12 months but not committed in the same transaction — Joint trial of several accused is illegal)

(21) 8 AIR 1921 All 403 (409) 22 Cr L Jour 397 *Pai Sahai v Emperor*

(23) 10 AIR 1923 All 89 (89) 24 Cr L Jour 135 *Ganesh Lal v Emperor* (Joint trial of keeper of gaming house and persons found using it is legal)

(23) 10 AIR 1923 All 126 (126) 45 All 223 24 Cr L Jour 119 *Durga Prasad v Emperor*

(26) 13 AIR 1926 All 261 (261 262) 48 All 236 27 Cr L Jour 143 *Fauzdar v Emperor*

(28) 15 AIR 1928 All 417 (417) 30 Cr L Jour 214 *Sevak v Emperor*

(90) 15 Bom 491 (500) *Queen Empress v Fakirappa*

(05) 8 Cr L Jour 291 (307) 10 Bom L R 818 *Emperor v Bal Gangadhar Tilak* (Doubted whether separate new paper articles written week after week would come under same transaction)

(29) 10 AIR 1929 Bom 296 (298) 53 Bom 479 31 Cr L Jour 65 *Emperor v O E Ring*

(30) 19 AIR 1932 Bom 277 (277) 33 Cr L Jour 619 *Krishnaji Anant v Emperor*

(04) 1 Cr L Jour 58 (60) 8 Cal W N 180 *Pran Krishna Saha v Emperor* (Principle of joinder of charges and persons is applicable to inquiries under Section 107 Cr P C)

(10) 11 Cr L Jour 325 (326) 37 Cal 604 6 Ind Cas 350 *Ram Sewak Lal v Maneshwar*

(12) 13 Cr L Jour 593 (593) 40 Cal 168 16 Ind Cas 161 *Sita thir v Emperor*

(13) 14 Cr L Jour 493 (429) 40 Cal 318 20 Ind Cas 412 *Nitya Gopal v Jiban Krishna*

(16) 3 AIR 1916 Cal 693 (703) 16 Cr L Jour 611 *Ram Subhag Singh v Emperor* (Disregard to provisions of S 233 cannot be cured by S 537)

(22) 9 AIR 1922 Cal 76 (77) 23 Cr L Jour 685 *Banga Chandra v Ananda Charan*

(05) 2 Cr L Jour 34 (36) 1905 Pun Re No 2 Cr *Bhagwati Dyal v Emperor*

(28) 15 AIR 1928 Lah 34 (35) 29 Cr L Jour 591 *Muhammad Khan v Emperor*

(73) 7 Mad H C R 375 (375 376) *In re Noujan*

(08) 8 Cr L Jour 11 (13) 4 Nag L R 71 *Emperor v Batwant Singh*

1 Subbadu

v Emperor

v Emperor

In re Mallu Dora

(21) 8 AIR 1921 Oudh 49 (51) 22 Cr L Jour 341 *Kat v Emperor*

(31) 18 AIR 1931 Oudh 86 (87) 6 Luck 441 32 Cr L Jour 540 *Dubra Misir v Emperor* (The words same transaction are to be interpreted according to facts of each case)

(20) 7 AIR 1920 Pat 236 (231) 21 Cr L Jour 161 5 Pat L Jour 11 *Gobinda v Emperor*

(01-02) 1 Low Bur Rul 361 (361) *San Dirk v Grown*

(03-04) 2 Lo v Bur Rul 10 (13) (FB) *Nga Lun Maung v Emperor*

Emperor v Isgar Ali

Pe Mya v Emperor

v Emperor (It is legal

to join charges under Bombay Abkari Act)

[See also (25) 12 AIR 1925 Mad 1 (6) 47 Mad 746 25 Cr L Jour 1297 (FD) *In re Theetlumalai Gounder*]

4 (08) 8 Cr L Jour 191 (195) 1 S & L B 73 *Emperor v Ghulam*

(25) 12 AIR 1925 Mad 690 (697) 49 Mad 74 26 Cr L Jour 1513 *In re Mallu Dora*

5 (16) 3 AIR 1916 Mad 520 (559) 16 Cr L Jour 393 *Varipana Goud v Emperor*

Joinder of Charges.

233. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except, in the cases mentioned in sections 234, 235, 236 and 239.

Illustration

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

Synopsis

- | | |
|---------------------------------------|------------------------------------|
| 1 Joinder of charges and joint trials | 4 Separate charges |
| 2 Scope and object of the section | 5 Non-compliance with the section. |
| 3 Distinct offences — Illustration | 6 Counter-cases |

NOTE to the Synopsis See the Notes indicated for the following topics

- | | |
|--|---|
| Applicability to appeals See Note 2 | Offences not distinct See Note 3 |
| Applicability to summons cases See Note 1 | Offences of same kind See Note 3 |
| Bribery See Note 3 | Offences under different sections See Note 3 |
| Cases and counter cases See Note 6 | Offences under same section on different occasions See Note 3 |
| Charges in the alternative See Note 3 See also S 236 | Powers of Appellate Courts in joint trials See Note 2 |
| Defects whether cured by S 537 See Note 5 | Receiving of stolen properties of several persons. See Note 3 |
| General rule—Exceptions to the section See Notes 1 and 2 | Separate trial See Note 1 |
| Joint committal not prohibited See Note 1 | Several dacoities See S 235, Note 2 |
| Joint enquiry under S 107 not prohibited See Note 1 | Theft See Note 3 |
| Misappropriation of distinct sums of money See Note 3 | Two false statements in a single deposition See Note 3 |
| Objection even in appeal See Note 5 | Using forged documents — Only one user See Note 3 |
| Offences against several persons See Note 3 | |

1. Joinder of charges and joint trials — The law on the subject of joinder of charges and joint trials is contained in ss 233 to 239. Before the Code of 1872 there were no provisions corresponding to these, and the strict rules of the English Common Law as to the joinder of charges and joint trials were being followed. By ss 452 to 458 of the Code of 1872, which are reproduced with slight modifications in the present Code as sections 233 to 239, the Legislature considerably widened the powers of the Court as regards joinder of charges and joinder of defendants¹.

Section 233 lays down a general rule viz that for every distinct offence, of which any person is accused, there shall be a separate charge, and that every such charge shall be tried separately.² To this rule ss 234, 235, 236 and 239 are exceptions.³

¹ Code of 1882 - S 233 — Same as that of 1899 Code

Code of 1872 S 452 — Substantially same

Code of 1861 S 241

241 " " " " " " " "

charging such offences respectively

Section 233 — Note 1

1 (193) 8 Cr L Jour 191 (191 195) 1 Sind L R 73, *Emperor v Ghulam*

2 See cases in foot note (3)

3 (45) 92 AIR 1915 Lah 236 (289) (FB) *Sardara Qasam v Emperor*,

(44) 51 AIR 1914 All 137 (113) 16 Cr L Jour 39. ILR (1944) All 403 215 Ind Cas 213 (FB),

ILR (1944) 1 Cal 399 213 Ind Cas 401 (DB)
with three offences of theft and three offences of

exception? (See Note 1) The exceptions provided for are only empowering sections and must be strictly construed and applied so as not to defeat the right of independent trial conferred by this section. As to whether the exceptions are mutually exclusive or not, see S 233 Note 2.

The object of the section (which has been enacted for the benefit of the accused)⁵ is requiring that there shall be a separate charge for every distinct offence and a separate trial for every charge is twofold: *firstly* to give the accused notice of the charges which he has to meet and *secondly* to see that he is not embarrassed by having to meet charges in no way connected with one another.⁶ Another object is to prevent the mind of the Court from being prejudiced against the accused if he were tried in one trial upon different charges arising on different evidence. In other words, the object is to prevent the inconvenience of having to try of such a number of instances of culpability and the consequent embarrassment both to the Judge and to the accused.⁷

This section applies not only to original trial but also to an Appellate Court in sitting in finality under s 42 or in the trial of two appeals arising out of two separate cases.⁸

3 Distinct offences — Illustration — The words distinct offence in the section mean the illustration that certain laws offences which have no connexion with each other.¹ The following are illustrations of distinct offences

- (16) 3 AIR 1916 Mad 111 (1915) 16 C L J 1 234 *In re Melalalati Subbadu*
 (16) 3 AIR 1916 Mad 110 (1915) 33 M L J 17 16 C L J n 593 (FD) *Public Prosecutor v Kadiri Koya Haji*
 (23) 12 AIR 1915 Mad 640 (1914) 43 M L J 74 6 C L J 1 1513 *In re Mallu Dora*
 (03) 1903 Pan L P N 1411 613 61 1903 Pan L R N 17 Cr Singhetra *Emperor*
 3 (23) 10 AIR 1923 All 88 (88) 21 C L J 1 1155 *Ganesh Lal v Emperor*
 (23) 10 AIR 1923 All 126 (126) 45 All 233 24 C L J 1 1 149 *Durga Prasad v Emperor*
 [See also (23) 10 AIR 1923 Cal 311 (311) 32 Cal 233 26 C L J n 487 *Ummuddi Nasir v Emperor*]
 Also see S 233 Note 1
 4 (18) 5 AIR 1918 Pat 163 (169 170) 31 n L J n 124 19 Cr L J n 673 *Kailash Prasad v Emperor* (Accused should not be tried jointly if the trial is prejudicial to their interest)
 (20) 7 AIR 1920 Pat 230 (231) 5 Pat 1 Jour 11 21 Cr L J n 163 *Gobinda v Emperor*
 (17) 4 AIR 1917 All 401 (401) 39 All 457 18 Cr L J n 47 *Emperor v Bechan Pandit*
 (13) 14 Cr L J n 116 (117) 18 Ind Cr 676 (All) *Shanlax v Emperor*
 (02) 2 Cr L J n 34 (36) 130 J n 18 N 2 C *Bhagwati Dial v Emperor*
 5 (02) 2 Cr L J n 34 (36) 130 J n 18 N 2 C *Bhagwati Dial v Emperor*
 6 (16) 3 AIR 1916 Cal 693 (697) 16 Cr L J n 611 *Jamsabai Singh v Emperor*
 7 (84) 7 All 174 (177) 1891 All W N 321 (11) *Queen Empress v Juala Prasad*
 (21) 6 AIR 1921 All 19 (21) 22 Cr L J n 641 *Singh v Emperor*
 (90) 15 Bom 491 (497) *Queen Empress v Laksaraj*
 (16) 3 AIR 1916 Mad 550 (552) 16 Cr L J n 325 (4) *Arupana Goud v Emperor*
 8 (39) 26 AIR 1939 Bom 123 (143) 40 Cr L J n 573 *Indra Chandra Ranjo v Emperor* (Necessity of following procedure relating to order of charge is dictated by reasons of practical expediency and justice)
 (03) 2 Low Bur Pal 10 (12) *Aga Khan Wazir v King Emperor*
 (93) 1894 All W N 20 (207) 21 All 127 *Queen Empress v Mathura Prasad*
 (23) 12 AIR 1923 Mad 690 (697) 49 Mad 74 26 Cr L J n 1513 *In re Mallu Dora*
 [See (39) 26 AIR 1939 Mad 59 (59) 40 Cr L J n 211 *In re Uppara Dodda Narasim* (Charges under S 302 and 211 of preferring false complaint of murder ought not to be tried together though joint trial is not illegal as they formed part of same transaction — But it is an error to prosecute and to the accused and may lead to failure of justice)]
 9 (02) 2 Cr L J n 694 (694) 1903 J n 18 N 33 Cr *Sahib Singh v Emperor*
 Also see S 423 Note 31
 10 (24) 15 AIR 1923 Cal 230 (230 231) 29 Cr L J n 510 *Doat Ali v Emperor*
 [See also (77) 1 Bom 610 (614) *Reg v Hanumantha*]

Note 3

- 1 (39) 26 AIR 1939 Bom 123 (138) 40 Cr L J n 579 *Panchandra Ranjo v Emperor*
 (39) 26 AIR 1939 Cal 32 (33) 40 Cr L J n 290 *Emperor v Ifsaruddin Nasraddi*

235 and 236 apply to cases where *one* person may be dealt with at one trial for more than one offence, while S. 239 applies to the trial of *more* persons than one jointly.⁶

The principles as to joinder of charges and joint trial of accused persons embodied in ss. 233 to 239 are applicable to the trial of even summons cases⁷ and to inquiries under S. 107⁸

Sections 233 to 239 refer only to the *trial* of the accused and not to a preliminary inquiry before a committing Magistrate and, therefore, no objection can be taken to the commitment on account of any misjoinder of charges or joint inquiry.⁹ See also Note 6.

The test whether a trial is or is not bad due to misjoinder of charges is not the number of offences of which the accused has been convicted but number of offences with which he has been *charged*. It is the multiplicity of charges which vitiates the trial and prejudices the accused in his defence.¹⁰

For a discussion on the question whether the exceptions under ss. 234 to 239 are mutually exclusive, see S. 239, Note 2.

Where at the time of framing charges in a warrant case the Magistrate finds that to frame charges against all the accused will lead to a misjoinder of charges, he can, in the exercise of his inherent power, order that there should be a new trial in regard to some of the accused and is not bound to frame charges against them also at that stage.¹¹

2 Scope and object of the section. — The provisions of this section are mandatory¹ and must be strictly applied.² Separate trial is the rule and joint trial the

6 (14) 1 AIR 1914 Low Bur 263 (264) : 7 Low Bur 272 16 Cr L Jour 44, *Po Mya v. Emperor*.

(The last words of S. 239 do not mean that S. 239 and S. 234 are to be read together)

(21) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(22) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(23) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(24) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(25) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(26) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(27) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(28) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(29) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(30) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(31) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(32) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(33) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(34) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(35) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(36) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(37) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(38) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(39) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(40) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(41) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(42) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(43) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(44) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(45) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(46) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(47) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(48) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(49) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(50) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(51) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(52) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(53) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(54) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(55) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(56) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(57) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(58) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(59) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(60) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(61) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(62) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(63) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(64) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(65) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(66) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(67) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(68) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(69) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(70) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(71) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(72) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(73) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(74) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(75) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(76) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(77) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(78) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(79) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(80) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(81) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(82) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(83) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(84) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(85) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(86) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(87) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(88) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(89) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(90) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(91) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(92) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(93) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(94) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(95) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(96) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(97) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(98) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(99) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(100) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(101) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(102) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(103) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(104) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(105) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(106) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(107) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(108) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(109) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(110) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(111) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(112) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(113) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(114) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(115) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(116) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(117) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(118) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(119) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(120) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(121) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(122) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(123) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(124) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(125) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(126) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(127) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(128) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(129) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(130) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(131) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(132) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(133) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(134) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(135) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(136) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(137) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(138) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(139) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(140) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(141) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(142) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(143) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(144) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(145) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(146) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(147) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(148) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(149) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(150) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(151) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(152) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(153) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(154) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(155) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(156) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(157) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(158) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(159) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(160) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(161) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(162) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

(163) 8 AIR 1921 All 246 (247) 22 Cr L Jour 657, *Ram Prasad v. Emperor*.

exception³ (See Note 1) The exceptions provided for are only empowering sections and must be strictly construed and applied so as not to defeat the right of independent trial conferred by this section⁴ As to whether the exceptions are mutually exclusive or not, see S. 229, Note 2

The object of the section (which has been enacted for the benefit of the accused)⁵ in requiring that there shall be a separate charge for every distinct offence and a separate trial for every charge is twofold *firstly* to give the accused notice of the charges which he has to meet and *secondly*, to see that he is not embarrassed by having to meet charges in no way connected with one another⁶ Another object is to prevent the mind of the Court from being prejudiced against the accused if he were tried in one trial upon different charges resting on different evidence⁷ In other words, the object is to prevent the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrassment both to the Judge and to the accused⁸

This section applies not only to original trials but also to an Appellate Court in altering a finding under S. 423⁹ or in the trial of two appeals arising out of two separate cases.¹⁰

3 Distinct offences — Illustration — The words "distinct offence" in the section mean, as the illustration to the section shows, offences which have no connexion with each other¹ The following are illustrations of distinct offences

- (16) 8 AIR 1916 Mad 571 (572) 16 Cri L Jour 298 *In re Mehatahats Subbadu*
 (16) 8 AIR 1916 Mad 110 (115) 39 Mad 527 16 Cri L Jour 593 (FD), *Public Prosecutor v Kadira Koya Haji*
 (23) 12 AIR 1916 Mad 630 (637) 49 Mad 71 26 Cri L Jour 1513 *In re Mallu Dora*.
 (23) 1903 Pun L R No 149 p 613 (615) 1903 Pun R No 17 Cr, *Singhara v Emperor*
 3 (23) 10 AIR 1923 All 69 (88) 24 Cri L Jour 155, *Gauresh Lal v Emperor*
 (23) 10 AIR 1923 All 126 (126) 45 All 223 24 Cri L Jour 149 *Durga Prasad v Emperor*
 [See also (25) 12 AIR 1925 Cal 341 (345) 52 Cal 253 26 Cri L Jour 487, *Alimuddin Nasir v Emperor*]

Also see S 235 Note 1

- 4 (18) 5 AIR 1918 Pat 168 (169, 170) 3 Pat L Jour 124 19 Cri L Jour 673 *Kailash Prasad v Emperor* (Accused should not be tried jointly if the trial is prejudicial to their interest)
 (20) 7 AIR 1920 Pat 230 (231) 5 Pat L Jour 11 21 Cri L Jour 161 *Gobinda v Emperor*
 (17) 4 AIR 1917 All 404 (404) 38 All 457 18 Cri L Jour 47, *Emperor v Bechan Pande*
 (13) 14 Cri L Jour 116 (117) 18 Ind Cas 676 (All) *Shankar v Emperor*
 (05) 2 Cri L Jour 84 (36) 1905 Pun Re No 2 Cr *Dhagwati Dial v Emperor*
 5 (05) 2 Cri L Jour 34 (36) 1905 Pun Re No 2 Cr *Dhagwati Dial v Emperor*
 6 (16) 3 AIR 1916 Cal 693 (697) 16 Cri L Jour 641, *Ramabag Singh v Emperor*
 7 (84) 7 All 174 (177) 1884 All W N 321 (FB), *Queen Empress v Juala Prasad*
 (21) 8 AIR 1921 All 19 (21) 22 Cri L Jour 641 *Sanuman v Emperor*
 (90) 15 Bom 491 (497) *Queen Empress v Fakirappa*
 (16) 3 AIR 1916 Mad 550 (552) 16 Cri L Jour 323 ¹¹ *Arupana Goud v Emperor*
 8 (39) 26 AIR 1939 Bom 129 (143) 40 Cri L Jour 579, *Ram Chandra Rango v Emperor* (Necessity of following procedure relating to joinder of charges is dictated by reasons of practical expediency and justice)

Varasa (Charges)

under Ss 302 and 211 of preferring false complaint of murder ought not to be tried together, though

Note 3

- 1 (39) 26 AIR 1939 Bom 129 (138) 40 Cri L Jour 579, *Ramchandra Rango v Emperor*.
 (39) 26 AIR 1939 Cal 32 (33) 40 Cri L Jour 290 *Emperor v. Afsaruddin Nasraddi*

1. Offences falling under *different sections* of a penal enactment, as for example, under two sections of the Penal Code,² or of a special or local

(Two murders and one offence of causing grievous hurt committed in same night at different times and places cannot be jointly tried—Two separate charges under S. 302 and another under S. 325 are necessary)

(16) 3 AIR 1916 Cal 693 (705) : 16 Cri L Jour 641, *Ram Subhag Singh v. Emperor*.

[See (36) 23 AIR 1936 Cal 686 (687) : 38 Cri L Jour 1, *Haridas Chatterjee v. Manmatha Nath Mullick*, (Held, offence under S 283, Penal Code, of creating obstruction in river bed and making bank, and that under S 76B, Bengal Embankment Act, 1882, are not distinct offences)]

2 (41) 1 L R (1941) All 36 (38) : 1940 All W R (H C) 583 (584), *Dhu Bakash v. Emperor*. (Offences under S 409 and S 477A, Penal Code)

(40) 27 AIR 1940 Pesh 10 (11) : 41 Cri L Jour 513, *Jhar Khan Nur Khan v. Emperor*. (Offences under Ss 353 and 225, Penal Code, are separate offences)

(39) 26 AIR 1939 Bom 129 (138) : 40 Cri L Jour 579, *Ramchandra Rango v. Emperor*. (Offences under Penal Code, Ss 477A, 193 read with S 109)

(39) 26 AIR 1939 Cal 32 (33) : 40 Cri L Jour 290, *Emperor v. Afsaruddin Naseruddin* (Sections 302 and 325)

ion 411 and S 489 (c))

peror. (Sections 147 and 323)

v Emperor. (Do)

(22) 9 AIR 1922 Cal 573 (574) : 50 Cal 94 : 24 Cri L Jour 72, *Radha Nath v. Emperor*. (Sections 147 and 323 and 325)

(28) 15 AIR 1928 Lah 185 (186) : 29 Cri L Jour 31, *Dabu Mat v. Ghasi* (Sections 147 and 429)

(Sections 147 and 447)

of Sreenath Kur. (Ss 167 and 466)

1, *Muthusami Pillai v. Govt. Tahsildar of*

Ramnad (Sections 170 and 175)

(18) 10 Bom 181 (182)

aneshwar Singh

(80) 8 Cri L Jour 497 (502, 504) : 4 Low Bur Rul 294 (FD), *S. P. Chatterji v. Emperor*. (Ss 193 and 201)

1 and 3/0)

(Sections 225 and

(89) 11 Mad 441 (442) : 1 Weir 210, *Queen-Empress v. Kutta* (Sections 225 and 380)

(70) 1 Cri L Jour 714 (716) : 31 Cal 1007 : 8 Cal W N 717, *Prosanna Kumar v. Emperor*. (Sections 240 and 243)

'91)

(Ss 302 and 323)

(19) 10 Bom 181 (182) : 29 Cri L Jour 31, *in re Narasimha Rao* (Sections 323, 341 and 395)

(Sections 323 and 392)

v. *Nga Tol Gyi*. (Do)

Emperor (Sections 323

tions 325 and 379)

ror. (Sections 325 and 454)

v *Emperor*. (Sections 330

1)

(Sections 352 and

- (106) 3 Cr L Jour 141 (142) 10 Cal W N 53, *Gul Muhammad Sircar v Chicharu Mandal* (Sections 352 and 384)
- (23) 12 AIR 1925 Mal 1065 (1066) 26 Cr L Jour 1618 *Krishnamurthy v Narayanaswamy*. (Sections 352 and 504)
- (1865) 2 Sath W R Cr L 6 (7) (Sections 361 and 363)
- 366 and 420)
- (89) 12 Mad 73 (276) 1 Weir 375 *Queen Empress v Ramanna* (Sections 372 and 373 — Held, only an irregularity which did not result in failure of justice)
- (94) 9 Cal P L R Cr 23 (23) *Empress v Amilal Perdhani* (Sections 376 and 377 — Accused not prejudiced — No order of charges held only an irregularity)
- (103) 1903 Pun Re No 17 Cr, p 44 (46) 1903 Pun L R No 149 *Singhara v Emperor* (Sections 369 and 419)
- (77) 1 Bom 610 (613) *Reg v Hanwanta*
- (1865) 3 Sath W R Cr L 17 (17)
- (18) 5 AIR 1918 Cal 233 (234) 18 Cr L Jour 310 *Asrofulla Sarkar v Emperor* (Sections 380 and 403)
- (1900) 5 Cal W N 294 (296) *Nisunja Behari v Queen Empress*. (Sections 380 and 409)
- (104) 1 Cr L Jour 831 (831) 6 Bom L R 725 (725) *Emperor v Wassanji* (Sections 380 and 411)
- (22) 9 AIR 1922 All 244 (245) 23 Cr L Jour 671 *Bechari v Emperor* (Sections 380 and 420)
- (102) 15 C P L R Cr 53 (54) *Emperor v Bisahu Panla* (Sections 380 and 454)
- (104) 1 Cr L Jour 537 (539) 1901 Lpp Bur Bul 1 t Qr Cr P C 2 *Emperor v Isgar Ali* (Sections 380 and 457)
- (32) 19 AIR 1932 Bom 277 (278) 33 Cr L Jour 619 *Krishnaji Anant v Emperor* (Do)
- (33) 20 AIR 1953 Lah 512 (512) 34 Cr L Jour 402 *Ajay Singh v Emperor* (Sections 393 394 and 397)
- (82) 1882 All W N 178 (178) *Empress v Lekha* (Sections 395 and 400)
- (107) 6 Cr L Jour 215 (216) 1907 All W N 208 *Emperor v Ram Singha* (Sections 397 and 451)
- (83) 1883 All W N 179 (179) *Empress v Bhulara* (Sections 401 and 411)
- (82) 1882 All W N 215 (215) *Empress v Daya Ram* (Sections 411 and 457)
- (31) 18 AIR 1931 Oudh 86 (87) 6 Luck 441 32 Cr L Jour 540 *Dubri Misir v Emperor* (Sections 405 and 477A)
- (17) 4 AIR 1917 Mad 612 (612) 17 Cr L Jour 369 *In re Krishnaswamy Iyer* (Do)
- (33) 1933 Mad W N 326 (326) *Venkata Subbaya v Emperor* (Sections 408 and 471)
- (109) 10 Cr L Jour 476 (479) 4 Ind Cas 29 (Cal) *Parmeshwar Lal v Emperor* (Sections 409 and 420)
- (10) 11 Cr L Jour 285 (285 286) 32 All 219 5 Ind Cas 896 *Sheo Saran Lal v Emperor* (Sections 408 and 467)
- (102) 26 Mad 125 (126) 2 Weir 293 *Krishnasami Pillai v Emperor* (Sections 408 and 477)
- (13) 14 Cr L Jour 428 (429) 10 Cal 318 20 Ind Cas 412 *Nitya Gopal v Jiban Krishna* (Sections 408 and 477A)
- (22) 9 AIR 1922 All 214 (214) 44 All 510 23 Cr L Jour 258 *Shuja v Emperor* (Do)
- (15) 2 AIR 1915 Cal 296 (296 297) 41 Cal 722 15 Cr L Jour 153 *Raman Behari Das v Emperor*.
- 152 5 AIR L Jour 400 *Emperor v Mata Prasad*
- 260 *Nagendra Nath v Emperor* (Sections 409 and 477)
- (107) 5 Cr L Jour 341 (349) 30 Mad 328 2 Mad L Rm 177 17 Mad L Jour 141 *Kasi Viswanathan v Emperor* (Do)
- (13) 13 Cr L Jour 21 (22) 13 Ind Cas 213 (Mad) *Subramanyya Pattar v Emperor* (Do)
- (15) 2 AIR 1915 All 162 (162) 38 All 42 16 Cr L Jour 813 *Kalka v Emperor* (Do)
- (82) 8 Cal 631 (636) 10 Cal L Rep 406 *In the matter of the petition of Uttam Koondoo* (Sections 411 and 413)
- (22) 9 AIR 1922 Cal 401 (401) 49 Cal 555 24 Cr L Jour 66 *Chetto v Emperor* (Sections 411 and 414)
- (Sections 411 and 454)
- (Do)
- (106) 3 Cr L Jour 76 (77) 1905 Pun Re No 51 Cr *Jagga v Emperor* (Sections 411 and 453)
- (102) 29 Cal 387 (388) 6 Cal W N 539 *Mohendro Nath Das v Emperor* (Sections 411 and 454)

2 Offences committed on different occasions even though they may fall under the same section⁶

- (32) 26 AIR 1939 Bom 129 (138) : 40 Cri L Jour 579, *Pamchandra v Emperor* (Criminal breach of trust in respect of different sums of money on different occasions.)

2. Offences committed against different persons⁷

- (37) 24 AIR 1937 Sind 304 (304) 32 S L R 30 39 Cri L Jour 59 *Emperor v Shivalomal* (Accused persons consisting of two groups having no connection with one another showing that they were engaged in the same transaction and playing at different places cannot be summarily tried together under S 12, Bombay Prevention of Gambling Act)
- (82) 1882 All W N 178 (178) *Empress v Lekha* (Dacoities)
- (82) 1882 All W N 160 (160) *Empress v Dalla* (Do)
- (83) 1883 All W N 12 (12) *Empress v Serha* (Do)
- (83) 1883 All W N 107 (107) *Empress v Dukha* (Robbery)
- (18) 5 AIR 1918 All 399 (400) 40 All 565 19 Cri L Jour 967 *Karimuddin v Emperor* (Offence under S 404 Penal Code)
- (19) 6 AIR 1919 All 239 (239) 20 Cri L Jour 353 *Fauja v Emperor* (Several murders in one day but not so connected as to represent acts forming same transaction)
- (24) 11 AIR 1924 All 316 (317) 46 All 54 25 Cri L Jour 466 *Puloo Lal v Emperor* (Offences under Ss 393 and 342 Penal Code)
- (30) 2 Cri L Jour 450 (453) 29 Bom 449 7 Bom L R 527 *Emperor v Jethalal Harlochand* (Different receipts of stolen property)
- (19) 6 AIR 1919 Bom 111 (112 114) 20 Cri L Jour 657, *Ramnarayan Amarchand v Emperor* (Charges in respect of items in two balance sheets)
- (39) 19 AIR 1932 Bom 277 (278) 33 Cri L Jour 619 *Krishnaji Anant v Emperor* (1865) 2 South W R Cr L 17 (17) *In re Mola*
- (65) 9 South W R Cr 14 (15) *Queen v Feozdar Roy* (Offence under S 193 Penal Code)
- (71) 15 South W R Cr 5 (5) *In re C A Chetter* (Misappropriation of each separate item of money)
- (73) 20 South W R Cr 70 (70) *Queen v Sobras Gorrallak*
- (04) 1 Cri L Jour 713 (714) 31 Cal 1053 8 Cal W N 715 *Hira Lal v Emperor*
- (05) 2 Cri L Jour 393 (394) 1 Cal L Jour 475 *Emperor v Esua Sheikh*
- (06) 2 Cri L Jour 847 (851) 9 Cal W N 1027 *Ram Sarup v Emperor*
- (06) 3 Cri L Jour 111 (119) 2 Cal L Jour 618 10 Cal W N 520 *Johan Subrana v Emperor*
- (06) 8 Cri L Jour 126 (127 128) 33 Cal 292 10 Cal W N 32 *Budlas Sheikh v Tarap Sheikh*
- (07) 6 Cri L Jour 321 (323) 11 Cal W N 1128 *Nanda Kumar Sircar v Emperor*
- (09) 9 Cri L Jour 277 (278) 1 Ind Cas 335 (Cal) *Ali Muhammad v Emperor*
- (09) 10 Cri L Jour 469 (469) 4 Ind Cas 16 (Cal) *Srish Chandra v Emperor* (Cheating)
- (16) 14 Cri L Jour 449 (449) 40 Cal 846 20 Ind Cas 609 *Asgar Ali v Emperor*
- (26) 13 AIR 1906 Cal 320 (321) 27 Cri L Jour 263 *Keramat Mandal v Emperor*
- (04) 1 Cri L Jour 971 (971) (Lah) *Bhagat Singh v Emperor*
- (06) 4 Cri L Jour 496 (497) (Lah) *Abdul Satar v Emperor*
- (66) 1866 Pun Re No 66 Cr p 71 (71) *Mohur Bangs v Chunda* (Theft)
- (10) 11 Cri L Jour 537 (538) 8 Ind Cas 229 (Lah) *Wasawa Singh v King Emperor*
- (22) 9 AIR 1922 Lah 144 (145) 22 Cri L Jour 505 *Ganda Singh v Emperor* (Theft and assault)
- (28) 15 AIR 1928 Lah 637 (637) 10 Lah 158 29 Cri L Jour 737 *Hayat v Emperor*
- (32) 19 AIR 1932 Lah 615 (616) 34 Cri L Jour 458 *Jatal v Emperor*
- (89) 12 Mad 273 (275 276) 1 Weir 375 *Queen Empress v Pamanna*

appropriation

of the

Emperor.

(Cheating different persons at different intervals)

- (21) 8 AIR 1921 Pat 291 (291) 21 Cri L Jour 619 *Padmanabh Patnank v Emperor* (Receiving stolen

and Prasad v Emperor (Withdrawing

v Alu Jaro (Offences under Ss. 379

and 215)

- (26) 27 Cri L Jour 872 (873) 96 Ind Cas 120 (Sind) *Ghulamo v Emperor* (Receiving stolen property at different dates)

law,³ or under a section of the Penal Code and a section of a special or local law,⁴ or under a section of one special law and a section of another special law.⁵

- 2 Offences committed on different occasions even though they may fall under the same section⁶

(105) 2 Cr L Jour 84 (35, 36) : 1905 Pun Re No. 2 Cr, *Bhugwath Dayal v. Emperor*. (Sections 420 and 467)
 471 and 467)
 (Sections 426 and 504)

Also see S 234, Note 8

3 Excise Act, 12 [XII] of 1896 :

(14) 1 AIR 1914 Lah 455 (456) : 1914 Pun Re No. 20 Cr. 15 Cr L Jour 172, *Banwar Lal v. Emperor*, (Sections 48 and 53)

Bengal Excise Act, 5 [V] of 1909 :

(14) 1 AIR 1914 Cal 603 (606) : 41 Cal 694 : 15 Cr L Jour 73, *U. N. Biswas v. Emperor*. (Sections 13 and 20)

Gambling Act, 3 [III] of 1867 :

(10) 11 Cr L Jour 211 (212) : 5 Ind Cas 720 (Lah), *Makhan v. Emperor* (Sections 3 and 4)

Prevention of Adulteration Act (1912) :

(31) 18 AIR 1931 All 705 (705, 706) : 32 Cr L Jour 1031, *Raghubar Dayal v. Emperor*. (Sections 4 and 5)

Opium Act and Dangerous Drugs Act :

(37) 24 AIR 1937 Nag 183 (189) : 38 Cr L Jour 542 : 1 L R (1939) Nag 297, *Ghashiram Tularam v. Emperor* (Selling opium with a license and without a license)
 offence
 4 1939

v. Emperor, (S 147, Penal Code and

Section 11A, Forest Act)

(34) 21 AIR 1934 Oudh 457 (459) : 35 Cr L Jour 1417 : 10 Luck 235, *Onkar Singh v. Emperor*. (Section 411, Penal Code, and S 19 (d), Arms Act)

(102) 29 Cal 385 (386) : 6 Cal W N 468, *Gobind Kori v. Emperor*. (Section 225, Penal Code, and S 128, Railways Act)

(28) 15 AIR 1928 Lah 34 (35) : 29 Cr L Jour 521, *Muhammad Khan v. Emperor*. (Section 307, Penal Code, and S 20, Arms Act)

(18) 5 AIR 1918 Lah 148 (148) : 1917 Pun Re No. 44 Cr. 19 Cr L Jour 100, *Jas Singh v. Emperor*. (Section 395, Penal Code and S 20, Arms Act)

(103) 30 Cal 822 (830) : 7 Cal W N 639, *Birendra Lal v. Emperor*. (Section 467, Penal Code, and S 82, Registration Act)

[See however (36) 23 AIR 1936 Cal 686 (687) : 39 Cr L Jour 1, *Haridas v. Maninatha* (Held, offence under S. 283, Penal Code, of creating obstruction in river bed by extending a tank, and making banks and offence under S. 76B, Bengal Embankment Act, are not distinct offences within the meaning of S. 403)]

5. (42) 29 AIR 1942 Oudh 462 (463) : 43 Cr L Jour 912 : 203 Ind Cas 12, *Bankey Lal v. Emperor*. (The offences committed by the accused fell under S. 60 (2) read with S. 69, Excise Act, and S. 9 of Opium Act)

6. *See also*

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the two houses be tried together)

(39) 26 AIR 1939 Bom 129 (138) : 40 Cr L Jour 579, *Ramchandra v. Emperor*. (Criminal breach of trust in respect of different sums of money on different occasions)

3 Offences committed against different persons⁷

- (3*) 24 AIR 1937 S nd 304 (304) 32 S L R 30 39 Cri L Jour 59 *Emperor v Shivalomal* (Accused persons consisting of two groups having no connection with one another showing that they were engaged in the same transaction and playing at different places cannot be summarily tried together under S 12, Bombay Prevention of Gambling Act)
- (82) 1882 All W N 178 (178) *Empress v Lekha* (Dacoities)
- (82) 1882 All W N 180 (180) *Empress v Dalla* (Do)
- (83) 1883 All W N 12 (12) *Empress v Serha* (Do)
- (83) 1883 All W N 10* (107) *Empress v Dukla* (Robbery)
- (18) 5 AIR 1918 All 399 (400) 40 All 563 19 Cri L Jour 967, *Karimuddin v Emperor* (Offence under S 403 Penal Code)
- (19) 6 AIR 1919 All 239 (239) 20 Cri L Jour 333 *Fauja v Emperor* (Several murders in one day but not so connected as to represent acts forming same transaction)
- (24) 11 AIR 1924 All 316 (317) 46 All 54 20 Cri L Jour 466 *Puloo Lal v Emperor* (Offences under S 393 and 342 Penal Code)
- (03) 2 Cri L Jour 480 (483) 29 Bom 449 7 Bom L R 527 *Emperor v Jethalal Harlocl and* (Different receipts of stolen property)
- (19) 6 AIR 1919 Bom 111 (112 114) 20 Cri L Jour 657, *Ramnarayan Amarchand v Emperor* (Charges in respect of items in two balance sheets)
- (39) 19 AIR 1932 Bom 277 (278) 33 Cri L Jour 619 *Krishnaji Anant v Emperor*
- (1865) 2 Sath W R Cr L 17 (17) *In re Mola*
- (68) 9 Sath W R Cr 14 (15) *Queen v Feoydar Roy* (Offence under S 193 Penal Code)
- (71) 15 Sath W R Cr 5 (5) *In re C A Chetter* (Misappropriation of each separate item of money)
- (73) 20 Sath W R Cr 70 (70) *Queen v Sobras Gocallah*
- (04) 1 Cri L Jour 713 (714) 31 Cal 1053 8 Cal W N 715 *Hara Lal v Emperor*
- (06) 2 Cri L Jour 393 (394) 1 Cal L Jour 475 *Emperor v Esua Sheikh*
- (06) 2 Cri L Jour 847 (851) 9 Cal W N 1097 *Ram Sarup v Emperor*
- (06) 3 Cri L Jour 111 (119) 2 Cal L Jour 618 10 Cal W N 520 *Johan Subrana v Emperor*
- (06) 3 Cri L Jour 126 (127 129) 33 Cal 292 10 Cal W N 32 *Budla Sheikh v Tarap Sheikh*
- (07) 6 Cri L Jour 321 (323) 11 Cal W N 1128 *Nanda Kumar Swcar v Emperor*
- (09) 9 Cri L Jour 277 (278) 1 Ind Cas 335 (Cal) *Ali Muhammad v Emperor*
- (09) 10 Cri L Jour 469 (469) 4 Ind Cas 16 (Cal) *Srish Chandra v Emperor* (Cheating)
- (13) 14 Cri L Jour 449 (449) 40 Cal 846 20 Ind Cas 609 *Asgar Ali v Emperor*
- (26) 13 AIR 1926 Cal 320 (321) 27 Cri L Jour 263 *Keramat Mandal v Emperor*
- (04) 1 Cri L Jour 971 (971) (Lah) *Bhagat Singh v Emperor*
- (06) 4 Cri L Jour 496 (497) (Lah) *Abdul Satar v Emperor*
- (66) 1866 Pun Re No 66 Cr p 71 (71) *Mohur Bangs v Chunda* (Theft)
- (10) 11 Cri L Jour 597 (598) 8 Ind Cas 229 (Lah) *Wasawa Singh v King Emperor*
- (22) 9 AIR 1922 Lah 144 (145) 22 Cri L Jour 505 *Ganda Singh v Emperor* (Theft and assault)
- (28) 15 AIR 1928 Lah 637 (637) 10 Lah 158 29 Cri L Jour 737, *Hayat v Emperor*
- (32) 19 AIR 1932 Lah 615 (615) 34 Cri L Jour 458 *Jatal v Emperor*

or (Misappropriation)

in breach of the

and 21b)

- (26) 27 Cri L Jour 872 (873) 96 Ind Cas 120 (Sind) *Ghulamo v Emperor* (Receiving stolen property at different dates)

Offences of the same kind committed on *one* occasion though consisting of *parts* are not distinct offences but are to be treated as constituting only one offence

Illustrations

- (a) The theft of several articles from one person or more at the same time⁸
- (b) The receiving of stolen property belonging to different owners or the gains of different thefts but received at the same time⁹
- (c) The making of any number of false allegations in one statement¹⁰
- (d) The misappropriation of several sums of money not proved to be committed on different occasions and in regard to one person,¹¹ or of several books of account in respect of the same estate,¹² or of several articles¹³

- (04) 1 All L Jour 220n (225n) *In re Nand Lal* (Receiving different sums of money as illegal gratification from different persons)
- (04) 1 Cri L Jour 364 (364) 26 All 195 1903 All W N 231 *Emperor v Patu* (Discrepancy in several houses in the same night)
- (66) 6 South W R Cr 83 (83) *Queen v Itwaroo Dome* (Do)
- (68) 9 South W R Cr 30 (30) *In the matter of Gool ar Khan* (Criminally intimidating three different persons)
- (07) 6 Cri L Jour 442 (444) 6 Cal L Jour 757 *Talaldhar Das v Emperor* (Criminal breach of trust with monies of different persons)
- (09) 9 Cri L Jour 277 (276) 1 Ind Cas 335 (Cal) *Ali Muhammad v Emperor* (Receiving property stolen from different persons)

- (16) 3 AIR 1916 Cal 693 (699 706) 16 Cri L Jour 641 *Ravi Subhag v Emperor* (Causing hurt to different persons on one occasion)
- (66) 5 South W R Cr L 4 (4) (Do)
- (07) 11 Cal W N cclxxiv (cclxxiv) *King v Henry Augustus Bernay* (Do)
- [See also (08) 4 Cri L Jour 394 (390) 4 Cal L Jour 411 *Mamli Lal Mullick v Corporation of Calcutta*]

- 8 (36) 23 AIR 1936 Rang 94 (90) 37 Cri L Jour 530 *Nga Po E v Emperor*
- (81) 1891 All W N 154 (154) *Queen Empress v Paghu Rai*
- (97) 1897 Rat 927 (927) *Queen Empress v Krishna Shahaji*
- (28) 13 AIR 1926 Nag 89 (90) 28 Cri L Jour 1495 *Bhura v Emperor*
- (72 92) 1872 1892 Low Bur Bul 168 (168) *Queen Empress v Nga Po*
- (72 92) 1872 1892 Low Bur Bul 475 (475) *San Hla v Queen Empress*
- (05) 2 Cri L Jour 708 (708) 1905 Pan Re No 58 Cr *Har Dial v Emperor*
- (69) 11 South W R Cr 38 (38) *Queen v Sheikh Monceak*
- (20) 7 AIR 1920 Cal 571 (573) 21 Cri L Jour 682 *Byjoy Krishna v Satish Chandra*
- 9 (93) 15 All 317 (318) 1893 All W N 101 *Queen Empress v Makhan*
- (06) 3 Cri L Jour 207 (208) 28 All 313 1906 All W N 22 *Emperor v Mian Jan*
- (23) 10 AIR 1923 All 547 (547 548) 45 All 485 24 Cri L Jour 632 *Sheo Charan v Emperor*

v Sahu v Emperor

Emperor v Emperor

- (32) 19 AIR 1932 Lah 615 (615) 34 Cri L Jour 458 *Jalal v Emperor*
- (34) 21 AIR 1934 Pat 483 (480) 13 Pat 161 36 Cri L Jour 343 *Bannalaha v Emperor*

Also see S 403 Note 5

v Emperor

(Section 193 Penal Code — Single charge in respect of two or three false statements made in one deposition held to be defective)

- 11 (86) 14 Cal 128 (132) *In the matter of Luckhmi Narain*
- 12 (13) 14 Cri L Jour 219 (222) 19 Ind Cas 315 (Cal) *Promotha Nath v Emperor*
- 13 (21) 8 AIR 1921 Cal 114 (115) 22 Cri L Jour 666 *Kali Charan v Emperor*

- (e) A single use of several forged documents as genuine in a Court of law ¹⁴
- (f) Receiving a bribe partly on one day and partly on another ¹⁵
- (g) The projection of one board attached to two different rooms, into the street an offence under s 11 of the Bombay District Municipalities Act ¹⁶
- (h) An alternative charge of perjury ¹⁷
- (i) The giving of a number of strokes with a stick to a person but not to different persons. (See Penal Code s 71 Illustrations)

4 **Separate charges** — For every distinct offence of which any person is accused, a separate charge should be framed¹ and this rule applies even though the case is one in which the accused may be tried at one trial for all the offences under the provisions of s 214 CrP 1932 and 233.

5 **Non compliance with the section** — In *Subramanya Iyer v King Emperor*¹ in which a person was tried on an indictment charging him with forty-one acts extending over a period of two years it was held by their Lordships of the Privy Council that this was plainly in contravention of s 231 of the Code and that the defect was one which could not be cured by s 537. Their Lordships observed as follows:

Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law, could have been joined together in one indictment. The illustration to the section itself sufficiently shows what was meant.

The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that

- 14 (93) 20 Cal 413 (417) *Queen Empress v Raghunath Das*
- 15 (1900-01) 5 Cal W N 392 (393) *Jagat Chandra v Lal Chandra*
- (11) 12 Cr L Jour 217 (224) 1911 Pun Re No 11 Cr 10 Ind Cas 156 *Gurdars v Emperor*
- 16 (02) 4 Bom L R 842 (943) *Emperor v Atmarao*
- 17 (84) 10 Cal 937 (945) *Habibullah v Queen Empress*

Note 4

- 1 (71) 3 N W P H C R 314 (315) *Queen v Sico Churun*
- (1865) 3 Suth W R Cr L 15 (15)
- (1865) 4 Suth W R Cr L 9 (9)
- (66) 5 Suth W R Cr L 5 (5)
- (67) 7 Suth W R Cr 8 (8) *In re Kalaram Singh*
- [See (40) 27 AIR 1940 Oudh 396 (396) 41 Cr L Jour 720 189 Ind Cas 208 *Emperor v Madho Singh* (Mere fact that in one part of charge sheet the charges are mentioned together does not invalidate the charge sheet where actually separate charges have been framed)]
- [See also (75) 7 N W P H C R 137 (144) *Queen v Jamurha*]

Id: *Nasraddi*
65 Ind App 159 32 Sind
committed in course of same

error (False statements made

- in course of same deposition—Separate charges necessary)
- (04) 1 Cr L Jour 364 (364) 25 All 195 1903 All W N 231 *Emperor v Fallu*
- (27) 14 AIR 1927 Cal 17 (20) 54 Cal 237 28 Cr L Jour 99 *Aramoddy v Emperor* (In the course of one transaction three murders were committed and only one charge was framed Overruled on another point in AIR 1939 P C 47 1941 Rang L R 789n 66 Ind App 65 I L R (1939) Kar P C 123 18 Pat 234 40 Cr L Jour 364 (PC) 1)
- (08) 7 Cr L Jour 178 (178) (Mysore) *In re Venkatagadu*
- (13) 14 Cr L Jour 449 (449) 40 Cal 816 20 Ind Cas 609 *Agar Ali Biswas v Emperor*

Note 5

- 1 (01) 25 Mad 61 (96 97) 28 Ind App 257 8 Sar 160 11 Mad L Jour 233 (PC)

which has taken place here shall not be permitted, this contravention of the Code comes within the description of error, omission or irregularity"

The question has arisen as to how far this decision is applicable to a disobedience of the directions of this section. The section directs two things namely

- (1) that for every distinct offence of which any person is accused there shall be a separate charge, and
- (2) that every such charge shall be tried separately unless the case falls within the classes of cases mentioned in Ss 234 235 236 and 239

Where a single charge is framed for several distinct offences and a single trial is held in respect of such charge and the case does not fall within Ss 234 235 236 or 239 there is a non compliance both as regards the framing of the charge and as regards the mode of trial. Where separate charges are framed for the distinct offences but a single trial is held in respect of all such charges and the case is not governed by Ss 234, 235, 236 or 239, there is a non compliance with the section as to the mode of trial. Where a single charge is framed for several distinct offences and a single trial is held in respect of such charge and the case falls within Ss 234 235 236 or 239 there is a non compliance as regards the framing of the charge but not with regard to the mode of trial. A non compliance of the first kind is governed by the rule enunciated in *Subramanaya Iyer's case* and is an illegality not cured by s 537² so also is a non compliance of the second kind³. But a non

2 (45) 93 AIR 1945 Pat 388 (389) 34 Pat 303 221 Ind Cas 312 (DB) *Chintaman Rai v Emperor*
 (44) 31 AIR 1944 Bom 306 (312) 1 L R (1944) Bom 728 (DB) *Keshavlal Tribhuvandas v Emperor*
 (44) 31 AIR 1944 Cal 224 (227 228) 45 Cri L Jour 666 1 L R (1944) 1 Cal 398 213 Ind Cas 401 (DB) *Beelaram Mukherji v Emperor* (In this case there were three sets of charges—Each set

cannot be part of the same transaction as the dishonest misappropriation of property entrusted to the alleged forger as a servant — Therefore the joinder of three charges under S 468 with a charge under S 408 I P C cannot come within the provisions of S 235 Cr P C, and is contrary to the direct provisions of s 233—

(42) 29 AIR 1942 Ou

(42) 29 AIR 1942 Oud
v Emperor

(39) 26 AIR 1939 Bom 129 (138) 40 Cri L Jour 579 *Ramchandra Rango v Emperor*

(38) 1 LR (1938) 1 Cal 98 (110 113) 41 Cal W N 1112 *Kemalakanta Ray v Emperor* (Contravention of S 233 read with S 235 vitates trial—S 537 is no answer)

(36) 25 AIR 1938 Sind 164 (168) 39 Cri L Jour 831 1 LR (1939) Kar 64 *Chuharmal Nirmaldas v Emperor*

(15) 2 AIR 1915 All 462 (462) 38 All 42 16 Cri L Jour 813 *Kalka Prasad v Emperor* (Joint

or so con

(Single

one year) committed in various distinct transactions extending over

(04) 1 Cri L Jour 875 (876) 1904 All W N 223 *Emperor v Nand Lal*

(07) 5 Cri L Jour 341 (349) 30 Mad 328 17 Mad L Jour 141 *Kasi Viswanathan v Emperor*

(13) 14 Cri L Jour 116 (117) 18 Ind Cas 676 (All) *Shankar v Emperor*

(32) 19 AIR 1932 Bom 277 (278 279) 33 Cri L Jour 619 *Krishnaji Anant v Emperor* (Single charge for offences under Ss 380 and 457, Penal Code)

3 (41) 28 AIR 1941 Cal 707 (710) 43 Cri L Jour 393 1 L R (1941) 2 Cal 319 198 Ind Cas 499 (DB) *H F Bellgard v Emperor* (Against B nine charges three under each of Ss 420 467 and 477A, Penal Code framed — Nine charges in aforesaid manner also framed against M for abetting B — Both accused tried jointly — Trial of B for nine charges at one trial held not warranted by Ss 234 and 235 — Joint trial of B and M held not justified by S 239 (d) — Joint trial held illegal on other grounds also)

(22) 9 AIR 1922 Lah 144 (145) 22 Cri L Jour 506 *Ganda Singh v Emperor* (Charges for theft and assault.)

compliance of the third kind which has reference merely to the *framing of the charge* but not to the *mode of trial*, is not governed by the Privy Council decision, and is only a

- (31) 18 AIR 1931 All 705 (706) 32 Cri L Jour 1031 *Raghubar Dayal v Emperor*
 (34) 4 Bom L R 440 (441) *Emperor v Lallubhai Girdaldas* (Charges for offences under Ss 471, 469 and 477A Penal Code)
 (04) 1 Cri L Jour 834 (834) 6 Bom L R 725, *Emperor v Wassanji Dayal* (Joinder of charges under Ss 340 and 414 Penal Code)
 (14) 1 AIR 1914 Cal 589 (589) 15 Cri L Jour 472 *Shyambar Koyal v Emperor* (Charges of theft and grievous hurt)
 (15) 2 AIR 1915 Cal 296 (297) 41 Cal 722 15 Cri L Jour 153 *Raman Behari Das v. Emperor.*

under Ss 409 and 477A Penal Code) peror. (Charges

under Ss 457 and 390 Penal Code)

- (05) 2 Cri L Jour 480 (484 495 499 500) 29 Bom 449 7 Bom L R 527, *Emperor v Jethalal Hurlockhand*
 (09) 9 Cri L Jour 147 (148) 1 Ind Cas 69 (Cal) *Tilakdhare Mahton v Lali Singh* (Joinder of charges under Ss 225 and 379)
 (12) 13 Cri L Jour 495 (496) 15 Ind Cas 495 (Low Bur) *Nga Tha Gyi v Emperor.* (Charges under Ss 434 and 325 I P C)
 (10) 3 AIR 1916 Mad 550 (553) 16 Cri L Jour 323 *Virupana Gowd v Emperor*
 (16) 5 AIR 1916 Cal 189 (195) 42 Cal 907 16 Cri L Jour 497 *Amratalal v Emperor.*

v. Emperor
 Emperor
 ok Gyi
 or
 ror (Charges

- (33) 1933 Mad W N 326 (328) *Venkatasubbaya v. Emperor* (Joinder of charges for offences under Ss 406 and 474 Penal Code)
 (12) 13 Cri L Jour 21 (22) 13 Ind Cas 213 (Mad) *Lakshminarasimnapuram v Emperor* (Charges for offences under Ss 409 and 477A)
 (21) 8 AIR 1921 Lah 381 (382 383) 1 Lah 562 21 Cri L Jour 626, *Pahlad v Emperor*
 (14) 1 AIR 1914 Lah 455 (456) 1914 Pan Re No 20 Cr 15 Cri L Jour 172 *Banwari Lal v Emperor* (Joint trial of persons separately accused of offences under Ss 48 and 53 Excise Act)
 (09) 8 Cri L Jour 243 (248) 1908 Pan Re No 12 Cr, *Mangal Singh v Emperor* (Joint trial of several persons for separate offences)

(Do)
 (Do)
 ror
 (Principles of section

oer v Emperor
 awak v Emperor.
 haf v Emperor
 ah], Mahbub Ali v Emperor]
 or 330 *In re Rangaswamy Chetty*]

Also see S 234 Note 7, S 235 Note 13, S 239 Note 21 and S 537 Note 10

The following cases most of which were decided before the date of the Privy Council decision in 23

which has taken place here shall not be permitted this contravention of the Code comes within the description of error omission or irregularity

The question has arisen as to how far this decision is applicable to a disobedience of the directions of this section. The section directs two things namely

(1) that for every distinct offence of which any person is accused there shall be a *separate* charge and

(2) that every such charge shall be *tried separately* unless the case falls within the classes of cases mentioned in Ss 231 235 236 and 239

Where a *single* charge is framed for several distinct offences and a *single* trial is held in respect of such charge and the case does not fall within Ss 231 235 236 or 239 there is a non compliance both as regards the *framing* of the charge and as regards the *mode of trial*. Where *separate* charges are framed for the distinct offences but a *single* trial is held in respect of all such charges and the case is not governed by Ss 231 235 236 or 239 there is a non compliance with the section as to the *mode of trial*. Where a *single* charge is framed for several distinct offences and a *single* trial is held in respect of such charge and the case falls within Ss 231 235 236 or 239 there is a non compliance as regards the *framing* of the charge but *not* with regard to the *mode of trial*. A non compliance of the first kind is governed by the rule enunciated in *Subramanaya Iyer's case* and is an illegality not cured by S 537² so also is a non compliance of the second kind³. But a non

2 (45) 32 AIR 1945 Pat 389 (389) 24 Pat 203 22 Pat 203 22 Pat 203

(44) 31 AIR 1944 Bom 306 (312) 1 L R (19

(44) 31 AIR 1944 Cal 224 (227 228) 45

401 (DB) *Beclaram Mukherji v Emperor* (In this case there were three sets of charges—Each set contained two distinct offences under two distinct sections of the Penal Code and there was one trial)

(42) 29 AIR 1942 Cal 237 (239) 43 Cr L Jour 553 199 Ind Cas 362 *Jugal Krishna Dey Sarkar*

alleged forger as a servant — Therefore the joinder of three charges under S 468 with a charge under S 408 I P C cannot come within the provisions of S 233 Cr P C and is contrary to the direct provisions of S

(42) 29 AIR 19

(42) 29 AIR 191

v Emperor

(20 25 AIR 1920 P — 20 2

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Chuharmal Nirmaldas v

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(15) 2 AIR 1915 All 460 (462) 38 All 42 16 Cr L Jour 813 *Kalka Prasad v Emperor* (Joint

orders not so con

(2 14 AIR 19 All 223 (224) 49 All 312 28 Cr L Jour 171 *Raman Lal v Emperor* (Single charge with respect to criminal breach of trust committed in various distinct transactions extending over one year)

(04) 1 Cr L Jour 875 (876) 1904 All W N 293 *Emperor v Nand Lal*

(07) 5 Cr L Jour 341 (342) 30 Mad 328 17 Mad L Jour 141 *Kasi Viswanathan v Emperor*

(13) 14 Cr L Jour 116 (117) 18 Ind Cas 676 (All) *Shankar v Emperor*

(30) 19 AIR 1932 Bom 277 (278 279) 33 Cr L Jour 619 *Krishnaji Anant v Emperor* (Single

(22) 9 AIR 1920 Lah 144 (145) 22 Cr L Jour 505 *Ganda Singh v Emperor* (Charges for theft and assault)

compliance of the third kind which has reference merely to the *frame of the charge* but not to the *mode of trial* is not governed by the Privy Council decision and is only a

- (31) 18 AIR 1931 All 705 (706) 32 Cr L Jour 1031 *Raghubar Dayal v Emperor*
 (04) 4 Bom L P 440 (441) *Emperor v Lallubhai Gikaldas* (Charges for offences under Ss 471 469 and 477A Penal Code)
 (04) 1 Cr L Jour 834 (834) 6 Bom L R 720 *Emperor v Wassanj Dayal* (Joinder of charges under Ss 300 and 414 Penal Code)
 (14) 1 AIR 1914 Cal 509 (509) 15 Cr L Jour 472 *Shyambar Kojal v Emperor* (Charges of theft and grievous hurt)
 (15) 2 AIR 1915 Cal 296 (297) 41 Cal 72 15 Cr L Jour 153 *Faman Behari Das v Emperor* (Joinder of charges under Ss 477A and 1409 Penal Code)
 (03) 1903 Pun L R No 17 Cr p 44 (46) 1903 Pun L R No 149 *Singhara v Emperor*
 (02) 26 Mad 120 (127) 2 Weir 293 *Krishnaswami Pillai v Emperor*
 (31) 16 AIR 1931 Oudh 66 (68) 6 Luck 441 32 Cr L Jour 510 *Dubri Massir v Emperor* (Charges under Ss 409 and 477A Penal Code)
 (01-09) 1 Low Bur Rul 361 (369) *San Dail v Crown*
 (03-04) 2 Low Bur Rul 10 (11 12) *Nga Lun Maung v King Emperor*
 (04) 1 Cr L Jour 537 (539) 1904 Lpp Bur Rul 1st Qr Cr P C 2 *Emperor v Asgar Ali* (Charges under Ss 457 and 300 Penal Code)
 (05) 2 Cr L Jour 490 (494 495 499 500) 29 Bom 419 7 Bom L R 597 *Emperor v Jethalal Hurlochand*
 (09) 9 Cr L Jour 147 (149) 1 Ind Cas 69 (Cal) *Tilakdhari Mahlon v Lali Singi* (Joinder of charges under Ss 200 and 379)
 (12) 13 Cr L Jour 455 (456) 15 Ind Cas 495 (Low Bur) *Nga Tha Gyi v Emperor* (Charges under Ss 434 and 325 11 C)
 (16) 3 AIR 1916 Mad 500 (503) 16 Cr L Jour 393 *Varupana Gowd v Emperor*
 (16) 3 AIR 1916 Mad 500 (503) 16 Cr L Jour 393 *Varupana Gowd v Emperor*
 (21) 8 .
 (14) 1 .
 (04) 1 .
 (34) 21 AIR 1934 Oudh 457 (459) 10 Luck 235 30 Cr L Jour 1417 *Onkar v Emperor*
 (33) 20 AIR 1933 Nag 327 (328) 34 Cr L Jour 673 *Rameshwar Brijmohan v Emperor* (Charges for offences under Ss 409 and 477A Penal Code)
 (33) 1933 Mad W N 326 (328) *Venkatasubbaya v Emperor* (Joinder of charges for offences under Ss 405 and 474 Penal Code)
 (12) 13 Cr L Jour 21 (22) 13 Ind Cas 213 (Mad) *Lakshminarayanapurani v Emperor* (Charges for offences under Ss 409 and 477A)
 (21) 8 AIR 1921 Lah 391 (392 393) 1 Lah 567 21 Cr L Jour 626 *Pahlad v Emperor*
 (14) 1 AIR 1914 Lah 455 (456) 1914 Pun Re No 20 Cr 15 Cr L Jour 170 *Banwari Lal v Emperor* (Joint trial of persons separately accused of offences under Ss 48 and 53 Excise Act)
 (08) 8 Cr L Jour 243 (248) 1908 Pun Re No 12 Cr *Mangal Singh v Emperor* (Joint trial of several persons for separate offences)
 (04) 1 .
 (1900) 1 . (Do)
 (09) 9 . (Do)
 (07) 6 Cr L Jour 321 (323) 11 Cal W N 1128 *Nanda Kumar Sirkar v Emperor*
 (04) 1 Cr L Jour 58 (62) 8 Cal W N 160 *Pran Krishna Saha v Emperor* (Principles of section

cal decision in 25

An objection as to non compliance with the requirements of the section regarding the mode of trial can be taken for the first time even in appeal ⁶

- omission to frame separate charges does not vitiate trial (p 490) but a misjoinder in one trial is illegal (p 496)

- Mecharals Bachal.**
ndul

(34) 21 AIR 1934 Oudh 244 (245) 35 Cri L Jour 935 *Mendi Lal v Emperor* (Single charge for different offences committed against different persons in same transaction)

- [But see (30) 17 AIR 1930 Sind 62 (64) 30 Cr L Jour 1073 *Ali Mahomed v Emperor* (There was

of m sjoinder)

- (33) 1933 Mad W N 326 (329) *Venkatasubbayya v Emperor*

In the unpermitted case the accused had committed three offences. Two were under s 403 Penal Code committed in the course of the same transaction while the third was under s 467 Penal Code. There were three separate charges for these offences. The accused pleaded guilty to the third charge and therefore the trial proceeded only on the first and second charge. It was held that no illegality was committed as there were three separate charges and the trial proceeded only in respect of the first two which could be tried jointly under s 223 of this Code.

6 Counter-cases. — The joint trial of two parties arrayed against each other in a riot at one and the same trial is altogether illegal and void under this section¹. It cannot be held that the offences in such cases are committed in the course of the same transaction as the accused have not been acting in pursuance of a *common purpose*² (See s 239 Note 8). It has been held that even committals in such cases should be made separately and not all together though it is in the power of the Sessions Judge to try them separately in spite of the joint committal³. Nor can the evidence for the prosecution in one case be used as evidence for the defence in the other case and *vice versa*⁴. It has however been held that unless the accused has been prejudiced by reason of the evidence in the cross case being acted upon the trial should not be set aside⁵.

A *simultaneous trial* of a case and a counter case is not a joint trial and is not prohibited by the Code.

A simultaneous trial in certain cases and in certain circumstances might be irregular and improper but that would not entitle the accused to have the whole trial set aside unless the procedure adopted had prejudiced him in his defence⁶. The proper course to pursue is

7 (40) 1943 1 Mad L Jour 466 (467) *In re Krishna Murthi Ajar*

Note 6

1 (44) 31 AIR 1944 Bom 140 (147) 1 L B (1944) Bom 344 45 Cr L Jour 701 213 Ind Cas 213 (DB) *Banappa Kallappa v Emperor*

(43) 30 AIR 1943 Pat 376 (376) 40 Cr L Jour 308 211 Ind Cas 103 *Kjetramohan Das v Emperor*

(06) 4 Cr L Jour 75 (76) 1906 Pan Re No 5 Cr *Ala Dya v Emperor*

(94) 11 AIR 1914 Lah 104 (106) 107 4 Lah 376 20 Cr L Jour 68 *Allu v Emperor*

(25) 1st AIR 1915 Lah 149 (150) 25 Cr L Jour 551 *Muhammad v Emperor*

(20) 7 AIR 1920 Low Bur 90 (90) 22 Cr L Jour 707 *Mamsa v Emperor*

(03-04) 2 Low Bur Rul 106 (107) *Nga Tha Dun Aung v Emperor* (A causing hurt to D and B causing grievous hurt to A)

(69) 12 Suth W B Cr 75 (76) *Queen v Suroop Chunder Paul*

Also see S 239 Note 8

2 (44) 31 AIR 1944 Bom 146 (147 148) ILR (1944) Bom 344 45 Cr L Jour 701 213 Ind Cas 213

at

4 (38) 25 AIR 1938 Oudh 249 (249) 39 Cr L Jour 929 *Saraju v Emperor*

[See also (44) 31 AIR 1944 Lah 377 (378) (DB) *Saudagar Singh v Emperor* (In cross-cases where the accused in one case figure as witnesses in the other and the evidence is obviously of a partisan character circumstances which are reliably established *alibis* can serve as a proper guide in adjudicating upon the guilt or innocence of the persons involved)]

5 (42) 29 AIR 1919 Oudh 444 (446) 43 Cr L Jour 781 201 Ind Cas 791 *Debi Dayal v Emperor*.

Singh v Emperor

v Emperor

(28) 1b AIR 1928 All 593 (593 594) 50 All 457 30 Cr L Jour 537 *Sukhas Ahir v Emperor*

234.* (1) When a person is accused of more offences than one of

Three offences of same kind within year may be charged together the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law

Provided that, for the purpose of this section, an offence punishable under section 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

Synopsis

- | | |
|--|---|
| 1 Legislative changes | 5 'More offences than one' |
| 2 Section applies to trials and not to commitments | 6 'Committed within the space of twelve months' |
| 3 "Person," if includes 'persons' See Note 5a on S 239 | 7 'Not exceeding three' |
| 4 'Whether in respect of the same person or not' | 8 Offences of the same kind |
| | 9 Proviso |

NOTE to the Synopsis: See the Notes indicated for the following topics

- | | |
|---|--|
| Distinct offence See S 233 Note 3 | Offences under same section See Note 8 |
| Effect of violation of this section See Notes 6 and 7 | Offences under Ss 124A and 153A, I P C See Note 5 |
| Forgery See Note 5 | Only one offence — Section inapplicable See Note 5 |
| Object of the section See S 233 Note 1 | Same series under different sections See Note 5 |
| Offences and not charges See Note 5 | Single trial and not separate trials prohibited See Note 5 |
| Offences and not transactions See Note 5 | Theft See Notes 8 and 9 |
| Offences not of the same kind See Note 8 | |

1 Legislative changes**Changes made in the Code of 1862 —**

The words "committed within the space of twelve months from the first to the last of such offences" were substituted for the words "committed within one year of each other" occurring in the Code of 1879

* Code of 1898, original S 234

234 (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences he may be charged with and tried at one trial for any number of them not exceeding three

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law

Code of 1882 — Section same as original section of 1898 Code

Code of 1872 S 453

453 When a person is accused of more offences than one of the same kind committed within one year of each other he may be charged and tried at the same time for any number of them not exceeding three

Explanation — Offences are said to be of the same kind under this section if they fall within the provisions of section four hundred and fifty five

Code of 1861 — Nil.

Changes made by Act 18 [XVIII] of 1923 —

- 1 In sub s (1) after the words "such offences" the words "whether in respect of the same person or not" have been inserted
- 2 The proviso to sub s (2) is added

2. **Section applies to trials and not to committals.** — The section refers to a *trial* and not to a *commitment*. So, where an accused is committed to trial on more than three charges, the commitment is not illegal, as the Sessions Judge can limit the *trial* to three charges only.¹ See also S 233, Note 1.

- 3 "Person," if includes 'persons' — See Note 5a on S 239

4. **"Whether in respect of the same person or not."** — Before the amendment of 1923, there was a conflict of opinions as to whether the section was applicable to cases of offences committed against *several* persons, one set of cases holding that it applied only when the offences were committed against the *same* person¹ and another set holding that there was no such restriction and that it applied in all cases, whether the offences were committed against the same person or against different persons.² The addition of the words "whether in respect of the same person or not" has removed this conflict and a person can now be charged for offences of the same kind not exceeding three within a year even if they were committed against several persons.³

5 **"More offences than one."** — The section applies only where a person is accused of *more offences than one* of the same kind, and not where he is charged with only *one* offence. A trial for such offence is not barred even though such offence is based upon various acts which by themselves are offences, and which extend beyond a period of one year. In other words the word 'offence' in the section is not intended to include every act so connected with that offence as to form part of the same transaction.¹

Section 234 — Note 2

- 1 (17) 4 AIR 1917 Mad 612 (612) 17 Cri L Jour 369 *In re Krishnamurthy Iyer*
Note 4

- (184) 1 All 114 (118) 1884 All W N 321 (FB), *Queen Empress v Juala Prasad*
(17) 4 AIR 1917 All 369 (369) 38 All 459 18 Cri L Jour 41, *Emperor v Jagar Deo* (4 All 147, not followed)
(19) 6 AIR 1919 All 26 (27, 28) 42 All 12 20 Cri L Jour 642 *Babu Ram v Emperor*.

- Fletcher J*)
10 Cri L Jour 332 *Subedar Ahir v Emperor*. (Per
11 v Emperor

- coins on different occasions to different persons on the same day.—Joint trial is not barred.
(18) 4 AIR 1917 All 369 (369) 38 All 459 18 Cri L Jour 41, *Emperor v Jagar Deo* (4 All 147, not followed)

- (26) 13 AIR 1926 Pat 347 (348) 27 Cri L Jour 909 *Farsand Ali v Emperor*
Note 5

- 1 (44) 31 AIR 1914 Sind 142 (144, 145) ILR (1914) Kar 107 (DN), *Emperor v Manghumal* (A selling coal above controlled price — B buying for himself and his friends — Sale is one and constitutes one offence)

Illustrations

1. A is charged with an offence under S 401 of the Penal Code. It is based on several offences of theft and various acts of association extending over more than one year. The trial is not laid under this section. The reason is that the gist of the offence under S 401 is association for the purpose of habitually committing theft or robbery and habit is to be proved by the aggregate of acts extending, it may be, over many years.²
2. A is charged with the offence of waging war under S 121 of the Penal Code, based upon seventeen separate incidents ranging over a period of fifteen months. The trial is not laid inasmuch as the offence under S 121 is a *single continuing offence*.³
3. A is charged with the offence of falsification of accounts under S 477A, Penal Code. Prosecution is not restricted to only three instances of falsification but any number of false entries or omission of entries may be proved.⁴

The section refers to 'offences' and limits the trial to three offences. 'An offence' is defined in S 4 (o) as an *act or omission* made punishable by any law for the time being in force. A single act or omission will be only one offence though chargeable under several sections of the Penal Code. Thus, the printing of a seditious article on a particular date is only *one* offence though the accused may be charged therefor under ss 124A and 153A. The printing of another article of a similar nature on *another date* is another offence chargeable under the same two sections and of the same nature as the first. The two offences can, therefore, be tried together at one trial under this section.⁵ This section does not allow a single trial in respect of two *transactions* of the same kind, each of such transactions being made up of offences of different kinds. Thus, when A was charged (1) with abetting of forgery in respect of the service of summons alleged to have been served on 21st October, 1914, (2) with swearing a false affidavit with regard to the service of such summons, (3) with abetment of forgery in respect of the service of summons alleged to have been served on 22nd January 1915, and (4) with swearing a false affidavit as to the service of the latter summons, it was held that S 234 did not apply and that the trial was bad,⁶ inasmuch as there were *four* offences not of the same kind, though there were *two transactions of the same kind*, namely, in respect of the two summonses. See also the undermentioned decisions.⁷

(34) 21 AIR 1934 Sind 57 (64) 28 Sind L R 119 35 Cri L Jour 1337, *Dur Md v Emperor*

(05) 2 Cri L Jour 34 (37) 1905 Pan Re No 2 Cr, *Bhagwati Dial v King Emperor*

2 (20) 7 AIR 1920 Cal 87 (88) 47 Cal 154 21 Cri L Jour 386 *Kasem Ali v Emperor*

3 (25) 12 AIR 1925 Mad 630 (635) 49 Mad 74 26 Cri L Jour 1513 *In re Mallu Dora*

4 (31) 18 AIR 1931 Cal 8 (9) 32 Cri L Jour 318 *Prafulla Chandra v Emperor*

(15) 2 AIR 1915 Cal 296 (297) 15 Cri L Jour 153 41 Cal 722 *Paman v Emperor*

5 (08) 8 Cri L Jour 272 (277, 280) 1 Ind Cas 641 33 Bom 77 *Emperor v Tribhuvandas*

6 (17) 4 AIR 1917 Sind 40 (41) 10 Sind L R 192 18 Cri L Jour 661 *Gerimal v Emperor*

[See also (07) 5 Cri L Jour 311 (312) 30 Mad 328, *Kas Viswanathan v Emperor* (Offences committed within one year in the course of three separate transactions if they amount to more than three cannot be tried at one trial)]

7 (44) 31 AIR 1914 Cal 224 (227, 228) ILR (1914) 1 Cal 393 45 Cri L Jour 666 213 Ind Cas 401 (DB), *Becharam Mukherji v Emperor* (Accused charged with three offences of theft and three offences of dishonest misappropriation in alternative — Section does not apply)

(43) 30 AIR 1913 Mad 209 (209) 41 Cri L Jour 413 205 Ind Cas 336, *In re Chinnappa Chetty* (Two transactions each of such a nature that a charge in alternative for offence under S 360 or S 411, Penal Code can be framed—Offences involved are not of same kind—Same accused involved in both the transactions cannot be jointly tried under S 239 (c))

(42) 29 AIR 1912 Pat 401 (405) 43 Cri L Jour 625 21 Pat 113 200 Ind Cas 350 (DB) *Jogendra Nath v Mahan Lal* (Series of defalcations and falsifications of accounts to conceal the defalcations — But each defalcation and connected falsification being a separate transaction — Joint trial under Ss 409 and 477A, I P C for all the offences committed in one year not legal)

(41) 28 AIR 1911 Cal 707 (712) 43 Cri L Jour 399 ILR (1911) 2 Cal 319 199 Ind Cas 492 (DB) *Hugh Francis Bellgard v Emperor* (The joint effect of Ss 234 and 235 Cr P C is not to sanction the joinder of all charges arising out of three transactions of the same kind carried out within the space of twelve months and unless it is clearly alleged at the trial that the three transactions were carried out

proceeding on the same principle Where the accused is charged with offences of the same kind it is not permissible under this section to add a further charge in respect of another offence which is not of the same kind but which is alleged to have been committed in the course of the same transaction as one or more of the other offences.⁸ But in some decisions it has been held that where a person is charged with several offences of the same kind under this section, there is no objection to his being freed on additional charges framed under S 235 or S 236.⁹ See also S 239, Note 2

The section bars only a single trial of more than three offences of the same kind committed within the space of a year It does not mean that if the accused had committed fifty offences in the course of twelve months, only three shall be tried and the rest abandoned He may be tried in batches of three at each trial under separate charges.¹⁰ Further, the section merely authorises a combination of three offences in one trial. It does not bar a separate trial of the accused for each separate offence.¹¹ Moreover, the effect of the section is not to make the three offences, which are tried together under its provisions, one offence The offences continue to be separate though there is only one trial for all of them.¹²

6 "Committed within the space of twelve months" — The section provides for a single trial of offences committed within the space of twelve months If the offences extend over a period longer than a year, a single trial therefor is illegal as contravening the provisions of this section, and the defect is not curable under section 537.¹

7. "Not exceeding three."—An accused can, under the section be charged and tried at one trial for offences of the same kind not exceeding three A trial for more than three offences committed during the year is contrary to the provisions of this section, and

in furtherance of a general conspiracy to commit such offences, their joinder in one trial is not sanctioned by the provisions of S 235, Cr P C)

(41) 28 AIR 1941 Rang 337 (339) 43 Cri L Jour 418 (1941) Rang L R 559 199 Ind Cas 27, *G H Astell v I Eng Take* (The provisions of S 239 (d) Cr P Code cannot be combined with those of S 234 so as to allow of three sets of offences committed in the course of three transactions or six offences in all being charged and tried together If such an illegality is committed then the trial is bad—S 537 only deals with mere errors and irregularities in the charge and not with illegalities such as trial for plurality of offences in a manner not allowed by law)

8 (42) 46 Cal W N 287 (288) (DB) *Jogendra Chandra Ghosh v Postal Department of the Government of India* (Joinder of three charges under I P C, S 409 and one charge for offence under S 477A I P C, alleged to have been committed in connection with the offence in the third charge—Joinder is illegal)

[See also (44) 31 AIR 1944 Bom 306 (310) ILR (1944) Bom 728 (DB) *Keshavlal Tribhuvandas v Emperor* (Two offences under S 3 and two under S 4 (a) Explosive Substances Act, are not offences of the same kind)

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Note 6

1. (01) 25 Mad 61 (97) 23 Ind App 257 8 Sar 160 (PC) *Subramaniam v Emperor* (On appeal from

as an illegality and not merely an irregularity covered by S 537¹ The same principle applies even where the accused is charged with three offences of the same kind falling under one section and in the alternative with three offences of the same kind falling under another

Note 7

- (41) 23 AIR 1941 Bom 156 (156-157) 42 Cr L Jour 571 1941 Ind Cas 345 (DB) *Emperor v. Champal Lal* (Criminal cases cannot like civil suits be consolidated and tried together on same evidence except within limits as to joinder of charges)
- (35) 20 AIR 1938 Sind 164 (168) 1 LR (1939) Kar 61 39 Cr L Jour 861 *Chuharmal Nirmaldas v Emperor*
- (37) 1937 Mad W N 209 (203) *Appalaswami v Emperor* (Six counts of bribery and six counts of false personation relating to different dates and different persons — Single trial illegal — Conviction held void and of no legal effect)
- (36) 23 AIR 1936 Cal 693 (634) 38 Cr L Jour 201 *Amritani Ghose v Emperor*
- (01) 20 Mad 61 (96-97) 28 Ind App 257 8 Sar 160 (PC) *Subramaniya v Emperor*
- (04) 1 Cr L Jour 875 (876) 1904 All W N 223 *Emperor v Nand Lal*
- (05) 8 Cr L Jour 4 (5) 30 All 351 5 All L Jour 400 1903 All W N 150 *Emperor v Mata Prasad*
- (10) 11 Cr L Jour 51 (52) 5 Ind Cas 178 (All) *Umed Singh v Emperor*
- (10) 11 Cr L Jour 235 (236) 5 Ind Cas 696 32 All 219 *Sheo Saran Lal v Emperor*
- (18) 5 AIR 1916 All 351 (359) 19 Cr L Jour 161 *Emperor v Raghunath* (In this case the High Court accepted the above principle — However, in order to meet the ends of justice the conviction was not set aside)
- (19) 8 AIR 1919 All 239 (233) 20 Cr L Jour 353 *Emperor v Fauza*
- (19) 8 AIR 1919 All 413 (414) 20 Cr L Jour 784 *Avadh Behari v Emperor*
- (23) 10 AIR 1923 All 493 (494) 20 Cr L Jour 220 *Ganga Prasad v Emperor*
- (07) 4 Bom L R 433 (434) *Emperor v Nathalal*
- (26) 18 AIR 1926 Bom 110 (112) 49 Bom 692 27 Cr L Jour 805 *Emperor v Manant*
- (24) 21 AIR 1934 Bom 303 (305) 30 Cr L Jour 1477 *Khunchand A Mehta v Emperor*
- (87) 14 Cal 193 (181) *In the matter of Luchma Narain*
- (93) 2 Cal W N 341 (346) *Ekram Ali v Queen Empress*
- (05) 2 Cr L Jour 817 (850-851) 9 Cal W N 1027 *Ram Sarup Bensa v Emperor*
- (27) 14 AIR 1927 Cal 946 (946) 23 Cr L Jour 291 *Krishna Lal v Emperor*
- (32) 19 AIR 1932 Cal 377 (379) 33 Cr L Jour 357 *Surendra Nath Goswami v Emperor*
- (26) 13 AIR 1926 Lah 193 (194) 27 Cr L Jour 793 *Fulzmaurice v Emperor*
- (02) 2 Weir 299 (299) *In re Venkata Laut*
- (07) 5 Cr L Jour 94 (95-96) 29 Mad 568 17 Mad L Jour 219 1 Mad L Tim 409 *Manavala Chetty v Emperor*
- (12) 13 Cr L Jour 21 (22) 13 Ind Cas 213 (Mad) *Lakshminarain v Emperor*
- (12) 13 Cr L Jour 121 (125) 13 Ind Cas 780 (Mad) *Emperor v Arumukhan Pillai*
- (12) 13 Cr L Jour 125 (126) 13 Ind Cas 781 (Mad) *Mandi Ghasi v Emperor*
- (17) 4 AIR 1917 Mad 612 (612) 17 Cr L Jour 369 *In re Krishnamurthy Iyer*
- (22) 9 AIR 1922 Mad 435 (435) 24 Cr L Jour 462 *Shama Sastri v Emperor*
- (30) 17 AIR 1930 Mad 508 (509) 31 Cr L Jour 1195 *Vaswamy Nasdu v Emperor*
- (18) 5 AIR 1918 Nag 22 (27) 19 Cr L Jour 657 *Jangulal v Emperor*
- (27) 14 AIR 1927 Nag 22 (23) 27 Cr L Jour 1099 *Emperor v Dhanshram*
- (31) 18 AIR 1931 Oudh 86 (87) 6 Luck 441 32 Cr L Jour 540 *Dubri Misir v Emperor*
- (34) 21 AIR 1934 Oudh 325 (326) 35 Cr L Jour 1018 *Gunno v Emperor*

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- (26) 18 AIR 1926 Sind 129 (129-130) 20 Sind L R 3 27 Cr L Jour 32 *Hyder v Emperor*
- (35) 20 AIR 1935 Oudh 273 (274-275) 36 Cr L Jour 618 *Parey Lal v Emperor*
- [See (35) 22 AIR 1935 Bom 24 (20) 36 Cr L Jour 515 *Emperor v Suleman Abbv.* (Where it was not material and not having prejudicial effect)]
- Ikarilal v Emperor* (Held, on facts that
- [See also (28) 29 Cr L Jour 297 (289) 107 Ind Cas 896 (Pat) *Jamuna Prasad v Emperor*]
- Also see S 233 Note 5 S 235 Note 13 and S 637 Note 10
- [But see (08) 7 Cr L Jour 90 (97) 7 Cal L Jour 63 35 Cal 161, *Depin v Emperor*];

section, because the total number of offences charged in such a case exceeds three² Where a person is charged with more than three offences at one trial, the Judge can, *before the trial begins* strike off a charge or charges so as to reduce the number of charges to be tried to three³ After the trial begins however, the illegality cannot be cured by the striking out of the extra charges⁴ See also S 227, Note 4

This section must be read subject to the special provisions of sub section (2) of S 222 with regard to the offences of criminal breach of trust and dishonest misappropriation of money, as to which, see S 222 and the Notes thereon

8 Offences of the same kind — This section applies only where a person is accused of more offences than one of the *same kind* It does not apply where a person is accused of offences which are not of the same kind such as criminal breach of trust and falsification of accounts¹ The provisions of the section cannot be evaded by the omission to name the offences and sections of the statute in the charge where in fact the accused has been charged with two offences which are not of the same kind²

Sub section (2) provides that in order that offences may be of the *same kind*, they should be punishable —

(1) under the same section and

(2) with the *same amount* of punishment

See the undermentioned cases³ for examples of offences which are not of the same kind

See also Note 5 and S 233 Note 3

2 (44) 81 AIR 1944 Cal 224 (227 228) 45 Cri L Jour 666 I L R (1944) 1 Cal 398 213 Ind Cas 401 (DB) *Becharam Mukherji v Emperor* (Accused charged with three offences of theft and

4 (44) 31 AIR 1944 Bom 306 (311) I L R (1944) Bom 728 (DB) *Keshavlal v Emperor*
(07) 5 Cri L Jour 94 (95 96) 29 Mad 569 17 Mal L Jour 219 1 Mad L Tim 409, *Manatola Chetty v Emperor*

(22) 9 AIR 1922 Cal 401 (401) 49 Cri 553 24 Cri L Jour 86 *Chetoo Kalwar v Emperor*
(26) 13 AIR 1920 Lah 193 (194) 27 Cri L Jour 793 *Fatema Maurice v Emperor*

[See also (42) 46 Cal W N 287 (288) (DB) *Jogendra Chandra Ghosh v Postal Department of the Government of India* (Joinder of three charges under Section 409 I P O and one charge under Section 477A I P C — Trial on all four charges but accused acquitted on last charge for want of necessary sanction.—Held, whole trial as vitiated)]

Also see S 227 Note 4

Note 3

1 (37) 24 AIR 1937 Sind 1 (1) 30 Sind L R 391 38 Cri L Jour 394 *Emperor v Mohammad Ismail* (Offences of falsification of accounts and criminal breach of trust even though they relate to the same transaction are not one offence and three charges of criminal breach of trust

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4 (DB) *Keshavlal v Emperor* (Three Substances Act and the other two under section 4 (a) of that Act cannot be said to be of the same kind)

(43) 30 AIR 1913 Mad 209 (209) 44 Cri L Jour 413 205 Ind Cas 336 *In re Chinnappa Chetty* (Offences under sections 380 and 411 I P C)

(41) 28 AIR 1941 Cal 707 (711) 43 Cri L Jour 389; I L R (1941) 2 Cal 319 198 Ind Cas 499 (DB) *Hugh Francis Bellgard v Emperor* (Sections 420 467 and 477A I P C)

(39) 26 AIR 1939 Bom 129 (136) 40 Cri L Jour 579 *Ramchandra Rango v Emperor* (Offence of fabrication of false evidence relating to items partly or wholly unconnected with the charge of criminal breach of trust)

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⁴ *asraraddi* (Murder and

9 Proviso. — The proviso lays down specifically that an attempt to commit an offence is of the same kind as the actual offence when such attempt is itself an offence. It also provides that offences under ss. 379 and 380 of the Penal Code are of the same kind even though punishable under different sections and with different punishments, thus overruling the view held in the undermentioned cases¹ that they were not offences of the same kind.

235.* (1) If, in one series of acts so connected together as to

Trial for more than one offence form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence

(2) If the acts alleged constitute an offence falling within two or

Offence falling within two definitions. more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

* Code of 1882 Section same as that of 1898 Code

Code of 1872 S 454

454 I — If in one set of facts so connected together as to form the same transaction more
Trial of more than one offence offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time

II — If a single act falls within two separate definitions of any law in force for the time being
One offence falling within two definitions. by which offences are defined or punished the person who does it may be charged with each of the offences so committed but he must not receive a more severe punishment than could be awarded by the Court which tries him for either

(9-) 21 All 127 (131 132) 1899 All W N 205 *Queen Empress v Mathura Prasad* (Sections 161 and 409 I P C)

(87) 8 Cal 40 (454) 10 Cal L Rep 421 *Empress v Srinath Kur* (Sections 167 and 406 I P C)

(17) 4 AIR 1917 Sind 40 (41) 10 Sind L R 192 18 Cri L Jour 664 *Gerwal Hemanmal v Emperor* (Sections 193 and 463 with 109 I P C)

(29) 1909 Mad W N 395 (307) *Collett v Emperor* (Sections 279 and 304 I P C)

(13) 14 Cri L Jour 116 (116) 18 Ind Cas 676 (All) *Slaker v Emperor* (Sections 302 and 323 I P C)

(92) 14 All 502 (503 504) 1892 All W N 95 *Queen Empress v Mulua* (Sections 302 and 392 I P C)

(24) 11 AIR 1924 All 316 (317) 46 All 54 25 Cri L Jour 466 *Puttos Lal v Emperor* (Sections 373 and 342 I P C)

(24) 11 AIR 1924 All 454 (455) 46 All 138 25 Cri L Jour 550 *Badli Shah v Emperor* (Sections 366 and 368 I P C)

(00) 15 C P L R Cr 53 (54) *Emperor v Disha Panla* (Sections 380 404 and 457 I P C)

(32) 19 AIR 1932 Bom 277 (278) 33 Cri L Jour 619 *Krishnaji Anant v Emperor* (Sections 380 and 457 Penal Code)

(04) 1 Cri L Jour 537 (530) 1904 U B R 1st Cr Cr P O 2 *Emperor v Asgar Ali* (Do)

(32) 19 AIR 1932 Sind 64 (65) 26 Sind L R 191 33 Cri L Jour 650 *Emperor v Attursing*

27 Cri L Jour 305 *Emperor v Manant K Mehla* (Do)
Cri L Jour 673 *Rameshwar Brijnahan v Emperor*

(Sections 409 and 477A I P C)

(02) 4 Bom L R 433 (434) *Emperor v Nathalal* (Do)

(32) 19 AIR 1932 Cal 496 (496) 33 Cri L Jour 260 *Nagendra Nath v Emperor* (Do)

(07) 5 Cri L Jour 341 (312) 30 Mad 398 17 Mad L Jour 141 2 Mad L Tim 177, *Kasi Vasanathan v Emperor* (Do)

(82) 8 Cal 634 (636) 10 Cal L Rep 466 *Empress v Uttom* (Sections 411 and 413 I P C)

(34) 21 AIR 1934 Pat 170 (172) 35 Cri L Jour 614 *Jangli Mitun v Emperor* (Accused charged in alternative of kidnapping or abduction of minor girl—Separate charges must be framed in respect of each offence)

(34) 21 AIR 1934 Bom 303 (305) 35 Cri L Jour 1477 *Khynchand A Mehla v Emperor* (Clause (a) and Clause (b) of Section 103 of the Presidency Towns Insolvency Act)

Note 9

1 (16) 3 AIR 1916 Cal 124 (124) 17 Cri L Jour 224 *Rakuman Bibi v Mubarak Mondal*

(18) 5 AIR 1918 Ag 107 (109) 20 Cri L Jour 751, *Hari Singh v Emperor*

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(4) Nothing contained in this section shall affect the Indian Penal Code, section 71.

Illustrations

TO SUB-SECTION (1) —

(a) *A* rescues *B* a person in lawful custody, and in so doing causes grievous hurt to *C* a constable in whose custody *B* was. *A* may be charged with, and convicted of, offences under Ss 225 and 333 of the Indian Penal Code

(b) *A* commits house-breaking by day with intent to commit adultery, and commits in the house so entered adultery with *B*'s wife. *A* may be separately charged with, and convicted of, offences under Ss 454 and 497 of the Indian Penal Code

(c) *A* entices *B* the wife of *C*, away from *C* with intent to commit adultery with *B*, and then commits adultery with her. *A* may be separately charged with, and convicted of, offences under Ss 498 and 497 of the Indian Penal Code

(d) *A* has in his possession several seals knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under S 465 of the Indian Penal Code. *A* may be separately charged with, and convicted of, the possession of each seal under S 473 of the Indian Penal Code

(e) With intent to cause injury to *B*, *A* institutes a criminal proceeding against him knowing that there is no just or lawful ground for such proceeding, and also falsely accuses *B* of having committed an offence, knowing that there is no just or lawful ground for such charges. *A* may be separately charged with, and convicted of, two offences under S 211 of the Indian Penal Code

(f) *A* with intent to cause injury to *B* falsely accuses him of having committed an offence knowing that there is no just or lawful ground for such charge. On the trial, *A* gives false evidence against *B* intending thereby to cause *B* to be convicted of a capital offence. *A* may be separately charged with, and convicted of offences under Ss 211 and 194 of the Indian Penal Code

(g) *A*, with six others, commits the offences of noting grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. *A* may be separately charged with, and convicted of offences under Ss 147, 325 and 152 of the Indian Penal Code

(h) *A* threatens *B*, *C* and *D* at the same time with injury to their persons with intent to cause alarm to them. *A* may be separately charged with and convicted of, each of the three offences under S 506 of the Indian Penal Code

The separate charges referred to in Illustrations (a) to (h) respectively may be tried at the same time

TO SUB-SECTION (2) —

(i) *A* wrongfully strikes *B* with a cane. *A* may be separately charged with, and convicted of, offences under Ss 352 and 323 of the Indian Penal Code

(j) Several stolen sacks of corn are made over to *A* and *B*, who know they are stolen property, for the purpose of concealing them. *A* and *B* thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. *A* and *B* may be separately charged with, and convicted of, offences under Ss 411 and 414 of the Indian Penal Code

(k) *A* exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. *A* may be separately charged with, and convicted of, offences under Ss 317 and 304 of the Indian Penal Code

III — If several acts of —

Acts severally constituting more than one offence, but collectively coming within one definition	when committed at the same time by the same person, may be charged as every offence which he may have committed, but he must not receive for such offences collectively, a punishment more severe than that which might have been awarded, by the Court trying him, for any one of such offence, or for the offence formed by their combination
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(f) *A* dishonestly uses a forged document as genuine evidence, in order to convict *B*, a public servant, of an offence under S 167 of the Indian Penal Code. *A* may be separately charged with and convicted of, offences under Ss 471 (read with 466) and 196 of the same Code.

TO SUB-SECTION (3) —

(m) *A* commits robbery on *B* and in doing so voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offences under Ss 323, 392 and 394 of the Indian Penal Code

Illustrations

To Paragraph I —

(a) *A* rescues *B* a person in lawful custody, and causes grievous hurt to *C*, a constable in whose custody *B* was. *A* may be separately charged with, convicted of, and punished for, offences under Ss 225 and 333 Indian Penal Code

(b) *A* has in his possession several counterfeit seals, with the intention of committing several forgeries. *A* may be separately charged with convicted of and punished for, the possession of each seal for a distinct forgery under S 473 Indian Penal Code

(c) *A* with intent to cause injury to *B*, institutes proceedings against him knowing there is no just or lawful ground for such proceedings. *A* also falsely charges *B* with having committed an offence. *A* may be separately charged with, convicted of, and punished for, two offences under S 211, Indian Penal Code

(d) *A* with intent to injure *B* brings a false charge against him of having committed an offence. On the trial *A* gives false evidence against *B*. *A* may be separately charged with, convicted of, and punished for offences under Ss 211 and 194 or S 193 Indian Penal Code

(e) *A*, knowing that *B*, a female minor, has been kidnapped, wrongfully confines her and detains her as a slave. *A* may be separately charged with, convicted of, and punished for, offences under Ss 368 (read with S 367) and 370, Indian Penal Code

(f) *A* with six others commits the offences of rioting grievous hurt and of assaulting a public servant engaged in suppressing the riot. *A* may be separately charged with, convicted of, and punished for, offences under Ss 147, 325 and 152, Indian Penal Code

(g) *A* criminally intimidates *B*, *C* and *D* at the same time. *A* may be separately charged with, convicted of and punished for, each of the three offences under S 506, Indian Penal Code

(h) *A* intentionally causes the death of three persons by upsetting a boat. *A* may be separately charged with, convicted of, and punished for, three offences under S 302, Indian Penal Code

To Paragraph II —

(i) *A* commits mischief by cutting down a tree in a Government forest. The tree overhangs the bank of a river and falls into the stream. *A* commits theft by having severed the tree and by floating it down the river to his village where he sells it. *A* may be separately charged with, and convicted of, offences under Ss 426 and 379, Indian Penal Code, but the Court which tries him may not inflict a more severe sentence than if it had convicted him under S 379 only

(j) *A* wrongfully strikes *B* with a cane. *A* may be separately charged with, and convicted of, offences under Ss 352 and 323, Indian Penal Code, but the Court which tries him may not inflict a more severe sentence than if it had convicted him under S 323 only

(k) *A* wrongfully kills a buffalo worth sixty rupees belonging to *D*, and then takes away the carcass in a manner amounting to theft. *A* may be separately charged with, and convicted of, offences under Ss 429 and 379, Indian Penal Code, but the Court which tries him may not inflict a more severe sentence than if it had convicted him under S 429 only

(l) Several stolen sacks of corn are made over to *A* and *B*, who know they are stolen property. *A* and *B* thereupon assist each other to conceal the sacks at the bottom of a grain pit. *A* and *B* may be separately charged with and convicted of, offences under Ss 411 and 414, Indian Penal Code, but the Court which tries them may not inflict a severer sentence than if it had convicted them under one of those Sections only

(m) *A* uses a forged document in evidence, in order to convict *B*, a public servant, of an offence under S 167. *A* may be separately charged with, and convicted of, offences under Ss 471 (read with S 466) and 196, Indian Penal Code, but the Court which tries him may not inflict a severer sentence than if it had convicted him under one of those Sections only

To Paragraph III —

(n) *A* commits house breaking by day with intent to commit adultery and commits, in the house so entered, adultery with *B*'s wife. *A* may be separately charged with, and convicted of, offences under Ss 454 and 497, Indian Penal Code but the Court which tries him may not inflict a severer sentence than if it had convicted him under S 497 only

(o) *A* robs *B*, and in doing so, voluntarily causes hurt to him. *A* may be separately charged with, and convicted of, offences under Ss 323, 392 and 394, Indian Penal Code, but the Court which tries him may not inflict a severer sentence than if it had convicted him under S 392 or S 394 only

Synopsis

- 1 Scope of the section
- 2 "Same transaction" — Sub-section (1)
- 3 "More offences than one"
- 4 "Are committed by the same person"
- 5 "May be tried at one trial"
- 6 "Trial" includes conviction
- 7 Sub-section (2)
- 8 "Constitute, when combined, a different offence" — Sub-section (3)
- 9 Sub-section (4) See Note 4 on S 35

10 Illustration (j)

11. Sections 234, 235 and 236, if mutually exclusive. See Note 2 on S 239
- 12 Failure to charge under sub-section (1) — Subsequent trial therefor — Section 403 See S 403 and Notes thereon
- 13 Joint trial for several charges not forming part of same transaction — Effect
- 14 Offences forming part of same transaction — Jurisdiction to try

NOTE to the Synopsis See the Notes indicated for the following topics

- Acts include illegal omissions. See S 3, sub-s (2) of General Clauses Act
- Burden of proof on prosecution as to applicability of Ss 234 to 239 See Note 1
- Connected as cause and effect See Note 2
- Connected as principal and subsidiary acts See Note 2
- Conspiracy and offence for which conspiracy formed See Note 2
- Desirability of avoiding embarrassment See Note 5
- Identity of purpose and continuity of action See Note 2
- Instances See Note 2

- Joint charges See S 233, Note 1
- Joint trial, some with jury and some with assessors See S 269, sub-s (3)
- Offences for which complaint by or on behalf of Government is needed See Note 5
- Offences under different sections or definitions See S 233, Note 3
- Prejudice to accused See Note 5
- Proximity of time See Note 2
- Question of same transaction is one of fact See Note 2
- Section permissive and not mandatory See Note 5

1. Scope of the section. — This section is another exception to the rule in s 233 that there should be a separate trial for every offence charged. Where the case falls within this section, a *single trial* for more offences than one is legal. The exception only extends, however, to the *trial* and not to the framing of *charges*. The general rule that every offence should be *charged separately* applies though there may be one trial for all such offences under the provisions of the section¹. See also Notes 4 and 5 on S 233.

Separate trial for different offences being the rule and joint trial the exception,² the burden of proof is on the prosecution to show that the case falls within the exceptions to the general rule³.

See also the undermentioned case⁴

(p) A entices B, the wife of C over and charged with and convicted of, offences tries him may not inflict a severer sentence

be separately Court which

Charges in cases falling within two or more Sections of the Penal Code

Code of 1861 S 240

240 When it appears to the Magistrate that the facts which can be established in evidence show a case falling within two or more sections of the Penal Code the charge shall contain two or more heads, each of which shall be applicable to one of such sections.

Section 235 — Note 1

1. (39) 20 AIR 1939 Cal 321 (322) 40 Cri L Jour 649 *Nanda Ghose v Emperor*
(38) 25 AIR 1938 Bom 481 (484) 1 L R (1939) Bom 12 40 Cri L Jour 118 *Emmear v Karamalla*

led on
(1939)

2 "Same transaction" — Sub section (1) — Sub section (1) provides that an accused person may be charged with and tried at one trial for any number of offences which he is alleged to have committed in one series of acts so connected together as to form part of the same transaction.¹ The expression same transaction has however, not been defined in the Code. From its very nature the word transaction is incapable of exact definition and appears to have been purposely used because it has this quality.² It should be interpreted not in any special or technical way but in its ordinary etymological meaning³ of an affair or a carrying through.⁴ The Court may also look for guidance to the illustrations to the section remembering however that those illustrations are not exhaustive.⁵ In *Imperor v. Sharufali*⁶ it was observed that the real and substantial test for determining whether several offences are connected together so as to form one transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect or as principal and subsidiary acts as to constitute one continuous

Note 2

- 1 (41) 2 AIR 1941 Mad 339 (340) 40 Cri L Jour 414 193 Ind Cas 375 *In re Balam Pate* (a)
 (30) 2 AIR 1939 Bom 491 (191) 1 L R (1939) Bom 40 40 Cri L Jour 118 *Emperor v. Karamalli Gulam* (11 offences are committed in the course of the same transaction they may be tried together although they are more than three in number and extending over a period of more than a year)
 (1900) 1 Low Bur Rul 33 (30 36) (FD) *Queen Empress v. Aw Wa* (Effect working of still and possession of spirit manufactured in that still)
 (15) 2 AIR 1915 All 8-0 (380) 16 Cri L Jour 790 (196) *Sohanlal v. Emperor* (Offences under Ss 403 and 417 Penal Code can be tried together)
 2 (40) 3 AIR 1945 Lat 933 (991) 24 Pat 144 46 Cri L Jour 602 220 Ind Cas 80 (DB) *Palak Dandapani v. Emperor*
 (30) 23 AIR 1936 Bom 151 (156) 60 Bom 148 37 Cri L Jour 688 *Shapurji v. Emperor*
 (08) 8 Cri L Jour 191 (190) 1 Sind L R 73 *Emperor v. Ghulam*
 (20) 10 AIR 1910 Sind 233 (235) 18 Sind L R 199 27 Cri L Jour 207 *Frank Crossly Woodward v. Emperor*
 (21) 8 AIR 1921 All 19 (92) 29 Cri L Jour 641 *Sanuman v. Emperor*
 (23) 10 AIR 1913 All 89 (89) 24 Cri L Jour 155 *Ganesh Lal v. Emperor*
 (91) 15 Bom 491 (195) *Queen Empress v. Fakirappa*
 (27) 14 AIR 1927 Bom 177 (183) 51 Bom 310 28 Cri L Jour 373 *Sejmal v. Emperor*
 (00) 2 Cri L Jour 578 (51) 30 Bom 49 7 Bom L R 633 *Emperor v. Datto Hanmant*
 (33) 20 AIR 1933 Bom 266 (267) 57 Bom 400 34 Cri L Jour 870 *Mazharah v. Emperor*
 (20) 7 AIR 1920 Lah 265 (267) 1 Lah 562 21 Cri L Jour 696 *Pahlad v. Emperor*
 (27) 14 AIR 1917 Lah 274 (275) 28 Cri L Jour 357 *Muhanmadi v. Emperor*
 (27) 12 AIR 1925 Mad 690 (700) 26 Cri L Jour 1513 49 Mad 74 *In re Mallu Dora*
 (10) 11 Cri L Jour 258 (209) 5 Ind Cas 817 33 Mad 597 *Choragudi Venkatadr. v. Emperor* (It is not necessary or advisable to attempt to define it)
 3 (41) 31 AIR 1944 Bom 306 (311) 1 L R (1914) Bom 798 (DB) *Keshavlal Tribhutandas v. Emperor*
 (36) 23 AIR 1936 Bom 151 (156) 60 Bom 148 37 Cri L Jour 688 *Shapurji Sorabji v. Emperor* (Common sense and ordinary use of language must decide whether on the facts of a particular case there is one transaction or several transactions)
 (25) 12 AIR 1915 Mad 690 (698) 26 Cri L Jour 1513 49 Mad 74 *In re Mallu Dora*
 (97 01) 1 Upp Bur Rul 31 (40) *Nga Pa Ke v. Queen Empress*
 (10) 11 Cri L Jour 293 (991) 6 Ind Cas 242 (Mad) *Musalappa v. Emperor*
 [See also (30) 17 AIR 1930 Mad 857 (858) 53 Mad 937 32 Cri L Jour 30 *Ramaraju Thevar v. Emperor*]
 (00) 27 Bom 135 (138 139) 4 Bom L R 930

v. Madhav

- (34) 21 AIR 1934 Pat 483 (484 485) 13 Pat 161 36 Cri L Jour 342 *Ramnath Rai v. Emperor*
 5 (91) 15 Bom 491 (190) *Queen Empress v. Fakirappa*
 (05) 2 Cri L Jour 578 (581) 30 Bom 49 7 Bom L R 633 *Emperor v. Datto Hanmant*
 (23) 10 AIR 1913 All 89 (89) 24 Cri L Jour 155 *Ganesh Lal v. Emperor*
 (10) 11 Cri L Jour 293 (294) 6 Ind Cas 242 (Mad) *Musalappa v. Emperor*
 (09) 8 Cri L Jour 191 (190) 1 Sind L R 73 *Emperor v. Ghulam*
 6 (09) 27 Bom 135 (138 139) 4 Bom L R 930

action." And this has been adopted generally by the Courts.⁷ Proximity of time is not so

7. (46) 33 AIR 1946 Oudh 26 (32) : 1945 Oudh W N 331 (348) (DB), *Tahawar Ali Khan v. Emperor*. (The fact that offences are committed at different times does not necessarily show that they may not be so connected as to fall within s. 235 of the Cr. P. C. — The occasion may be different, but there may be a continuity and a community of purpose.)

(44) 31 AIR 1944 Bom 306 (311) : 1 L R (1944) Bom 728

(44) 31 AIR 1944 Oudh 122 (128) : 45 Cr L Jour 538 :

Prasad v. Emperor. (Although several items of defalcation necessarily constitute one transaction, each act may be completely separate from the others. If the acts of criminal breach of trust by themselves cannot be regarded as connected or if the acts of falsification by themselves cannot be regarded as connected, there cannot be such connexion between the series of acts as a whole as to constitute one transaction. But if there exists such connexion between the acts of criminal breach of trust on the one hand and the acts of falsification on the other as to constitute in law one offence in each case, all these acts constitute a series of acts so connected together as to form the same transaction, for the connection between the falsification regarded as a whole and the criminal breach of trust regarded as a whole is obvious particularly when the definite allegation is that the falsification alleged was designed to further the criminal breach of trust alleged. The reference to S. 231 in S. 222 (2) does not necessarily imply that the word "offence" cannot be given the same meaning in S. 235.)

(42) 29 AIR 1942 Oudh 441 (442) : 43 Cr L Jour 776 : 18 Luck 403 : 201 Ind Cas 737, *Harsai v. Emperor*. (To ascertain whether a series of acts would form part of the same transaction the most important point to be considered is whether there was a common purpose and design and continuity of action. Where the common object of an unlawful assembly was to beat and extort money from a person and people from a neighbouring village come to rescue him but were chased back and the tiles of their houses in that village were broken and the people of another village who came to remonstrate against such action were assaulted, it was held that the assault of the second batch of villagers was not because they interfered with the extortion and beating but because of their interference with the breaking of the tiles of houses in another village and hence it was a separate transaction and could not be tried jointly with the offence under Ss. 147 and 384/511, Penal Code.)

(41) 28 AIR 1941 Sind 121 (126) : 42 Cr L Jour 715 : 195 Ind Cas 267 (DB), *Moujaal v. Emperor*.

(transaction)

(36) 23 AIR 1936 Bom 154 (158) : 60 Bom 148 : 37 Cr L Jour 689, *Shapurji v. Emperor*,

(21) 8 AIR 1921 All 19 (22) : 22 Cr L Jour 641, *Sanuman v. Emperor*,

(06) 4 Cr L Jour 420 (421, 422) : 2 Nag L R 147, *Empress v. Hari Raut*. (Distinct interval of time — Not same transaction.)

(28) 15 AIR 1928 Oudh 401 (401) : 3 Luck 664 : 29 Cr L Jour 801, *Rasul v. Emperor*. (Trial of offences under Ss. 324 and 325, I. P. C., though outside common objects of rioting is not illegal if the acts constitute one transaction.)

(24) 11 AIR 1924 Cal 389 (391) : 50 Cal 1004 : 25 Cr L Jour 1032, *Kushal Mallik v. Emperor*. (Abduction and concealment on different dates.)

(22) 9 AIR 1922 Lah 144 (145) : 22 Cr L Jour 505, *Ganda Singh v. Emperor*. (Theft and assault committed on different occasions — Joinder of charges for, is bad and vitiates trial.)

(34) 21 AIR 1934 Mad 88 (94) : 57 Mad 545 : 35 Cr L Jour 631, *Venkata v. Emperor*. (Series of acts of misappropriation, though subject of separate charges can be jointly tried with the main offence of conspiracy to commit breach of trust.)

(17) 4 AIR 1917 Low Bur 5 (5) : 19 Cr L Jour 34, *Emperor v. Nga Lu Gale*. (Illegal possession of opium and cocaine for carrying on business of vendor of contraband — Possession of both articles held to be part of same transaction.)

(19) 10 AIR 1905 S. 1000 (1001)

Emperor. (Accused charged with possession of opium and cocaine, in the alternative charges were misjoinder.)

(26) 13 AIR 1926 Sind 151 (153) : 20 Sind L R 74 : 27 Cr L Jour 456, *Hussainbibi v. Emperor*. (Accused decoying girl to make money by giving her in marriage on pretext of being her lawful guardian and after about fortnight cheating a man by inducement to marry the girl — The offences under Ss. 366 and 420, Penal Code, held committed in the same transaction.)

(12) 13 Cr L Jour 833 (840) : 17 Ind Cas 705 (Bom), *Emperor v. Ganesh Narayan*

(75) 2 AIR 1915 Cal 688 (689) : 16 Cr L Jour 3 (3), *Superintendent and Remembrancer of Legal Affairs, Dargal v. Manmohan Roy*.

essential a continuity of action and purpose.⁸ On the one hand the mere proximity of

- (10) 11 Cr L Jour 258 (1961) 5 Ind Cas 847 33 Mad 502 *Choragudi v Emperor*
 (19) 6 AIR 1919 Mad 353 (356) 30 Cr L Jour 145 *Krishna v Emperor* (Unlawful assemblies at different places—Each with different common object but all in pursuance of a common purpose—Acts of all accused can be subject of one trial)
 (25) 12 AIR 1925 Mad 690 (692 700) 49 Mad 74 26 Cr L Jour 1513 *In re Mallu Dora* (Reilly, J., contra)
 (14) 1 AIR 1914 Oudh 2 5 (2 8) 17 Oudh Cas 276 15 Cr L Jour 613 *Abbas-Quli Khan v Emperor*
 (0-) 8 Cr L Jour 191 (190) 1 Snd LR 73 *Emperor v Glulam*
 (29) 16 AIR 1929 Bom 296 (303) 53 Bom 479 31 Cr L Jour 65 *Emperor v C E Ring*
 (20) 7 AIR 1920 Mad 201 (202) 43 Mad 411 21 Cr L Jour 297 *W H Lockley v Emperor*
 (33) 20 AIR 1933 Cal 305 (309 310) 31 Cr L Jour 530 *Ali Hussain v Emperor*
 (20) 7 AIR 1920 Pat 730 (232) 5 Pat L Jour 11 21 Cr L Jour 161 *Gowinda v Emperor*
 (16) 3 AIR 1916 Mal 530 (531) 16 Cr L Jour 323 *Varupanna Goud v Emperor*
 (20) 7 AIR 1920 Lah 265 (267) 1 Lah 562 21 Cr L Jour 626 *Pahlad v Emperor*
 (35) 22 AIR 1935 Cal 312 (313) 62 Cal 808 *Kasharam Jhunjhunwalla v Hurdut Rai Gopal Rao* (Offence of misappropriation in respect of several items may be joined with charge of falsification which is one of series of act)
 (35) 22 AIR 1935 Nag 149 (151) 36 Cr L Jour 1153 31 Nag LR 318 *R S Ruikar v Emperor*
 (10) 11 Cr L Jour 130 (136) 5 Ind Cas 436 (Mad) *Krishna v Emperor* (Defamatory resolutions and transmission of resolutions to a newspaper are not parts of the same transaction in the absence of concert.)
 (25) 13 AIR 1926 Oudh 161 (165) 26 Cr L Jour 1609 *Bishambar Nath v Emperor*
 (0-) 6 Cr L Jour 11 (13) 4 Nag LR 71 *Emperor v Balwant Singh*
 (32) 19 AIR 1932 Bom 515 (516) 56 Bom 488 34 Cr L Jour 357 *Sanjay v Emperor*
 (29) 16 AIR 1929 Bom 129 (130) 53 Bom 344 30 Cr L Jour 588 *Emperor v Gopal*
 (25) 12 AIR 1925 All 301 (303) 26 Cr L Jour 731 *Tufail Ahmad v Emperor*
 (51) 1931 Mad W N 556 (557 559) *Balliah v Emperor* (Where it was held that identity of purpose is not the only test)
 (3) 19 AIR 1932 Bom 277 (278) 33 Cr L Jour 619 *Krishna, Anant v Emperor* (Do)
 (17) 4 AIR 1917 Pat 237 (238) 18 Cr L Jour 739 *Ghasi Ram v Sukra Uraon* (Where it was held that the mere sameness of motive does not make distinct acts parts of same transaction)
 (18) 5 AIR 1918 Pat 313 (314) 19 Cr L Jour 255 *Sital Prasad v Emperor* (Do)
 (27) 14 AIR 1927 Bom 177 (183) 51 Bom 310 28 Cr L Jour 373 *Sejmal v Emperor* (Where it was held that even community of purpose is not necessary)
 (26) 13 AIR 1926 All 834 (338 837) 48 All 325 27 Cr L Jour 415 *Rafuzzaman Khan v Chhotey Lal* (Where the expression identity of purpose was preferred to the expression community of purpose it was held that identity of purpose is enough)
 [See (39) 25 AIR 1938 Nag 283 (285) ILR (1939) Nag 686 40 Cr L Jour 197, *Nana Sadoba v Emperor* (Unity of time place and purpose ought to be looked to)]
 Also see S 239 Note 6
 8 (45) 30 AIR 1945 Pat 293 (294) 21 Pat 144 46 Cr L Jour 652 220 Ind Cas 80 (DB) *Palak, Dandapani v Emperor*
 (46) 33 AIR 1946 Oudh 26 (39) 1945 Oudh W N 331 (348) (DB) *Talawar Ali Khan v Emperor*
 (41) 29 AIR 1941 Rang 337 (339) 43 Cr L Jour 416 1941 Rang L R 509 199 Ind Cas 27, *G H Astell v Eng Tale*
 (38) ILR (1938) 1 Cal 98 (107 109) 41 Cal W N 1112 *Kamalakant Ray v Emperor* (There must be one continuous thread of a common purpose running through the acts to support a joinder of charges in respect thereof)
 (36) 23 AIR 1936 Bom 151 (157) 60 Bom 148 37 Cr L Jour 698 *Shapurji v. Emperor*
 (05) 2 Cr L Jour 578 (581) 30 Bom 49 *Emperor v Datto Hanmant*
 (06) 4 Cr L Jour 420 (421) 2 Nag L R 147 *Emperor v Hari Raot*
 (31) 18 AIR 1931 Pat 52 (53) 32 Cr L Jour 478 *Ganesh Pershad v Emperor*
 (29) 16 AIR 1929 Bom 128 (131) 53 Bom 344 30 Cr L Jour 588 *Emperor v Gopal*
 (24) 11 AIR 1924 Cal 389 (391) 50 Cal 1004 25 Cr L Jour 1082 *Kushal Malik v Emperor*
 (25) 12 AIR 1925 Cal 590 (581) 26 Cr L Jour 359 *Patil Paban Ray v Emperor*
 (20) 7 AIR 1920 Lah 265 (267) 1 Lah 562 21 Cr L Jour 626 *Pahlad v Emperor*
 (16) 3 AIR 1916 Nag 73 (76) 13 Nag L R 35 18 Cr L Jour 339 *Gunwant v Emperor*
 (17) 4 AIR 1917 Low Bur 5 (5) 19 Cr L Jour 31 *Emperor v Nga Lu Gale*
 (35) 22 AIR 1935 Nag 149 (151) 36 Cr L Jour 1153 31 Nag L R 318 *R S Ruikar v Emperor*
 (27) 14 AIR 1927 Lah 274 (275) 28 Cr L Jour 857 *Muhammadi v Emperor*
 (1900) 1 Low Bur Rul 361 (362) *Nga San Daik v Crown*
 (12) 13 Cr L Jour 485 (486) 15 Ind Cas 485 (Low Bur) *Nga Tha Gys v Emperor*

time between several acts will not necessarily constitute the acts parts of the same transaction,¹⁷ on the other hand, the mere fact that there are intervals of time between the various acts will not necessarily import want of continuity;¹⁸ though the length of the interval may be an important element in determining the question of connexion between the several acts.¹⁹ The transaction itself need not be a criminal transaction, an offence can be committed in the course of a transaction the aim of which is perfectly legitimate.²⁰ It has, however, been held in the undermentioned cases²¹ that *proximity of time* is also necessary in order to constitute the acts parts of the same transaction.

Although according to the test mentioned above, *community of action and purpose* is necessary in order to constitute the several acts, parts of the same transaction, the mere existence of some *general purpose or design* such as defrauding the public, is not sufficient. The purpose must be something particular and definite.²² The words "continuity of action"

(17) 1 AIR 1917 L.C. 287 (288) 18 Cal. L. Jour. 710 *Cham Ram v. Emperor* (Complaints on same day and substantially of motive is no ground for joint trial of several persons for distinct offences at different places)

(18) 18 AIR 1971 L.C. 102 (101-101) 22 Cal. L. Jour. 611 *Abdur Rahman v. Emperor*,

(19) 11 R. (1914) 1 Cal. 98 (107) 41 Cal. W. N. 1112 *Kamat Kanta Ray v. Emperor*,

(20) 13 Cal. L. Jour. 385 (386) 15 Ind. Cas. 185 (186) (Low Bur), *Nga Pha Oye v. Emperor*,

(21) 20 M.L. 125 (127) 3 W.R. 205 *Krishnaswamy Pillai v. Emperor*

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10 (18) 31 AIR 1910 Cal. 20 (12) 1915 Outh. W. N. 131 (310) (110) *Tahawar Ali Khan v. Emperor*
(19) 11 R. (1914) 1 Cal. 98 (107) 41 Cal. W. N. 1112 *Kamat Kanta Ray v. Emperor* (Mere difference in time of place between the several acts of one offence and of another will not necessarily import want of continuity)

(22) 27 B.M. 135 (136) 1 Bom. L. R. 910 *Emperor v. Sherufalli*,

(23) 2 Ind. Bur. Ind. 10 (21) *Ngai La Pu v. King Emperor*

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(17) 4 AIR 1917 B.M. 140 (11) 10 B.M. L. R. 192, 18 Cal. L. Jour. 710
same transaction in 235
that intervals of time or place

(23) 22 AIR 1915 N.B. 110 (15)

12 (15) 22 AIR 1915 N.B. 110

13 (10) 6 AIR 1910 M.L. 187

(16) 8 AIR 1918 Cal. 184 (104)

(22) 6 AIR 1911 Cal. 71 77

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do not mean merely doing the same thing or similar things continuously or repeatedly, for a recurring series of similar transactions is not according to the ordinary use of language the same transaction. The words mean the following up of some initial act through all its consequences and incidents until the series of acts or group of connected acts comes to an end either by attainment of the object or by being put an end to or abandoned. If any of those things happens and the whole process is begun over again it is not the same transaction but a new one in spite of the fact that the same general purpose may continue.¹⁵

When a person is charged with two offences and the evidence to prove the one offence is identical with that by which the other is to be established then the two must be held to have been committed in the course of the same transaction.¹⁶

It will be clear from the above discussion that the question as to what does or does not form part of the same transaction is a question of fact¹⁷ depending largely upon the circumstances of each case.¹⁸ As pointed out by Sadasiva Iyer J. in *Kumaramuthu v*

15 (41) 28 AIR 1941 Rang 337 (339) 43 Cr L Jour 448 1941 Rang L R 509 199 Ind Cas 27 *G H Atell v Eng Tale* (Further advances obtained on strength of original misrepresentation held formed part of same transaction.)

(156) 23 AIR 1936 Bom 154 (159) 60 Bom 148 37 Cr L Jour 688 *Shapurji Sorabji v Emperor*

same transaction nor existence of some general purpose or design.)

[See also (42) 29 AIR 1942 Pat 401 (406) 43 Cr L Jour 679 21 Pat 113 200 Ind Cas 930 (DB) *Emperor v Ram Autar Lal* (Each defalcation committed as occasion and opportunity arose held separate offence.)

(35) 22 AIR 1935 Nag 178 (181) 31 Nag L R 337 36 Cr L Jour 1216 *Ramsheshan v Emperor* (Each act of embezzlement and the steps taken to conceal it form one transaction and the fact that the offence was repeated on several occasions in pursuance of a studied policy of fraud cannot make all the acts parts of the same transaction.)

16 (39) 26 AIR 1939 Pat 577 (579) 18 Pat 450 40 Cr L Jour 605 *Emperor v Mayadhar Potthal* 17 (44) 31 AIR 1944 Cal 224 (227) 45 Cr L Jour 666 1 L R (1914) 1 Cal 393 218 Ind Cas 401 (DB) *Becharam Mukherji v Emperor* (Whether a series of acts form the same transaction is a question of fact depending on proximity of time and place continuity of action and unity of purpose and design.)

(37) 24 AIR 1937 All 714 (717 718) 1 L R (1937) All 779 39 Cal L Jour 33 *Emperor v Bishan Sahai*

(27) 14 AIR 1927 Cal 330 (332) 29 Cr L Jour 317 *Tameskha v Ruzjabai Mir*

(23) 10 AIR 1923 All 277 (280) 26 Cr L Jour 29 *Gajan Singh v Emperor*

(18) 5 AIR 1918 Bom 117 (119) 43 Bom 147 70 Cr L Jour 71 *Madhav v Emperor*

(19) 6 AIR 1919 Bom 111 (112) 20 Cr L Jour 657 *Pannarajan Amarchand v Emperor*

(20) 7 AIR 1920 Lah 265 (267) 1 Lah 567 21 Cr L Jour 676 *Pahlad v Emperor*

(30) 17 AIR 1930 Mad 877 (888) 53 Mad 917 37 Cr L Jour 30 *In re Ramaraju Tevan*

(16) 3 AIR 1916 Nag 73 (76) 13 Nag L R 3 18 Cr L Jour 339 *Gunnwant v Emperor*

(31) 18 AIR 1931 Oud 86 (88) 61 Oud 441 30 Cr L Jour 540 *Debi Misra v Emperor*

(31) 18 AIR 1931 Pat 102 (103) 32 Cr L Jour 611 *Abdur Rahim v Emperor*

18 (45) 32 AIR 1945 Pat 293 (294) 24 Pat 144 46 Cr L Jour 652 200 Ind Cas 80 (DB) *Palala Dandapani v Emperor* (Where the accused who has a grocery shop is keeping the contraband goods opium and ganja for purposes of illicit sale the possession of contraband goods for the purpose of illicit sale would be one transaction. The trial of the accused for offences under the Opium Act and the Bihar and Orissa Excise Act is not illegal.)

*Emperor*¹⁹

Different judicial minds might where the facts are complicated, arrive at different conclusions as to whether a particular complicated series of acts were committed in the same transaction or not and one can very well conceive many sets of facts which are on the border line."

Thus the offence of hiring a person to take part in a riot is a separate and distinct offence from the riot itself and ordinarily, the hiring and the riot would be separate transactions. There may, however, be circumstances which might justify the Court in holding that the alleged hiring or employing and the riot were parts of the same transaction²⁰

Where an offence is committed, the object of which is the concealment of another offence already committed or about to be committed the two would ordinarily be considered to form parts of the same transaction²¹. Thus a criminal misappropriation or a criminal breach of trust and a falsification of accounts for the purpose of concealing the former offence or a charge of murder and of causing evidence thereof to disappear, or causing

- (37) 24 AIR 1937 All 714 (717 718) 1 L R (1937) All 779 39 Cri L Jour 38 *Emperor v Disha Sahas*
 (37) 24 AIR 1937 Nag 168 (189) 1 L R (1939) Nag 297 39 Cri L Jour 542 *Ghan Ram v Emperor*
 (36) 23 AIR 1938 Bom 154 (158) 60 Bom 148 37 Cri L Jour 688 *Shapurji v Emperor*
 (35) 22 AIR 1935 Nag 149 (154) 31 Nag L R 318 36 Cri L Jour 1153 *R S Rukhar v Emperor*
 (08) 8 Cri L Jour 191 (195 200) 1 Sind L R 73 *Emperor v Ghulam*
 (25) 12 AIR 1925 Sind 233 (235) 18 Sind L R 199 27 Cri L Jour 257 *F C Woodward v Emperor*
 (19) 6 AIR 1919 Mad 487 (493) 20 Cri L Jour 354 *Kumaramuthu Pillai v Emperor*
 (83) 20 AIR 1938 Bom 268 (267) 34 Cri L Jour 870 57 Bom 400 *Mazharul v Emperor*
 19 (19) 6 AIR 1919 Mad 487 (493) 20 Cri L Jour 354
 20 (25) 12 AIR 1925 Cal 903 (905) 26 Cri L Jour 594 *Nayan Ullah v Emperor*

57, Nebti Mandal
 it necessary that

(Primary offence

- (plaintant to prevent him from making complaint)
 (29) 16 AIR 1929 Lah 843 (844) 30 Cri L Jour 958 *Mangal Sen v Emperor* (Criminal breach of trust and falsification of accounts to conceal it.)
 (20) 7 AIR 1920 Pat 775 (776) 22 Cri L Jour 230 *Gajadhar Lal v Emperor* (Criminal breach of trust and falsification of accounts)
 (34) 21 AIR 1934 Mad 673 (674) 35 Cri L Jour 1503 58 Mad 178 *Sivengachariar v Emperor* (Theft of railway ticket and making forged entries thereon)
 (33) 20 AIR 1933 Nag 136 (140) 34 Cri L Jour 505 29 Nag L R 251 *Mrs M F Rego v Emperor* (Charge under S 302 and 201 Penal Code)
 (02) 26 Mad 125 (127) 2 Weir 295 *Krishnasami Pillai v Emperor* (Charges of falsification of account books—Destruction of account books not for concealing the falsification—Not same transaction.)
 (12) 15 Ind Cas 485 (486) 13 Cri L Jour 485 (Low Bur) *Nga Tha Gya v Emperor* (House-trespass and possession of arms)

v. Jibankristo (Charge of criminal

a Rudrappa v Emperor (Murder

hurt for the purpose of extorting information and making false entries to attribute another cause for the death of the injured person)

- (10) 11 Cri L Jour 731 (733) 8 Ind Cas 936 4 Sind L R 174 *Emperor v Bai a Manghnidas*

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grievous hurt with the object of extorting a confession from a person and after his death forging entries to conceal the cause of death or misappropriation of ornament by a police officer and subsequent alteration of entries in the police diaries to conceal the fact of misappropriation will be considered to form parts of the same transaction³ Similarly, where a gang of dacoits he concealed waiting for nightfall in order to commit dacoity, but being seen by a woman kill her fearing detection and thereafter commit dacoity, the murder and dacoity will form parts of the same transaction⁴ But an offence A and an offence B the object of which is to conceal offence C cannot be considered to be parts of the same transaction⁵

Where there is a conspiracy having a definite object in view and several offences are committed in pursuance of such conspiracy the several offences will generally form parts of the same transaction⁶ But isolated acts committed by individual conspirators during the continuance of the conspiracy and not committed in pursuance of the conspiracy are not parts of the same transaction with the conspiracy itself⁶

All offences committed in prosecution of a common object will generally be parts of the same transaction⁷ As to illustrative cases of acts forming parts of the same trans

22 (35) 2^o AIR 1933 Nag 178 (161) 31 Nag L R 337 36 Cri L Jour 1^o 16 *Ramsheshan v Emperor* (Embezzlement and falsification of accounts for the purpose of concealing the embezzlement form one transaction)

(23) 12 AIR 1923 Sind 233 (235) 18 Sind L R 193 27 Cri L Jour 257 F C Woodward v Emperor Also see the cases cited in foot note (1)

23 (07) 4 Bom L R 789 (791) *Emperor v Puuya*

24 (19) 6 AIR 1919 Lab 440 (441) 19 Cri L Jour 187 *Emperor v Jagat Ram*

25 (35) 25 AIR 1933 P C 130 (133) 65 Ind App 158 32 Sind L R 476 1LR (1038) 2 Cal 295 39 Cri L Jour 452 (PC) *Babulal Choukhani v Emperor* (If several persons conspire to commit offences and commit overt acts in pursuance of the conspiracy these acts are committed in the course of the same transaction which embraces the conspiracy and the acts done under it)

(39) 26 AIR 1933 Bom 129 (140) 40 Cri L Jour 579 *Ramchandra Rango v Emperor*

(39) 25 AIR 1933 Cal 195 (201) 39 Cri L Jour 417 *Ramkrishna v Emperor* (Charge of offences committed as part of same transaction with offence of conspiracy — No misjoinder)

(38) 25 AIR 1933 Cal 258 (260) 1LR (1933) 1 Cal 588 39 Cri L Jour 596 *Akhil Bandhu v Emperor*

(39) 25 AIR 1933 Sind 171 (173) 1LR (1933) Kar 201 39 Cri L Jour 890 *Emperor v Dalumal Hotchand*

(37) 21 AIR 1937 Cal 269 (271) 38 Cri L Jour 1018 *Sanjasi Gam v Emperor* (But to make a joint trial legal, the accusation must be a real one and not a mere excuse for a joinder of charges which otherwise cannot be joined)

(37) 41 Cal W N 251 (255) C S *Joseph v Emperor*

(36) 23 AIR 1936 Cal 753 (759) 39 Cri L Jour 545 *Rash Behari v Emperor* (The principle will also apply where the several offences are committed by different persons)

(16) 3 AIR 1916 Cal 188 (196) 19 Cal W N 676 (686) 42 Cri 957 16 Cri L Jour 497 *Amratal Hazra v Emperor* (If A, B and C conspire to make or have in possession or under control an explosive substance and if in pursuance of such conspiracy A has in his possession an explosive substance they may be charged and tried together under S 120B Penal Code and S 4 (b) Explosive Substances Act 1908)

(33) 20 AIR 1933 Oudh 86 (89) 8 Luck 286 34 Cri L Jour 124 *Kunwar Sen v Emperor* (Conspiracy to start bogus bank and cheating and forgery in pursuance thereof)

(24) 11 AIR 1924 Rang 98 (99) 1 Rang 601 25 Cri L Jour 270 *Emperor v Nga Aung Gyaw* (Conspiracy to boycott)

(26) 13 AIR 1926 Rang 53 (57) 27 Cri L Jour 669 *Abdul Rahman v Emperor* (AIR 1915 Cal 689 16 Cri L Jour 3 and AIR 1924 Rang 98 1 Rang 604 25 Cri L Jour 270 followed)

(19) 6 AIR 1919 Cal 367 (368) 46 Cal 712 20 Cri L Jour 127 *Kavilash Chandra Pal v Emperor* (Accused misrepresenting to joint debtors and recovering excess amount from them — Offences being committed in same place and time and in pursuance of same conspiracy are triable together)

26 (37) 24 AIR 1937 All 714 (718) 1LR (1937) All 779 39 Cri L Jour 38 *Emperor v Bishan*

27 (44) 31 AIR 1944 Oudh 122 (129) 45 Cri L Jour 533 19 Luck 493 212 Ind Cas 125 (DB) *Debi Prasad v Emperor* (A number of falsifications can be included in a single charge provided they are connected with the same fraud)

action, see the undermentioned decisions²⁹

- (26) 13 AIR 1926 Lah 367 (367, 368) : 7 Lah 264 : 27 Cri L Jour 803, *Bahadur Singh v. Emperor*.
 (29) 16 AIR 1929 Lah 843 (844) : 30 Cri L Jour 958, *Mangal Sen v. Emperor*. (Series of falsifications of accounts made to cover a single act of defalcation)
 (20) 7 AIR 1920 Mad 201 (202) : 43 Mad 411 : 21 Cri L Jour 297, *W. H. Lockley v. Emperor*.
 (28) 15 AIR 1928 Pat 634 (637) : 29 Cri L Jour 728, *Habib Khan v. Emperor*. (Accused having common object of taking away complainants and confining them until they agreed to work for H — H not present at place from where complainants were taken away, but present at place of confinement—Complainants confined with his knowledge—Offences form part of the same transaction)
 (09) 9 Cri L Jour 367 (368) : 1 Ind Cas 682 (Mad), *Venkata Reddy v. Emperor*. (Several acts done at different times to demonstrate the power of the accused)
 (12) 13 Cri L Jour 251 (251) : 14 Ind Cas 603 (Mad), *Venkataramiah v. Emperor*.
 Also see S 239, Note 8
 28. (45) 32 AIR 1945 Nag 143 (145) : ILR (1945) Nag 315 (DB), *Ghudo Ramadhar v. Emperor*. (Offences under Ss. 302, 201 and 330, Penal Code)
 (46) 33 AIR 1946 Oudh 26 (32) : 1945 Oudh W N 331 (348) (DB), *Tahawar Ali Khan v. Emperor*. (Accused charged under Ss. 379 and 411, I P C, and also under R. 48 of Defence of India Rules for wearing uniform without excuse—Theft committed in 1st class railway compartment — Held, wearing uniform and subsequent theft formed part of same transaction)
 (45) 32 AIR 1945 Pat 293 (294), 21 Pat 114 46 Cri L Jour 652 220 Ind Cas 80 (DB), *Palali Dandapani v. Emperor* (Illegal possession of opium and illegal possession of ganja by a person would form part of the same transaction and can be tried together at one trial, one under the Opium Act and the other under the Excise Act)
 (46) 33 AIR 1946 Sind 23(24) ILR (1945) Kar 100 (102) (DB), *Fais Md v. Emperor* (Visit to brothel for committing theft—Accused also committing rape on prostitute—Both acts form part of same transaction)
 (44) 81 AIR 1944 Oudh 122 (129) 19 Luck 493 : 45 Cri L Jour 538 : 212 Ind Cas 125 (DB), *Dela Prasad v. Emperor* (Accused in charge of jute business of complainant, having complete dominion over account books and cash — Accused wrongfully purchased or paid for them and thus misappropriated — Held, for breach of trust of gross sum during the with intent to defraud made series of entries relating to defalcations — No misjoinder of charges.)
 (43) 80 AIR 1943 Pat 212 (217) : 44 Cri L Jour 590 : 22 Pat 203 : 207 Ind Cas 420 (DB), *Dana-mah Tripathy v. Emperor*. (Accused abducting married girl and having her married a second time — Accused paid sum of money by second husband who was not told that first husband was alive—Held, offences under S. 886 and S. 420 formed part of same transaction)
 (42) 29 AIR 1942 Oudh 214 (215) : 43 Cri L Jour 252 : 17 Luck 513 : 197 Ind Cas 710 *Sital v. Emperor*.
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 of a
 agreement between parties, the obtaining of the advances form part of the same transaction)
 (41) 28 AIR 1941 Sind 204 (207) : 43 Cri L Jour 241 ILR (1941) Kar 328 : 197 Ind Cas 693 (DB), *Emperor v. Mangharan Ghumanmal*. (Offences under Ss. 477A and 409, Penal Code)
 (40) 44 Cal W N 340 (343), *Ahmadur Rahman v. Emperor* (Accused alleged to have made up his mind to obtain insurance money from insurance company by fraud, and to that end setting fire to his shop and after the fire putting in a claim for the money—Attempt to cheat and arson are parts of same transaction)
 (39) 26 AIR 1939 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal* (Offences under Ss. 302, 392 and 411, Penal Code)
 (38) 25 AIR 1938 All 91 (95) : 39 Cri L Jour 364, *Mirza Zahid Beg v. Emperor*.
 (37) 24 AIR 1937 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (36) 23 AIR 1936 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (35) 22 AIR 1935 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (34) 21 AIR 1934 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (33) 20 AIR 1933 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (32) 19 AIR 1932 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (31) 18 AIR 1931 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (30) 17 AIR 1930 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (29) 16 AIR 1929 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (28) 15 AIR 1928 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (27) 14 AIR 1927 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (26) 13 AIR 1926 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (25) 12 AIR 1925 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (24) 11 AIR 1924 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (23) 10 AIR 1923 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (22) 9 AIR 1922 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (21) 8 AIR 1921 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (20) 7 AIR 1920 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (19) 6 AIR 1919 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (18) 5 AIR 1918 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (17) 4 AIR 1917 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (16) 3 AIR 1916 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (15) 2 AIR 1915 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (14) 1 AIR 1914 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (13) 1913 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (12) 1912 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (11) 1911 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (10) 1910 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (9) 1909 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (8) 1908 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (7) 1907 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (6) 1906 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (5) 1905 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (4) 1904 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (3) 1903 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (2) 1902 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (1) 1901 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (0) 1900 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (39) 26 AIR 1939 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.
 (38) 25 AIR 1938 Pat 577 (579) : 18 Pat 450 : 40 Cri L Jour 625, *Emperor v. Mayadhar Pothal*.

- (36) 30 Sind L R 238 (240) *Manghn Khan v Emperor* (There is nothing incongruous between a charge of attempted murder under S. 307, I P C, which also includes hurt and a charge under S. 326, I P C, for grievous hurt)
- (31) 18 AIR 1931 Cal 8 (9) 32 Cri L Jour 318 *Prafulla Chandra v Emperor* (Intention to defalcate a certain amount—An act done to achieve the object as making false entries forms part of the same transaction)
- (23) 10 AIR 1923 All 88 (88) 24 Cri L Jour 155, *Ganesh Lal v Emperor* (Offence of keeping gaming house and offence of using it)
- (23) 10 AIR 1923 All 137 (137) 24 Cri L Jour 153, *Ram Prasad v Emperor* (Gang of dacoits robbing several carts on road at short intervals)
- (32) 19 AIR 1932 Bom 545 (546) 56 Bom 488 31 Cri L Jour 357, *Sanjiv Patnappa v Emperor* (Charges of causing hurt, wrongful confinement and forgery to cover up the other offences)
- (23) 10 AIR 1923 Cal 647 (648) 25 Cri L Jour 313, *Bilas Chandra Banerjee v King Emperor* (Criminal misappropriation and criminal breach of trust by a public servant—Public servant issuing incorrect record—Falsification of record)
- (04) 1 Cri L Jour 974 (977) 1901 Pun Re No 18 Cr, p 53 (55) *Emperor v Harcharan Singh* (Intimidation to make and subsequent making of defamatory statements)
- (27) 14 AIR 1927 Oudh 369 (376) 2 Luck 631 29 Cri L Jour 129, *Ram Prasad v Emperor* (Joinder of charges under Ss. 121A and 120B, I P C, is not illegal)
- (03) 2 Low Bur Rul 23 (24), *King Emperor v Nga To* (Stealing cattle for the purpose of obtaining money for their restoration)
- (11) 12 Cri L Jour 316 (347) 10 Ind Cas 946 (Cal) *Jagadish v Atma Ram* (Persons acting as police-officer and committing extortion and cheating on the strength thereof)
- (04) 1 Cri L Jour 502 (553) 1904 Upp Bur Rul 1st Qr 1, *Emperor v Nga San Dun* (It was however stated that it is not desirable that there should be a conviction for the smaller offences—This, it is submitted, is not correct)
- (84) 7 All 29 (54 30) 1884 All W N 220, *Empress v Dungar* (Rioting and hurt)
- (20) 12 AIR 1925 All 299 (301) 47 All 284 26 Cri L Jour 688, *Pam Sukh v Emperor* (Affray and hurt)
- (86) 1880 Rat 228 (229, 229) *Queen Empress v Kashinath Mahadev* (Offences under Ss. 457 and 360 of the Penal Code)
- (88) 1888 Pun Re No 8 Cr, p 11 (12) *Empress v Mohurram* (Ss. 457 and 480)
- (85) 1883 Pun Re No 83 Cr p 70 (75, 76) *Jafir Khan v Empress* (Rioting, and hurt during such rioting)
- (34) 21 AIR 1934 Mad 673 (674) 35 Cri L Jour 1503 58 Mad 178, *Srirangachariar v Emperor*, (Theft of railway ticket and committing forgery thereon)
- (92) 6 C P L R Cr 36 (37) *Empress v Padam Singh* (Theft from child and hurting it to prevent it from giving information to any one)
- (23) 10 AIR 1923 Nag 156 (156) 26 Cri L Jour 327, *Tularam v Ganpat* (Several acts forming one transaction—Joint trial can be held)
- (32) 19 AIR 1932 Oudh 28 (29) 33 Cri L Jour 275 *Emperor v Zamin* (A joint trial for offences under Ss. 366 and 368, Penal Code is not illegal where the whole chain of events beginning with the kidnapping or abduction and ending with the discovery of the woman can fairly be regarded as forming one and the same transaction)
- (08) 7 Cri L Jour 76 (78) 4 Low Bur Rul 104, *Emperor v M. Thin* (Owning of common gaming house and also taking part in gambling)
- (09) 7 Cri L Jour 464 (466) 4 Low Bur Rul 199 (19) *Twel Pe v Emperor* (Theft and taking gratification to restore stolen property)
- (10) 11 Cri L Jour 415 (416) 6 Ind Cas 880 3 Sind L R 224 *Imperator v Daradi* (There is nothing improper in the accused being charged with and tried at one trial for the two offences under Ss. 147 and 332 read with S. 149, Penal Code)
- (12) 13 Cri L Jour 861 (862) 35 All 63 17 Ind Cas 797, *Dadri Prasad v Emperor* (Conviction at one trial of offences under Ss. 467 and 471 is legal)
- (17) 4 AIR 1917 All 11 (12) 39 All 623 18 Cri L Jour 788, *Katwaru Rai v Emperor* (Members of an unlawful assembly causing hurt to one person and by a separate act causing hurt to another—The offences under Ss. 323 and 147 can be tried jointly)
- (12) 13 Cri L Jour 609 (610) 16 Ind Cas 257 (Cal) *Pulin Behari Das v King Emperor* (Offences under Ss. 123 and 121A, Penal Code, can be tried jointly)
- (12) 13 Cri L Jour 501 (502) 15 Ind Cas 645 (Bom) *Emperor v Lalji Bhanji* (Criminal breach of trust and falsification of accounts—Offences under Ss. 408 and 465, Penal Code)

See also the undermentioned cases⁷⁹ for instances of acts not forming parts of the same transaction

See also s 230, Notes 6 to 15

- (33) 20 AIR 1933 Pesh 93 (100) *Gopichand v Emperor* (Offences made punishable under Ss 239 and 240 Penal Code can be jointly tried)
- (28) 15 AIR 1928 Bom 177 (179) 29 Cr L Jour 522, *Dagd, Dagdy v Emperor* (Offences under Ss 193 and 182 Penal Code)
- (16) 3 AIR 1916 Cal 41 (41) 42 Cal 760 16 Cr L Jour 120 *Deputy Superintendent and Remembrancer of Legal Affairs Bengal v Kailash Chandra Ghosh* (Offences under Ss 317 and 353 read with Section 114)
- (33) 20 AIR 1933 Sind 255 (256 257) 35 Cr L Jour 256 *Jethanand v Emperor* (Offences under Ss 45 and 43 (1) (i) read with S 47 Bombay Abkari Act 1878)
- (18) 5 AIR 1918 Mad 371 (372) 41 Mad 727 19 Cr L Jour 613 *Raghuraju Natcher v Singaram* (Sections 352 and 504 Penal Code)
- (19) 6 AIR 1919 All 26 (27) 42 All 12 20 Cr L Jour 642 *Babu Ram v Emperor*
- (35) 22 AIR 1935 Oudh 196 (194) *Bishunath v Emperor* (Rioting—Offences committed under Ss. 147, 333 302 and 396 — Joint trial legal)
- (15) 2 AIR 1915 Bom 203 (204) 16 Cr L Jour 761 40 Bom 97, *Jitram Danlari v Emperor* (Forging and using the document is one transaction)
- (31) 21 AIR 1934 1 at 483 (485) 13 Pat 161 36 Cr L Jour 349 *Ramnath Das v Emperor* (Property stolen on different occasions—Disbonest retention forms a single transaction)
- (35) 22 AIR 1935 Rang 357 (358 359) 37 Cr L Jour 3 *Maung Kaung Kywe v Emperor* (On two consecutive nights offences under Ss 447 and 449 Penal Code were committed by accused in respect of property over which they asserted a right of possession — Held that as those two offences formed part of the same transaction joint trial was valid under S 235)

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ting the police-officers discharge
332, Penal Code can be tried

jointly)

- (17) 4 AIR 1917 Low Bur 5 (5) 19 Cr L Jour 31 *Emperor v Nga Lu Gate* (Possession of opium and possession of opium punishable under the Excise Act and the Opium Act respectively)
- (02) 4 Low Bur Rul 19 (21) *Nga Ta Pu v King Emperor* (Theft and dishonestly receiving or dis-

ja Po Shat v Emperor (Do)

19 Cr L Jour 510 *Emperor v Muham-*

mad Hassan (Preparing several false records for screening the offenders from punishment)

- (86) 10 Bom 493 (196), *Queen Empress v Saklaram Bhau* (Offences under Ss 380 and 457, Penal Code)

- (84) 7 All 29 (35) 1884 All W N 220 *Queen Empress v Dunsar Singh* (Rioting and voluntarily

(Mischief and theft))

(DB) *Kesharlal v Emperor*

(accused 1 on requisition of accused 2 making bomb shells and supplying them to accused 2—Accused 2 himself or through others throwing bombs made out of aforesaid shells in fourteen places on different dates—Acts of supplying bomb shells and throwing them at different places on different dates held did not constitute one transaction)

- (44) 31 AIR 1944 Cal 224 (227 228) 45 Cr L Jour 666 ILR (1944) I Cal 992 913 T L J 101 (DB),

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(*Assra v Wicoz* (Forging a document with the intention that the document so forged shall be used for the purpose of deceiving somebody and thereby inducing that person to part with property cannot be part of the same transaction as the dishonest misappropriation of property entrusted to the alleged forger as a servant)

d Cas 12 Bankey Lal v Emperor
under Excise Act and Opium Act

Lal v Emperor (Accused of village B forming unlawful assembly — In prosecution of commu-

- object of extorting money from K of village B accused trying him to free and putting him in fear of beating — People of village S coming and trying to rescue K — Accused chasing them to village S and breaking tiles of some of houses belonging to them — People of village N coming and trying to stop accused from breaking tile — Accused assaulting them and beating them in village N — Offences at village B and village N held separate and not committed in same transaction)
- (40) 46 Cal W N 2-7 (22-1) (DB) *Jogenira Chandra Ghosh v Postal Department of the Government of India* (Three different offences of breach of trust occurring on different dates and committed against different persons cannot be held to form part of same transaction as mutilation of receipt in connection with one of them)
- (41) 28 AIR 1941 Cal 707 (711 712) 1 L R (1941) 2 Cal 319 43 Cr L Jour 389 198 Ind Cas 499, *Hugh Francis Belliard v Emperor* (Held under circumstances of case offences under Ss 420, 467 and 477A Penal Code were not committed in course of one transaction)
- (40) 27 AIR 1940 Mad 509 (510) (1940) 1 Mad L Jour 423 (429) 41 Cr L Jour 581 *In re Boya Lingadu* (Two distinct offences of theft in two separate houses or in the alternative two charges under S 411 in respect of properties stolen from two houses tried together — Trial bid for misjoinder)
- (39) 26 AIR 1939 Bom 129 (143) 40 Cr L Jour 579 *Ramchandra Ringo v Emperor* (Conspiracy to commit criminal breach of trust — Misappropriation of funds committed — New circumstances arising and parties agreeing to make a fraudulent adjustment of their accounts with a view to prolong refund of money misappropriated — This second conspiracy cannot be tacked on to a charge on the former conspiracy)
- (39) 26 AIR 1939 Cal 32 (33) 40 Cr L Jour 290 *Emperor v Afzaruddi Naseraddi* (Two murders and offence of causing grievous hurt committed at different times and places during same night — No evidence to suggest any connexion between the incidents — Incidents do not form part of the same transaction)
- (38) 25 AIR 1939 Cal 769 (770) 40 Cr L Jour 280 *Ali Hyder v Emperor* (It is doubtful whether an offence under S 376 committed by five persons before the end of September 1936 can rightly be held to be a part of the same transaction as an offence under S 377 Penal Code committed by three of them between the end of December 1936 and the end of June 1937)
- (38) ILR (1938) 1 Cal 93 (103 109), *Kamala Kanta Roy v Emperor* (Offence of cheating by personation tried along with offences under Ss 302 and 304 — Fact that accused entered complainant's service by cheating him by personating as a Brahmin and after an year killed complainant's wife will not make cheating part of the same transaction as murder)
- (37) 1937 Mad W N 203 (209) *Appalaswami v Emperor* (Six counts of bribery and six counts of false personation the counts of bribery relating to different dates and different persons and the counts of false personation relating to different persons — Offences committed on same day but at different times of the day — Joint trial is bad)
- (37) 24 AIR 1937 Nag 188 (189) ILR (1939) Nag 297 38 Cr L Jour 542 *Ghani Ram v Emperor* (Offence of sale of opium without a licence is quite dissimilar from the offence of importing foreign opium into British India and cannot form part of the same transaction)
- (36) 23 AIR 1936 Bom 154 (157) 60 Bom 148 37 Cr L Jour 689, *Shapurji Sorabji v Emperor* (Charges under Ss 409, 409 467, 471 420 and 403 Penal Code against two accused — Charges of forgery in respect of different consignments of tickets supplied at intervals in batches — Held offences committed in connexion with any one consignment of books would be part of same transaction but offences committed in connexion with any other consignment of books would not be part of the same but similar transaction)
- (36) 23 AIR 1936 Lah 507 (507) 37 Cr L Jour 722 *Bahali v Emperor* (Two offences under S 457 and S 324 read with S 34 Penal Code committed on different dates cannot possibly be considered to be part of one and the same transaction)
- (19) 6 AIR 1919 All 239 (239) 20 Cr L Jour 353 *Fauja v Emperor* (One trial for two offences of triple and double murders is unjustifiable if the offences do not represent a series of acts forming the same transaction)
- (21) 8 AIR 1921 All 409 (409) 22 Cr L Jour 397, *Ram Sahni v Emperor* (Several offences committed by several groups of accused some but not all being common — Joint trial improper)
- (19) 6 AIR 1919 Bom 111 (112 114) 20 Cr L Jour 657, *Ramnarayan Amarchand v Emperor*. (Preparation of balance sheets for the years 1912 and 1913 could not be regarded as forming the same transaction)
- (03) 30 Cal 822 (829 830) 7 Cal W N 639 *Brendra Lal v Emperor*
- (18) 5 AIR 1918 Cal 237 (237) 19 Cr L Jour 868 *Emperor v Rajendra Roy* (Three charges of criminal misappropriation committed by accused within a year added to by another charge of offence under S 210 Penal Code not committed within the same year — Held offence under S 210 did not form one transaction with other offences)
- (26) 13 AIR 1926 Lah 193 (195) 72 Cr L Jour 793, *Fitz Maurice v Emperor* (Four distinct acts on different dates relating to four different documents charged under S. 477A, I P C.)

3 "More offences than one" — The section is not controlled by s 234. There is nothing in the section to warrant the rule that not more than three offences can be combined even if those offences have been committed in the course of the same transaction¹ Nor is a trial illegal by reason of containing more than three offences spread over a period longer than a year² But a multitude of accusations which will result in bewildering the accused and prejudicing him in his defence ought not to be permitted³

4 "Are committed by the same person." — The expression 'by the same person' indicates that where there are more than one accused, this section is inapplicable. To such cases s 239 will apply. See Notes on s 233

5 "May be tried at one trial" — The provisions of this section are only enabling and not imperative and therefore though they provide for a joint trial yet a

(33) 20 AIR 1933 Lah 512 (512 513) 34 Cri L Jour 402 *Azab Singh v Emperor* (First charge related to an attempt to rob G near village D on a particular night — Robbery of P near village A with deadly weapons on the next night)

(34) 21 AIR 1934 Lah 630 (631) 36 Cri L Jour 676 *Dian Singh v Emperor*

(07) 26 Mad 451 (450 456) 2 Weir 298 *Glekutty v Emperor* (Kidnapping of X and assault next day on Y)

(29) 1929 Mad W N 266 (267) *Laxumana v Kamala* (Defamation published by word of mouth of five

etc and independent occurrences)

(A joint trial of charges under Ss 406

and 414 Penal Code is not legal where the acts constituting the two offences could not be said to be so connected as to be

acts

taken

as per

as v

in X

forms

as per

(09) 10 Cri L Jour 452 (453) 4 Ind Cas 1 (Cal) *Laskari v Emperor*

(09) 10 Cri L Jour 476 (478 479) 4 Ind Cas 28 (Cal), *Parmeshwar Lal v Emperor* (Cheating A and criminal misappropriation against B on different occasions)

(10) 11 Cri L Jour 293 (294) 6 Ind Cas 242 (Mad) *Musalappa v Emperor* (Permitting cattle to trespass in reserve forest rioting and rescuing cattle after they were impounded)

(11) 12 Cri L Jour 567 (567) 12 Ind Cas 655 (Mad) *Raghatendra Rao v Emperor* (Different acts — Unconnected — Not one transaction)

(13) 14 Cri L Jour 118 (118 119) 14 Ind Cas 118 (Cal)

(Offences under

489)

as per *Emperor* (Offences under Ss 411 and

(35) 22 AIR 1935 Nag 90 (98) 36 Cri L Jour 744 *Diwan Singh v Emperor* (Composing of article, editing and printing at one place and publishing it at different places at different times cannot be regarded as one set of acts forming the same transaction)

Note 3

1 (38) 25 AIR 1939 Bom 481 (484) 11 LR (1939) Bom 42 40 Cri L Jour 118 *Emperor v Karamah Gulamah*

as per

Kateyja

as per 118 119 Ind Cas 315 in re Balam

(34) 21 AIR 1934 Sind 57 (60) 28 Sind L R 119 35 Cri L Jour 1337 *Dur Md v Emperor*

separate trial for each of the offences is not illegal¹ As a matter of fact if there is a risk of embarrassing the defence a joinder of charges should not be resorted to² Nor is it necessary that the accused should be tried for all the offences committed by the same act Thus where the accused by a speech abets an offence under S 122 of the Penal Code and by the same speech also abets the offence of dacoity, he can be tried for each of the offences under this section but as this section is controlled as regards the offence against the State under S 120 by the provisions of S 196 of the Code its operation in this case could be restricted to the offence of dacoity alone³ Similarly, where in a trial for an offence under S 235 Penal Code which was triable by a jury, charges under ss 148 and 460, Penal Code, were added on the basis of the same facts to provide for the contingency of the jury returning a verdict of not guilty on the charge under S 300 it was held that though such a course might be within the law it was against the spirit of the law which requires that the accused should not be deprived, by subterfuges of his right to trial by jury⁴ A joint trial of several offences in cases not authorised by the Code is an *illegality* and not merely an irregularity⁵ (See Notes on S 233)

Note 5

- (1) 25 AIR 1941 Mad 330 (319) 42 Cri L Jour 414 193 Ind Cas 375 In re Dalam Patayya
(41) 28 AIR 1941 Oudh 33 (36) 42 Cri L Jour 40 190 Ind Cas 887 Vishambhar Dayal v Emperor
(Where in respect of the same speech a person is charged with two offences under Ss 124A and 153A,
I. P. C. there should not be two separate trials and the accused could be convicted under both the
sections in one trial But where there has been separate trial and the accused has not been prejudiced
the trial cannot be held to be illegal)
- (86) 1886 Rat 307 (308) Queen Empress v Ugra
(25) 12 AIR 1915 Cal 341 (345) 32 Cal 253 26 Cri L Jour 487, Alimuddin v Emperor
(27) 14 AIR 1927 Pat 13 (14) 6 Pat 208 27 Cri L Jour 1100 Abdul Hamid v Emperor
(72 92) 1872 1892 Low Bur Rul 444 (446) Nga San Dun v Queen Empress
(28) 15 AIR 1928 Bom 231 (232) 29 Cri L Jour 981 Emperor v Rama Deoji
(87) 8 Cal 481 (483) 4 Shome L R 282 Ameruddin v Farid Sarkar
(15) 2 AIR 1915 Mad 1036 (1037) 16 Cri L Jour 717 In re Sennimalai Goundan
- 2 (41) 28 AIR 1941 Mad 330 (342) 42 Cri L Jour 414 193 Ind Cas 375 In re Dalam Patayya (The
usual course to adopt in a case of very large number of counts is to ask the Public Prosecutor to select
what he considers to be the best case from his point of view and to try that case first and leave the
other charges to be tried if necessary later on after the result of the first trial is known)
- (29) 26 AIR 1939 Mad 59 59) 40 Cri L Jour 211 In re Uppara Dodda Narasa (It is very embarrass-
ing to the accused to have to answer a charge of murder at the same time as a charge of wilfully
preferring a false complaint of murder — It is also embarrassing to the prosecution and may lead to
failure of justice)
- (37) 41 Cal W N 414 (414 415) Abdul Gafur v Emperor (Charges under Ss 303 361 and 201—Joint
trial before one jury held improper)
- (36) 23 AIR 1936 Cal 753 (759) 38 Cri L Jour 545 Rash Behari Shaw v Emperor
(25) 12 AIR 1925 Cal 341 (345) 52 Cal 253 26 Cri L Jour 487 Alimuddin v Emperor
- veror
- v Emperor
- (25) 12 AIR 1925 Mad 690 (697) 26 Cri L Jour 1513 49 Mad 74 In re Mallu Dora
(28) 15 AIR 1928 Oudh 401 (401) 3 Luck 664 29 Cri L Jour 601, Rasul v Emperor
(08) 8 Cri L Jour 191 (195) 1 Sind L R 73 Emperor v Ghulam
(34) 21 AIR 1934 Sind 57 (60) 28 Sind L R 119 35 Cri L Jour 1337 Dur Md v Emperor
[See also (22) 9 AIR 1922 Cal 573 (574) 24 Cri L Jour 72 50 Cal 94 Radia Nath v Emperor]
- 3 (01) 25 Bom 90 (98) 2 Bom L R 653 Queen Empress v Anant Paranjpe
4 (47) 29 AIR 1942 1st 193 (200) 43 Cri L Jour 230 21 Pat 130 197 Ind Cas 617 (DB) Arjun
Panda v Emperor
- nyar (Joint trial on
offences committed

6 "Trial" includes conviction — The word 'trial' in this section includes conviction¹

7 Sub section (2) — Where the same facts will constitute different offences, this sub section authorizes a combined trial in respect of all of them¹ Thus, where a girl of fifteen went out of her husband's hut at night and the accused seized her and took her away, the act will amount to an offence both of kidnapping and abduction and under subs (2) can be tried at one trial² But under S 71 Penal Code, the offender cannot be punished with a more severe punishment than can be awarded for any one of the offences constituted³ See also Note 15 on S 403

8 "Constitute, when combined, a different offence"—Sub section (3) — An offence of theft under S 379 of the Penal Code and an offence of taking a gift to restore stolen property under S 215 of the Penal Code cannot be said to form when combined a different offence¹ An offence under S 143 (unlawful assembly) and an offence under S 353 (assault on a public servant) may, when combined, become an offence under S 147² See also the undermentioned case³

9 Sub section (4) — See Note 4 on S 35

10 Illustration (j) — See the undermentioned case¹

11 Sections 234 235 and 236 if mutually exclusive — See Note 2 on S 239

12 Failure to charge under sub section (1)—Subsequent trial therefor — Section 403 — See S 403 and notes thereon

13 Joint trial for several charges not forming part of same transaction — Effect — A joint trial of several charges in respect of acts not forming parts of the same transaction is illegal and is not cured by S 537¹ See also S 233 Note 5 S 234, Note 7 and S 537 Note 10

Note 6

1 (10) 11 Cr L Jour 415 (416) 6 Ind Cas 880 3 Sind L R 224 *Imperator v Barad* (Joint trial for two offences under Ss 147 332 and 149 is not illegal)

Note 7

1 (44) 31 AIR 1944 Cal 224 (226) 1 L R (1944) 1 Cal 398 45 Cr L Jour 666 213 Ind Cas 401 (DB) *Becharam Mukherji v Emperor* (Sub-section does not cover the case where different sets of acts constitute different offences)
(36) 23 AIR 1936 All 74 (75) 37 Cr L Jour 382 *Ghotalal v Emperor* (Joint trial is competent for two offences one under S 353 Penal Code and another under S 295 U P Municipalities Act)
[See (35) 156 Ind Cas 972 (972) 36 Cr L Jour 1037 (Sind) *Kaimji Khetsi v Emperor* (Where the same facts will constitute different offences the indictment may and ought to charge each such

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Emperor

Note 8

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— and caused by offender while trying to get away with the property — Offence of hurt is included in the robbery and where the latter charge is to be tried by a jury a separate charge for hurt to be tried by the Judge with assessors is not justified—Decision does not appear to be correct)

Note 10

1 (26) 13 AIR 1926 Bom 71 (75) 49 Bom 878 27 Cr L Jour 114 *Emperor v Abdul Gani*

Note 13

1 (44) 31 AIR 1944 Bom 306 (312) 1 L R 1944 Bom 723 (DB) *Keshavlal v Emperor*
(44) 31 AIR 1944 Cal 224 (228) 1 L R (1944) 1 Cal 398 45 Cr L Jour 666 213 Ind Cas 401 (DB), *Becharam Mukherji v Emperor*
(42) 29 AIR 1942 Oudh 462 (464) 43 Cr L Jour 912 203 Ind Cas 12 *Bankayal v Emperor*
(42) 29 AIR 1942 Oudh 441 (442 443) 43 Cr L Jour 776 18 Luck 403 201 Ind Cas 737 *Hiralal v Emperor*
(40) 27 AIR 1940 Cal 583 (583) 42 Cr L Jour 734 192 Ind Cas 835 *A K Sen v Madhu Mongal Das* (Offences of cheating and offence under S 6 Merchandise Marks Act not committed in course of same transaction—There is misjoinder of charges)

14. Offences forming part of same transaction — Jurisdiction to try. —

The accused were charged under S 420 read with S 120B, Penal Code. The conspiracy was entered into at B where the accused lived, but one or two acts of cheating were committed within the jurisdiction of the Court at P. It was held that the Court at P could not be clothed with jurisdiction to try the charge of conspiracy merely because the conspiracy and the different acts of cheating might form part of the same transaction¹. See also Note 3 on S 177.

236. If a single act or series of acts is of such a nature that it

Where it is doubtful which of several offences the facts which can what offence has been be proved will constitute, the accused may be charged committed

with having committed all or any of such offences, and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

Illustrations

(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

* Code of 1861, S 236, and Code of 1872, S. 455 — Sections same as that of 1898 Code; Illustration (b) was added in 1899

Code of 1861: S. 242.

242 When it appears to the Magistrate that the facts which can be established in evidence

Cases of doubt as to the show a case falling within some one of two or more sections of the Indian section which is applicable Penal Code, but it is doubtful which of such sections will be applicable, or cable, or the offence show the commission of one of two or more offences falling within the same which may be proved section of the said Code, but it is doubtful which of such offences will be proved, the charge shall contain two or more heads, framed respectively under each of such section or charging respectively each of such offences accordingly.

(34) ILR (1938) 1 Cal 98 (103, 113), *Kamala Kanta Ray v Emperor* (Per Biswas, J — Where the

Emperor

(36) 23 AIR 1936 Lah 507 (507): 37 Cri L Jour 722 *Bahali v Emperor*

(35) 22 AIR 1935 Nag 149 (155): 36 Cri L Jour 1153 31 Nag L R 313, *R S Ruyar v Emperor*.

(14) 1 AIR 1914 Cal 559 (589): 15 Cri L Jour 472, *Shyambar Koyal v Emperor* (An objection as to misjoinder of charges in a criminal case, whenever and wherever taken is fatal to the conviction, and there must be a re trial)

[See (39) 26 AIR 1939 Bom 129 (143): 40 Cri L Jour 579, *Ramchandra Rango v Emperor* (The necessity of following the procedure relating to joinder of charges laid down by law is obviously dictated by reasons of practical expediency and justice, namely, to simplify the inquiry from the point of view of the accused)]

(38) 25 AIR 1935 — — — — —

under S
(36) 23

(Where evidence called to prove the commission of offences extending over a long period, it is always extremely

han v.
Oudh

(44) 31 A 1 R 1944 Oudh 122 (129): 19 Luck 493: 45 Cri L Jour 538 • 212 Ind Cas 125 (DB), *Debi Prasad v Emperor* (AIR 1938 PC 130: 65 Ind App 158 • 1LR (1938) 2 Cal 295 • 32 Sind L R 476. 39 Cri L Jour 452 (PC) and A 1 R 1927 PC 44 51 Ind App 96 • 5 Rang 53: 29 Cri L Jour 259 (PC), followed)]

Note 14

1. (36) 23 AIR 1936 Mad 317 (317): 37 Cri L Jour 634, *In re Dana*

(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

Synopsis

- | | |
|--|--|
| 1 Scope of the section
2 Which of several offences
3 Theft and taking illegal gratification for the return of stolen property
4 Sections 236 and 239, if mutually exclusive See Note 2 on S 239
5 Contradictory statements—Illustration (b)
6 Murder and concealment of body to screen offender | 7 Murder and culpable homicide not amounting to murder and causing death by negligence
8 Principal offence and the abetment thereof
9 Alternative charges
10 Sentence.
11 'Series of acts,' meaning of |
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NOTE to the Synopsis. See the Notes indicated for the following topics

- | | |
|---|---|
| Alternative charges in respect of common object See Note 1
Alternative charges — When framed See Note 1
Appellate Court—Section applies See Note 1
Charges — Penal Code and special law See Notes 1 and 2
Cognate offences See Note 1
Contradictory statements — Both not offences — Effect See Note 5
Contradictory statements — Falsity of either unknown See Note 5
Contradictory statements—Same deposition or not on same occasion or different occasions See Note 5
Doubt as to facts and doubt as to law See Notes 1 2 7 and 8 | Effect of decision on subsequent trials See Note 1
Falsity of contradictory statements See Note 5
Form of charges See Note 9
Judgment on alternative charges See Notes 1 and 6
Offences — Same or of different kind See Note 1
Punishment on alternative charges See Notes 1 and 10
Section 182 or S 211, Penal Code See Notes 1 and 2
Sections 302 304 307, 391 or S 328, Penal Code See Note 1
Sections 366 and 376 Penal Code See Note 1
Statements under S 161 Cr. I Code See Note 5 |
|---|---|

1 Scope of the section — This section and the next form another exception to the general rule enacted in S 233 that every charge shall be tried separately. They deal with a class of cases which the language of S 235 may fail to cover¹. The stage at which this section applies is *before the evidence is gone into* in the case, in other words, *before the trial begins*. If at that stage the prosecution relies on certain facts, the proof of which is in its possession and such facts give rise to an inference that the accused must have committed *some* one of several offences but it is not clear, in the absence of further facts, which one of them it is the case falls under this section and the next². To take an illustrative case. Suppose before the trial begins the prosecution relies on the following facts as those which can be proved in the case

(1) that certain moveable property was stolen from the house of X,

Section 236 — Note 1

1 (1) 14 C. 111, 125, 27, 30

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(31) -

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offence have been alleged and proved is not correct]]

Sheikh v Emperor

or 753 Emperor v Abdul

with cases where all the facts constituting the

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(2) that the accused was in possession thereof and

(3) that the accused is unable to explain such possession

These facts are not consistent with the innocence of the accused person, but give rise to an inference that he has committed some offence, and that it may either be theft punishable under s 379 of the Penal Code or the offence of receiving stolen property punishable under s 411 of the Penal Code. It is however doubtful, without further facts, which one of the said two offences he has committed. This section applies to such a case and the accused may be charged cumulatively with the offence of theft as well as of receiving stolen property or may be charged in the alternative, with the offence of theft or of receiving stolen property.³

Where a charge is framed under this section, as in the above illustration either cumulatively or in the alternative, and the *trial proceeds*, and on the further facts disclosed in the evidence the doubt which existed at the beginning of the trial disappears, the accused should be convicted of the offence which has been *proved* to have been committed by him.⁴

Where on such a charge the trial proceeds and at the end thereof the Court is *still doubtful on the facts proved* which one of the offences charged has been committed by the accused, though it is clear that one or other of them must have been committed, the Court should pass judgment *in the alternative*.⁵ The punishment in such a case is for the offence for which the lowest punishment is provided if the same punishment is not provided for all (see s 72 of the Penal Code). See also Note 10.

Where in the above illustrative case, a charge is framed for *theft only*, but in the evidence in the trial it is proved that the accused is guilty only of receiving stolen property, he may be *convicted* of the latter offence though not charged with it, inasmuch as he could, on the facts relied upon at the beginning of the trial, have been charged under this section⁶ (see s 237). The undermentioned cases⁷ have all been decided on this principle.

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under Section 412 and also there might have been a charge in the alternative under s 395 or s 412.)

(45) 32 AIR 1945 Cal 402 (406) (DB), *Superintendent and Remembrancer of Legal Affairs, Bengal v Fatman*: (Accused misleading authorities by making false promise in order to get out of difficulty created by contravention of freezing order — Held accused can be charged alternatively under s 75 A of Defence of India Rules or under s 46 (2) (d) but not under both.)

(43) 30 AIR 1913 Lah 220 (221) 45 Cr L Jour 80 1 L R (1944) Lah 145 209 Ind Cas 117 (DB), *Banshi Ram v Emperor* (A person can be charged with an offence under Section 380, I P C, and alternatively with an offence under Section 420, I P C.)

4 (31) 18 AIR 1931 Cal 414 (415) 59 Cal 8 32 Cr L Jour 892 *Mohar Sheikh v Emperor*

(13) 14 Cr L Jour 278 (280) 19 Ind Cas 710 1913 Pan Re No 8 Cr, *Mohammad Shah v Emperor* (Appellate Court can also do this.)

(30) 17 AIR 1930 Cal 139 (140) 57 Cal 801 31 Cr L Jour 610 *Bulram Ali v Emperor* (Offence under s 395)

Emperor

peror

Fatman v.

Emperor (Accused cannot be convicted under ss 147 and 148 I P C, when the charge against them was merely under s 395 unless the case was one to which ss 236 and 237, Cr P C, were applicable.)

(45) 32 AIR 1945 Cal 421 (423) 221 Ind Cas 499 (DB) *Mektarah v Emperor*

(44) 31 AIR 1914 Pat 67 (73) 45 Cr L Jour 624 22 Pat 681 212 Ind Cas 293 (DB) *Saiyanarajana v Emperor*

- (43) 30 AIR 1943 Bom 458 (461) 45 Cri L Jour 221 • ILR (1944) Bom 25 : 210 Ind Cas 362 (DB), *Emperor v Bhikka Gober* (Murder and receiving stolen property)
- (43) 30 AIR 1943 Mad 209 (209) 44 Cri L Jour 413 : 205 Ind Cas 336, *In re Chinnappa Chetty* (A person charged under S 380, 1 P C, can be convicted under S 411)
- (40) 27 AIR 1940 Pat 414 (416) 41 Cri L Jour 810. 189 Ind Cas 867, *Amir Hasan v Emperor*. (An accused charged under S 295 Penal Code, can be convicted under S 297, on the same facts, when they disclose an offence under S 297, though he was not charged under the latter section)
- (37) 24 AIR 1937 Rang 250 (251) 38 Cri L Jour 989, *Rati Ram v Emperor* (Sections 419 and 341, Penal Code — Offences under the same chapter of Penal Code are not necessary for applicability of S 236)
- (36) 23 AIR 1936 All 337 (352) • 59 All 695 : 37 Cri L Jour 794, *Emperor v Mathuri* (Where the accused were charged under Ss 302 and 457, Penal Code, and the facts proved established an offence under S 460, Penal Code, they could be convicted under that section, although they were not specifically charged with that offence)
- (24) 11 AIR 1924 Rang 256 (260) • 2 Rang 80 • 25 Cri L Jour 907, *Rampershad v. Emperor*.
- (11) 12 Cri L Jour 374 (374) • 11 Ind Cas 142 (All), *Chunnoo v Emperor*. (Charge for criminal breach of trust—Conviction for theft can be given)
- (23) 10 AIR 1923 Cal 596 (597) 50 Cal 564 24 Cri L Jour 372, *Tulsi Tolint v Emperor*. (Offences under S 379, Penal Code, and S 54A, Calcutta Municipal Act)
- (31) 1931 Mad W N 861 (864), *Sukkirappa Goundan v Emperor* (Sections 307 and 506)
- (32) 19 AIR 1932 All 530 (531) 34 Cri L Jour 100 *Abdul v. Emperor* (Accused charged under S 366, Penal Code can be convicted of rape)
- (20) 10 AIR 1929 Cal 773 (773) 31 Cri L Jour 474, *Kalachand Ghose v Tatu Shastri* (Sections 379 and 426, Penal Code)
- (35) 22 AIR 1935 All 458 (459) 36 Cri L Jour 1294, *Gulab Singh v Emperor*. (Sections 395 and 453, Penal Code)
- (35) 22 AIR 1935 Oudh 4 (5) 36 Cri L Jour 112, *Mangal Prasad v. Emperor*. (Sessions Judge can convert conviction from S 405 to S 403, Penal Code)
- (35) 22 AIR 1935 Cal 244 (245 246) • 152 Ind Cas 1036 (Lah), *Emperor v. Narayan Singh* (Charge under S 393—Conviction under S 379)
- (28) 15 AIR 1928 Bom 130 (134) • 52 Bom 385 : 29 Cri L Jour 403, *Emperor v. Ismail Khadrab*. (Murder and theft)
- (34) 21 AIR 1934 Mad 565 (565) • 36 Cri L Jour 113, *Rama Doyan v Emperor* (Person charged with S 304 and S 149 can be convicted under S 304 with S 34)
- (25) 12 AIR 1925 Mad 1 (6) 47 Mad 740 25 Cri L Jour 1297 (TB), *In re Theethumalai Goundar*. (Charge framed under Ss 326 and 149, Penal Code—Conviction under S 326, Penal Code, alone is not necessarily bad)
- (15) 2 AIR 1915 Mad 802 (303) 15 Cri L Jour 680 (680) *In re Suryanarayana Rao*
- (14) 1 AIR 1914 Mad 425 (428) 13 Cri L Jour 739 (741) 37 Mad 236, *In re Adabala Muthiyala*. (Charge under S 307—Conviction for grievous hurt)
- (34) 21 AIR 1934 All 872 (873) • 36 Cri L Jour 766, *Dipchand v Emperor* (Person charged under S 353, Penal Code, can be convicted under S 358)
- (32) 19 AIR 1932 Nag 173 (173, 174) 28 Nag L R 218 34 Cri L Jour 66, *Deorao v Emperor* (Charge under S 457 Penal Code—Conviction can be given)
- How-
- under
- Ss 302/149—Conviction can be under S 302)
- (31) 18 AIR 1931 Lah 566 (568) 33 Cri L Jour 315, *Jogindar Singh v Emperor*. (Trial under Sections 302/149, 1 P C—Conviction for hurt to companion of deceased without charge under Section 323, Penal Code, is competent)
- (29) 16 AIR 1929 Pat 11 (14, 15) 7 Pat 758 • 30 Cri L Jour 205, *Bhundu Das v Emperor*. (Charge under Sections 326 and 149 of Penal Code—Conviction given under Sections 326 and 34 not bad)
- (29) 16 AIR 1929 Cal 401 (402) 31 Cri L Jour 59, *Radha Krishna v Jamnadas Fatepuria* (Accused tried under Sections 381 and 411, Penal Code, can be convicted of an offence under Section 54, Calcutta Police Act)
- (22) 9 AIR 1922 Mad 110 (111, 112) • 23 Cri L Jour 206, *Muthukanakku Pillai v Emperor*. (Charge under Section 147, Penal Code—Conviction under Section 352, Penal Code, can be given but not for abetment of assault)
- (35) 22 AIR 1935 Pesh 67 (68) : 36 Cri L Jour 1438, *Sura, Bhan v Emperor*. (Offence under Sections 324/114 can be altered to one under Sections 324/34 where latter charge could have been based on the facts proved)

Where in the illustrative case a charge is framed for *theft only* and the accused is after trial convicted or acquitted of it he cannot under the provisions of sub s (1) of S 403 be subsequently tried on the same facts for receiving stolen property inasmuch as he *might* have been tried under this section or convicted under S 237, of this offence in the previous case itself⁸ The cases cited below⁹ have all been decided on this principle

- (19) 13 Cr L Jour 202 (204) 14 Ind Cas 604 (Lah) *Lal Chand v Emperor* (Charge under Sections 232 and 235 Penal Code—Conviction under Sections 235 and 195 Penal Code permissible, though the latter sect on not mentioned in the charge)
- (20) 12 Bom H C R 1 (7) *Peg v Ramajirao* (Trial under Sections 409 511 167 218 and 193 I P C—Conviction for attempting to cheat can be given)
- (19) 6 AIR 1919 Pat 305 (305) 20 Cr L Jour 487 *Mahabir Singh v Emperor* (Accused prosecuted only under Section 47 Bihar and Orissa Excise Act can be convicted in addition under Section 55)
- (24) 11 AIR 1924 Bom 450 (451) 26 Cr L Jour 211 *Emperor v C J Waller* (With charge under Sect on 304 Penal Code conviction can be under Sect on 304A)
- (15) 2 AIR 1915 Bom 97 (99) 16 Cr L Jour 305 *Emperor v Ramata Chennappa* (Although no charge under Section 304A is framed at the trial for murder on reference under Sect on 307 the High Court is competent to record conviction under S 304A)
- (33) 20 AIR 1933 Oudh 160 (163) 8 Luck 474 34 Cr L Jour 385 *Basdeo Prasad v Emperor* (Trial for offence under Section 395 Penal Code—Conviction under Section 323 can be given—In so far as the Court adverts to the question of prejudice to the accused it is submitted that it is not relevant and does not affect the decision See Note on S 937)
- (27) 14 AIR 1927 Nag 163 (164) 28 Cr L Jour 189 *Gulabchand v Emperor* (Charge under Section 147 Penal Code—Conviction under Section 160 Penal Code is not illegal)
- (21) 8 AIR 1921 All 261 (262) 22 Cr L Jour 621 *Sabir Hussain v Emperor*
- (20) 7 AIR 1920 All 72 (74) 21 Cr L Jour 410 *Jagdeo Prasad v Emperor* (Accused charged under Section 467 Penal Code can be convicted under S 471)
- (19) 6 AIR 1919 Cal 85 (86) 20 Cr L Jour 525 *Arsled Molla v Emperor* (Charges under Sections 396 397 and 460 Penal Code—Conviction under S 411 Penal Code can be given)
- (29) 16 AIR 1929 Sind 147 (149) 30 Cr L Jour 875 *Haroon v Emperor* (Charge under Section on 395 Penal Code—Conviction under S 403)
- (30) 17 AIR 1930 Oudh 353 (356) 31 Cr L Jour 1210 *Hasari v Emperor* (Charge for offence under Section 397 Penal Code—Conviction for offence under S 412 is legal)
- (15) 2 AIR 1915 Low Bur 39 (45) 16 Cr L Jour 676 (683) 8 Low Bur Rul 274 *S P Gosh v Emperor* (Dacoity and abetment of robbery)
- (34) 21 AIR 1934 All 942 (942) 36 Cr L Jour 266 57 All 398 *Nathu Ram v Emperor* (Charge under Section 4b Explosive Substances Act—Conviction under S 5 is not illegal)
- (67) 1867 Pun Re No 50 Cr p 88 (89) *Nuthoo v Dewanna* (Charge for assault—Conviction for nothing not illegal)
- (95) 1893 Rat 761 (762) *Queen Empress v Bala Kashaba* (Charge under Section 82 (d) Registration Act 3 (III) of 1877—Conviction under S 182 Penal Code is permissible)
- (31) 18 AIR 1931 Sind 9 (12) 25 Sind L R 1 32 Cr L Jour 517 *Sabjhatullah Shah v Emperor* (Charge under Section 20 of the Arms Act—Conviction under S 19 (f) not bad)
- (25) 12 AIR 1925 Cal 581 (582) 26 Cr L Jour 356 *Abdul Sheikh v Emperor*
- (20) 12 AIR 1925 Sind 105 (107 109) 19 S L R 183 25 Cr L Jour 1057 *Fazailah v Emperor*
- [See (28) 15 AIR 1928 Bom 591 (521) 30 Cr L Jour 329 *Dwarkadas Haridas v Emperor*
- (38) 25 AIR 1938 Oudh 263 (263) 39 Cr L Jour 937 *Emperor v Shankar Dayal* (It is not illegal to convict a man of an offence under Section 452 Penal Code in a case in which he has been charged under Section 323 Penal Code—But if the alteration of the charge causes injustice to the accused the conviction from Section 323 Penal Code should not be altered to S 452 Penal Code))
- [See also (1884) 8 Bom 200 (212) *Queen-Empress v Appa Subhanta*]
- Also see S 423 Note 31
- 8 (21) 11 AIR 1924 Bom 448 (449) 26 Cr L Jour 831 *In re Pundalik Shanker Gujar*
- 9 (43) 30 AIR 1943 Mad 737 (739) 45 Cr L Jour 518 212 Ind Cas 97 *In re Drumugham* (Accused tried under Section 302 I P C and acquitted—He cannot be tried again under S 396)
- (31) 18 AIR 1931 Bom 309 (311) 55 Bom 500 33 Cr L Jour 60 134 Ind Cas 1219 *Emperor v Abba Isak* (Acquittal on charge of offence is bar to trial on charge of culpable homicide not amounting to murder)
- (27) 14 AIR 1927 Bom 629 (629 630) 28 Cr L Jour 1039 *Emperor v Kallazani* (Acquittal under Section 160 Penal Code—Subsequent trial for offence under S 61 (c) Bombay District Police Act, barred)

It will be clear from the above decisions that the applicability of this section or the next depends upon the facts relied upon by the prosecution at the beginning of the trial in other words the question in each case is '*what were the facts charged?*'¹⁰ Thus if the facts charged are simply that a girl *under* 16 years of age was forcibly taken away by the accused there may be a doubt as to whether she was kidnapped or whether she was abducted. A charge might therefore be framed under this section for both offences.¹¹ But if the facts charged are that a girl *over* 16 years of age was forcibly taken away by the accused the only offence for which the accused could be charged is abduction and not kidnapping.¹² There being no doubt as to which offence was committed, this section does not apply.

It follows from the principle set forth above that this section and consequently s 237 or sub s (1) of S 403 will have no application in the following cases

- (1) Where on the facts relied upon at the beginning of the trial, it appears that the accused has committed *more than one* offence, i.e., when he has committed *distinct* offences.¹³

- (18) 5 AIR 1918 Cal 406 (407) 19 Cr L Jour 193 45 Cal 727 *Manhara Chowdhury v Emperor* (Person in possession of bales of jute charged under Sections 380 and 411, Penal Code and acquitted—Proceedings under S 54A Calcutta Police Act against him are not maintainable.)
 (21) 8 AIR 1921 Snd 137 (139 142) 16 Snd L R 1 23 Cr L Jour 305 *Emperor v Menghray Devidas* (Trial for offence under Section 291 Penal Code and acquittal—Subsequent trial under Ss 186 and 290 Penal Code barred.)
 (71) 16 Suth W R Cr 3 (3) 7 Beng L R App 25 *Kaplan v G M Smith* (First trial for offence under S 352—Second trial for hurt barred.)
 (85) 6 Mad 296 (298 299) 2 Weir 554 *Erissay v Erramreddi* (Theft and mischief.)
 (24) 11 AIR 1924 Mad 478 (479) 25 Cr L Jour 214 *In re Chinnappa Naidu* (Sections 147 and 427 Penal Code.)
 (13) 14 Cr L Jour 214 (217 218) 36 Mad 308 19 Ind Cas 310 *Ganapathi Bhatta v Emperor* (Charge under Section 211—Acquittal is bar to subsequent trial under S 182.)
 (13) 14 Cr L Jour 185 (188) 18 Ind Cas 867 9 Nag L R 26 *Mahadeo Gir v Emperor* (Prosecution under Section 203 withdrawn—Subsequent trial under S 177 on same facts.)
 (21) 8 AIR 1921 Pat 22 (22) 22 Cr L Jour 63 *Maksuddan Maistry v Emperor* (Prosecution for offence under Section 338 I P C—Acquittal—Subsequent prosecution under Motor Vehicles Act S 16 on same facts—Second prosecution illegal.)
 (15) 2 AIR 1915 Low Bur 60 (61) 16 Cr L Jour 267 (267 268) *Nga Siwe Ya v Emperor* (Offences under Section 31 of the Rangoon Police Act and under Section 457 of the Penal Code could on the facts have been charged together.)
 (10) 11 Cr L Jour 731 (733) 8 Ind Cas 936 4 Snd L R 174 *Emperor v Bawa Manghadas*. (An acquittal on a charge of murder is a bar to a second trial on a charge of causing disappearance of evidence of the murder.)
 10 (38) 25 AIR 1938 Cal 51 (69) 1 L R (1938) 1 Cal 296 39 Cr L Jour 161 *Golole Behari v Emperor*
 (36) 23 AIR 1936 Cal 796 (799) 62 Cal 956 37 Cr L Jour 701 *Istahar Khondhar v Emperor* (A doubt as to whether the evidence led by the prosecut on would be believed by the Court is not within the section.)
 11 (30) 17 AIR 1930 Cal 209 (210) 57 Cal 1074 31 Cr L Jour 903 *Prafulla Kumar Bosa v Emperor*

reably carry

- 12 (30) 17 AIR 1930 Cal 209 (210) 57 Cal 1074 31 Cr L Jour 903 *Prafulla Kumar Bosa v Emperor*

argued under S 395 Penal

Ind Cas 382 *Ram Nath*
 offences being distinct)
 can be tried under S 420 Penal Code can be tried under S 409 subsequently the

- (41) 2 AIR 1941 Lah 214 (215) 42 Cr L Jour 660 1 L R (1941) Lah 423 105 Ind Cas 58 (DB), *Warren Singh v Emperor* (Charge for murder of 1—Conviction under S 307, Penal Code for attempt to murder B is illegal)
- (36) 23 AIR 1936 Pat 503 (504) 37 Cr L Jour 785, *Sankatha Das v Khaderan Mian* (Offences under S 160 and S 323 Penal Code—Acquittal under S 160 does not bar subsequent prosecution under S 323)
- (36) 23 AIR 1936 Rang 174 (174) 14 Rang 24 37 Cr L Jour 492, *Abdul Hamid v Emperor* (Swearing false affidavit and using false affidavit are distinct offences though committed in course of same transaction—Acquittal in respect of one offence does not bar trial in respect of other offence—Section 236 does not apply)
- (35) 22 AIR 1935 Nag 178 (182) 31 Nag L R 337 36 Cr L Jour 1216, *Ramsheshan v Emperor* (Section 236 refers to one offence although it may be difficult to determine what the actual offence is)
- Penal Code) and 365,
- (99) 1 Bom L R 15 (17 18), *Queen Empress v Subedar Krishnappa* (Offences under S 400 and under S 395)
- (33) 20 AIR 1913 Lah 939 (939 960) 35 Cr L Jour 291, *Maya Shah v Emperor* (Stamp Act, 1899, S 62 (1) (b) and 64 (a) — Complaint brought under S 64 (a) — Before accused can be convicted under S 62 (1) (b) his attention must be drawn to such fact)
- (15) 2 AIR 1915 Cal 181 (182) 16 Cr L Jour 42 (43) *Harnarain Sardar v Emperor* (Sections 147 and 553 Penal Code) and 318, Penal Code)
- and 365 and S 498, Penal Code)
- and theft)
- Hussain v Emperor* (Section 468 and
- (28) 15 AIR 1928 Oudh 373 (374) 29 Cr L Jour 763, *Rameshwar v Emperor* (Sections 392/397 and 325 Penal Code)
- (32) 1932 Mad WN 247 (248), *Nachiappa Goundan v Emperor* (Section 392 and S 183 Penal Code—Doubtful)
- (01) 6 Cal WN 202 (203) *In the*
- (01) 5 Cal WN 567 (568), *In the*
- (75) 23 Suth W R Cr 59 (59) Q:
- (01) 29 Cal 441 (442) 6 Cal W 1
- (97) 20 All 107 (103) 1497 All 3. 411,
- Penal Code)
- (27) 11 AIR 1927 All 75 (75) 27 Cr L Jour 1351 *Acchut Rai v Emperor* (Ss 302 and 101, Penal Code)
- (70) 1870 Rat 34 (34), *Reg v Gopala Pursoo* (Ss 395 and 412, Penal Code)
- (97) 1897 Rat 921 (921), *Empress v Punya Sakharan* (Ss 395 and 398 Penal Code)
- (22) 9 AIR 1922 Bom 97 (98 99) 46 Bom 657 23 Cr L Jour 259, *Mathubhai M Shah v Emperor* (Charge of offence under S 96 Bombay District Municipal Act—Charge cannot be altered into one under S 97 read with S 155) or (Charge on one set
- hwa Zon v Emperor.*
- v Emperor* (Ss 376,
- and 365)
- (32) 19 AIR 1932 Pat 241 (242) 11 Pat 392 33 Cr L Jour 709, *Bageshwar Ahir v Emperor.* (Ss 215 and 417 or 420)
- (20) 7 AIR 1920 Pat 590 (590, 591) 21 Cr L Jour 496, *Raghu Singh v Emperor* (Ss 457 and 456)
- (69) 6 Bom H C R Cr 43 (44) *Reg v Gangaram Malvi* (Ss 471 and 467)
- 60)
- 163,
- under
- Ss 147 and 323 Penal Code cannot be altered into one under S 160 Penal Code)
- (14) 1 AIR 1914 Mad 144 (144) 15 Cr L Jour 569 *In re Syed Ahmad Musaliyar* (Ss 471 and 469, Penal Code)

(2) Where there is no *doubt* as to which offence or offences the facts relied upon at the beginning of the trial amount to¹⁴

- (14) 1 AIR 1914 Mad 61 (61) 15 Cr L Jour 440, *Thoppulan v Santhara Iyer* (S 379 and S 403 or S 424)
 (10) 11 Cr L Jour 340 (340) 5 Ind Cas 974 (Mad) *In re Bommaraddi Somireddi* (Ss 417, 350 and 379 Penal Code)
 (10) 11 Cr L Jour 30 (34) 4 Ind Cas 700 (Mad) *In re Loganatha* (Charge under S 141 Penal Code—Convict on for common object different from that set out in the charge)
 (09) 9 Cr L Jour 406 (406) 1 Ind Cas 867 (Mad) *In re Subramanya Iyer* (Ss 406 and 400)
 (26) 13 AIR 1906 Lah 691 (691) 7 Lah 561 27 Cr L Jour 1004 *Ghanus v Emperor* (S 300, Penal Code and offences relating to property)
 (24) 11 AIR 1904 Lah 109 (110) 4 Lah 373 25 Cr L Jour 335 *Wallu v Crown* (Charge of murder cannot be converted into one of robbery)
 (23) 10 AIR 1923 Lah 260 (261) 3 Lah 440 23 Cr L Jour 709 *Arjan Mal v Emperor* (Sections 176/109 and 189 Penal Code)
 (89) 1889 Pun Re No 18 Cr p 67 (69) *Crow v Umashankar* (Ss 500 and 501 Penal Code)
 (01) 1901 Pun Re No 31 Cr p 92 (92) 1902 Pun L R No 37 *Mangal v Empress* (Ss 457 379 and 497)
 (11) 12 Cr L Jour 169 (170) 38 Cal 993 9 Ind Cas 965 *Lal Mohan v Kalu Kishore* (Ss 147 and 303)

15 Cr L Jour 155 *Emperor v Madan Mondal*
 Code — Acquittal by jury under S 148 — Conviction

under S 394 City of Bombay

trespass

offence

(Abet

419/114 Penal Code

Emperor
 Code)

(89) 9 Cal 371 (373) *Manu Moya v Empress*

(87) 1887 Pun Re No 43 Cr p 105 (106) *Sister Shal v Empress*

(33) 20 AIR 1933 Oudh 315 (321) 8 Luck 518 35 C L Jour 10 *Daulat Ram v Emperor*
 (Murder and receiving stolen property)

(15) 2 AIR 1915 Cal 219 (219) 15 Cr L Jour 704 (705) *Geeta Manjhi v Emperor* (Ss 147 and 323, Penal Code)

Emperor (Accused charged
 act to the complaint—

theft—Conviction

of forgery and

under S 342

not barred)

—subsequent prosecution under Ss 306 and 309 of the Act

O I P C.)

r (Charge

S 461 and S 420 Penal Code are distinct offences and cannot be covered by S 236)]
 14 (39) 26 AIR 1939 All 665 (667) 40 Cr L Jour 948 *Thakur Singh v Emperor*

(3) Where the facts relied upon are not inconsistent with the innocence of the accused, i.e., where such facts do not amount to an offence at all¹⁵

(4) Where the prosecution is itself not clear as to what facts it will rely upon¹⁶
Thus, where the accused, five in number are alleged to have assaulted either with one object or with another and the facts relied upon to establish an offence are themselves in doubt this section does not apply¹⁷ But a different note has been struck in a Full Bench decision of the Bombay High Court¹⁸

(39) 26 AIR 1939 All 710 (712) 41 Cri L Jour 111 *Nand Ashore v Emperor* (Definite and very clear case of cheating put forward by complainant — No allegation of concealment or removal of property — No evidence produced to show concealment — Conviction under S 124 Penal Code is wrong)

(39) 25 AIR 1938 Cal 51 (69) 1 L R (1938) 1 Cal 290 39 Cri L Jour 161 *Goloke Behari v. Emperor* (Section 237 does not deal with a case where the evidence falls short of proving the offence which the prosecution had set out to prove)

(36) 23 AIR 1936 Cal 796 (799) 62 Cal 956 37 Cri L Jour 701, *Istahar Khondkar v Emperor*.

(30) 17 AIR 1930 All 481 (482) 31 Cri L Jour 716, *Emperor v Kanbhaya*

(26) 13 AIR 1926 All 227 (228) 27 Cri L Jour 152, *Raghunath Kandur v Emperor*

(33) 20 AIR 1933 All 30 (31) 34 Cri L Jour 445, *Qadur v Emperor*

(31) 18 AIR 1931 Cal 414 (416) 59 Cal 8 32 Cri L Jour 892 *Mehar Sheshh v Emperor* (Section 237 also will not apply to such cases)

(98) 2 Weir 301 (302) *In re Perumal Nadan*

(29) 15 AIR 1928 All 139 (140) 29 Cri L Jour 232, *Har Prasad v Emperor* (The offences in this case were, however distinct)

(14) 1 AIR 1914 Cal 309 (310) 15 Cri L Jour 41, *Akram Ali v Emperor*

(18) 5 AIR 1918 Pat 165 (166) 19 Cri L Jour 121, *Hayat Khan v Emperor*

(18) 6 AIR 1918 Lah 49 (50) 1918 Pun Re No 23 Cr 19 Cri L Jour 931, *Raj Bahadur v Emperor*

(07) 5 Cri L Jour 427 (431) 34 Cal 698 11 Cal WN 666 *Jatindra Nath v Emperor* (On the facts there could be no doubt as to what the offence was.)

(20) 7 AIR 1920 Pat 216 (218 219) 21 Cri L Jour 439 *Pertap Rai v Emperor* (Offence charged under S 149 read with S 325—Offence merely under S 325 also cannot be charged)

(20) 7 AIR 1920 Pat 512 (513) 21 Cri L Jour 44 *Mt Sheorathu v Emperor*

(18) 6 AIR 1918 Pat 628 (629) 19 Cri L Jour 202 *Bhowanath Singh v Emperor*

(12) 13 Cri L Jour 593 (594) 40 Cal 169 16 Ind Cas 161 *Sita Akur v Emperor* (A was charged with causing hurt to A — He cannot be convicted for causing hurt to B which fact is disclosed in evidence — The reason is that the facts charged did not create any doubt as to the offences committed by A)

(10) 11 Cri L Jour 325 (325) 37 Cal 604 6 Ind Cas 352 *Paru Sewak Lal v. Maneshwar Singh* (False statement to a public servant in which defamatory statements were made against A — Here the act is one, but constitutes two offences — There is no doubt within the meaning of the section — The case was, however decided on the ground that they are distinct offence — This is not correct)

(15) 2 AIR 1915 Cal 219 (219) 15 Cri L Jour 701, *Genu Manjhu v Emperor*

is wrong) — Conviction for murder on the basis of evidence under S 302 is wrong)

16 (31) 18 AIR 1931 Cal 414 (415) 59 Cal 8 32 Cri L Jour 892 *Mehar Sheshh v Emperor*

(31) 18 AIR 1931 Cal 528 (528) 59 Cal 92 32 Cri L Jour 1167, *Paul De Flonder v Emperor*

(94) 21 Cal 955 (973) *Wafadar Khan v Emperor* (Facts alleged clear that the five accused assembled but there was a doubt as to the object of the assembly)

[See also (39) 25 AIR 1938 Sind 63 (65) 31 Sind L R 480 39 Cri L Jour 460 *Ghulam Hyder v Emperor* (Alternative charge for murder or culpable homicide not amounting to murder is bad)]

It has been held in the undermentioned cases¹⁹ that the "doubt" in this section does not mean doubt as to *facts* but means "doubt" as to questions of *law*, such as which section of the penal law applies. It is submitted that this view is not correct. The illustrations to the section themselves show that the doubts in those cases are not doubts as to questions of law, but only as to questions of fact²⁰. To this extent, however, the proposition would be correct, namely, that the section has no application where the *facts relied upon by the prosecution are themselves in doubt*²¹. It is not necessary for the application of this section that the several offences should fall under the same chapter of the Penal Code²².

It has also been held in another class of cases that the several offences which the facts may constitute should be *cognate offences*²³ or offences which differ in degree by reason of the difference in intention or by reason of subsidiary aggravating circumstances²⁴. This view also, it is submitted, is not correct and is not authorised by the terms of the section.

of the series of acts postulated can be proved. At the time the charge is framed, the prosecution can never know exactly what facts they will succeed in establishing. The most promising witness may break down, or the facts may be such that the prosecution is unable to prove them. If we prove certain of our alleged facts, then it will be prosecution is in re of kidnapping or

19 (45) 32 AIR 1945 All 81 (85) 46 Cr L Jour 750 1 I R (1945) All 558 220 Ind Crs 432, *Mallikar v Emperor*

Calcutta Behari v Emperor
t be as to what offence
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v Emperor.
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(75) 7 N W P H C R 137 (143), *Queen v Jamurha*

(29) 16 AIR 1929 Rang 209 (210) 7 Rang 96 30 Cr L Jour 750 *Emperor v Po Thin Gye.*
Nga Po Wain

Emperor. (Following 1897

20 (33) 20 AIR 1933 Rang 236 (237, 238) 11 Rang 354 35 Cr L Jour 41, *Nga Po Kyone v Emperor*

mplated is

Also see cases cited in foot notes (16) and (19) above

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v Emperor]

violation under S 493, Penal Code, can be altered to one under S 492)
(03) 2 Cr L Jour 590 (594) (Kathiawar) *In re Babar, Bhura Dewani*. (Contradictory statements must be of the same kind,
24 (11) 12 Cr L Jour 224 (226) 5 Sind L R 16 10 Ind Cas 168, *Ganesh Krishna v. Emperor* (Per
Pratt, J C)

or, (Con-

It was observed in the undermentioned cases² that the section applies only where from the evidence led by the prosecution it is doubtful which of several offences have been committed by the accused. It is submitted that this view is not correct. Such a case is really covered by s 367 sub s. (3).

See also the cases cited below³.

2 "Which of several offences"—This section applies even where the doubt is whether the accused committed one offence only or both that offence and another. Where A gives false information of theft in a house and states that he suspects B of the offence it is clear that he commits an offence under s 182 of the Penal Code but it is doubtful if the information will amount to the making of a false charge against B punishable under s 211 of the Penal Code. It has been held that this section will apply even to such cases¹.

Under the Code of 1861, a charge under the section corresponding to this section could be framed only in respect of offences under the Indian Penal Code². Under the present Code this is no longer necessary.³

3 Theft and taking illegal gratification for the return of stolen property.

— Where the facts relied upon by the prosecution are

(1) that certain property was stolen

(2) that A took gratification for its restoration and

(3) that he took no steps for its restoration or to cause the offender to be apprehended,

the only inference possible is that A committed an offence under s 215 of the Penal Code. It cannot be an inference that because A asked for a gratification for its return he is the thief. There being therefore no doubt such as is contemplated by the section A cannot be charged for theft along with the offence under s 215 of the Penal Code¹. If however in the above case there is the additional fact that he restored the property but did not take steps to cause the offender to be apprehended there will be a doubt as to whether he was not the

25 (45) 32 AIR 1945 Pat 376 (379) *Dijo Gope v Emperor*

(23) 10 AIR 1923 Pat 101 (100) 23 Cri L Jour 30 *Govind Mahlan v Emperor*

(20) 7 AIR 1920 Pat 512 (513) 21 Cri L Jour 44 *Mt Sheoratus v Emperor*

26 (45) 49 Cal W N 535 (537) (DB) *Krishna Das Saha v Emperor* (Under s 936 Cr P C it is legal to charge the accused both under s 411 Penal Code and under s 3 of Ordinance 83 [XXVIII] of 1913 for unlawful possession of military stores. If the charges are so framed, there can be no misjoinder.)

(37) 24 AIR 1937 Cal 99 (114) 38 Cri L Jour 818 (SD) *Jalendra Nath v Emperor* (Nothing contained in Criminal Law Amendment Act bars operation of ss. 196, 235, 236 and 237, Cr P C—Conviction or acquittal of person or overt act in regard to conspiracy does not bar trial of such person over again under s 121A Penal Code.)

Note 2

1 (13) 14 Cri L Jour 214 (216, 217) 36 Mad 308 19 Ind Cas 310 *Ganapathy v Emperor*

2 (71) 8 Bom H C R Cr 115 (117) *Peg v Ajaru Dulla* (A charge either of criminal breach of trust under s 409 Penal Code or of undue exaction of money under s 16 Regulation 17 [XXII] of 1897 is irregular.)

3 (23) 10 AIR 1923 Cal 596 (597) 50 Cal 564 24 Cri L Jour 372 *Tulsi Toli v Emperor* (Section 230 B, Cr P C)

Sahu Y. v Emperor (Section

Emperor (Trial under s 333

Illasani (Section 160 Penal Cod

Note 3

1 (27) 14 AIR 1927 Rang 254 (255) 28 Cri L Jour 759 *Emperor v Nga Po Wun* (The ground of the decision namely that the doubt must not be one of fact but of law is incorrect. See Note 1.)

(29) 16 AIR 1929 Rang 209 (210) 7 Rang 96 30 Cri L Jour 750 *Emperor v Po Thin G. (Do)*

thief seeing that he was in possession of the stolen property. In such a case an alternative charge for theft or for an offence under S 215 may be framed²

4. Sections 236 and 239, if mutually exclusive — See Note 2 on Section 239.

5. **Contradictory statements — Illustration (b).** — Illustration (b) was added in the present Code in order to give effect to the view that existed before that a person could be charged with giving false evidence on the basis of two contradictory statements.¹ It applies not only where the statements are made on two distinct occasions but also where they are made on the same occasion, as for example, in the same deposition.²

An alternative charge in respect of two contradictory statements can be framed under this section only when the prosecution is unable to prove which of the two statements is false.³

No charge in the alternative can be made, when one of the statements has been made in circumstances in which the person making it is not bound by law to state the truth, as for example :

(1) when the statement is made in a petition,⁴

2 (1908) 7 Can L Jour 464 (469); 4 Low Bur Rul 199, *Tuet Pe v. Emperor*.

Note 5

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The following decisions were decided prior to the present Code:

(74) 21 *Bath W R* 72 (76, 85, 86) : 13 *Beng L R* 324 (FB), *Queen v. Muhammad Humayoon Shah*,
10 Cranch 125 (1804) 131 (1804).
 (Overruling 5 All 17)
 . *3ff. Zamiran.*

(1994) 2 Mulla 172 N 151 15 (15), Queen v. Narain Dass

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James Hogg
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(109) 14 South W R Cr 23 (23), *Queen v. Kala Khan*.

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(See also ('39) 26 AIR 1939 Sind 170 (171) : I L R (1939) Kar 280 : 40 Cri L Jour 707, *Charandas Kanayalal v Emperor*. (Two conflicting statements by witness—Charge under Section 236 may be framed))

3 (90) 1890 Pan No No 27 Cr, p 00 (93), *Harnam Singh v. Emprress*

(88) 1888 Pun Re No 32 Cr, p 65 (68), *Sohan Singh v. Empress*

(96) 2 Weir 300 (300), *Public Prosecutor v. Muthu Vannan*.

(74) 23 South W R Cr 2 (3), Queen v. Gonowari.

4 (02) 2 Weir 169 (163), *In re Chennamma*.

- (2) when it is made in an examination by a Magistrate for the purpose of obtaining information, not liable to be on oath,⁵
- (3) when it is made to the police under S 161 of the Code, as to which see Note 9 on Section 161,
- (4) when an amn reports to a civil Court executing a decree complaining of obstruction⁶ or
- (5) when it is inadmissible in evidence as being one made under improper influence such as police threat and ill treatment⁷

Where an accused person entered in a sale deed, executed by him, the consideration as Rs 1475 and in a subsequent suit for pre-emption stated in evidence that the consideration was only Rs 900 it was held that the Court could charge accused under S 193 or S 423, Penal Code.⁸

6 Murder and concealment of body to screen offender. — In *Begu v King Emperor*,¹ where the facts relied upon by the prosecution, against the accused, were that a murder had been committed and that the accused made away with the evidence of murder by removing the body for the purpose of screening the offender, it was held by their Lordships of the Privy Council that though the charge against the accused was only under S 302 of the Penal Code, he could be convicted under S 201 of the Penal Code, if the evidence established that offence. Their Lordships observed:

'A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. That is what happened here. The three men who were sentenced to rigorous imprisonment were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case under S 237."

The same view has been held in the undermentioned cases²

5 (1900) 27 Cal 455 (457) 4 Cal W N 249 *Hari Charan Singh v Queen-Empress*.

6 (93) 17 All 436 (437) 1895 All W N 10^o *Queen Empress v Ajudhia Prasad*

7 (1865) 3 South W R Cr 6 (8) *Queen v Nagana Ourut*

8 (03) 1903 Inn L R No 60 p 245 (346) *Sobha Singh v Emperor*

Note 6

1 (25) 12 AIR 1925 P C 130 (131) 6 Lah 226 52 Ind App 191 26 Cri L Jour 1009 (PC)

2 (40) 27 AIR 1940 Pat 289 (289 290) 19 Pat 369 41 Cri L Jour 910 190 IC 457, *Nebti v Emperor*.

(37) 1937 Mad W N 544 (546), *Nagan v Emperor*

(33) 20 AIR 1933 All 178 (179) 54 All 792 34 Cri L Jour 107 *Sohan v Emperor*

(32) 19 AIR 1932 All 71 (72) 33 Cri L Jour 283 *Sawanta v Emperor*.

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Kalamma.

(30) 17 AIR 1930 Oudh 113 (121) 5 Luck 255 31 Cri L Jour 575 *Mata Din v Emperor* (Four persons charged with murder—Two convicted of murder—Other two not found to have taken part in murder—Evidence not sufficiently or definitely proving that they were pre-ent at, and had taken part in the murder—They were convicted under Section 201)

(28) 15 AIR 1928 Lah 906 (908) 10 Lah 213 29 Cri L Jour 746, *Ditta v Emperor*

(23) 10 AIR 1923 Bom 262 (263) 25 Cri L Jour 1349 *Hanmappa Rudrappa v. Emperor*

(10) 11 Cri L Jour 731 (733) 4 Sind L R 174 8 Ind Cas 936 *Emperor v Bawa Manghnidas*.

Ali Hassan. (Alter-
al.)

It has been held in the undermentioned case³ that where the disposal of the dead body is a separate transaction from the actual murder the conviction under both the sections 302 and 201 is legal

7. Murder, culpable homicide not amounting to murder and causing death by negligence.—Where the facts relied upon give rise to an inference of murder or culpable homicide not amounting to murder, a charge may be framed under the section either cumulatively or alternatively¹ for murder and culpable homicide not amounting to murder. In the undermentioned case,² however, it was held that this could not be done. The decision proceeded upon the view that s 236 did not apply to a "doubt" as to facts. In the cases cited below³ it was held that though a charge might under this section be framed *cumulatively*, it cannot be framed *alternatively* in respect of the two offences. It is submitted that the last two views are not correct.

8. Principal offence and the abetment thereof.—The question whether an offence and its abetment could both be charged under the provisions of this section depends, as has been seen in Note 1, on the facts relied upon by the prosecution at the beginning of the trial and on which charges are invited to be framed. A person may be convicted of abetment of an offence, even if he is charged with the substantive offence and *vice versa*, if the facts relied upon could have supported a charge for that offence¹.

3 (42) 29 AIR 1942 Lah 271 (275) 44 Cr L Jour 77 203 Ind Cas 488 (DB), *Ghulam Mohammad v Emperor*. (No separate sentence under Section 201 was, however, imposed.)

Note 7

1 (81) 18 AIR 1931 Bom 809 (311) 55 Bom 520 33 Cr L Jour 62 134 Ind Cas 1219, *Emperor v Abba Isak* (Acquittal on charge of murder is bar to trial on charge of culpable homicide not amounting to murder)

(72 92) 1872 92 Low Bur Ral 300 (301), *Mt N v Queen Empress* (Murder or in the alternative culpable homicide not amounting to murder)

(191 92) 1912 92 Low Bur Ral 300 (301), *Mt N v Queen Empress* (Charge under

(With charge under 41 Cal 621 14

Cr L Jour 660)

2 (87) 1887 Pun Re No 11 Cr, page 19 (21), *Khan Muhammad v Empress* (Sections 302 and 304, Penal Code)

3 (38) 25 AIR 1938 Sind 63 (65) 31 Sind L R 480 89 Cr L Jour 460, *Ghulam v Emperor* (11) 12 Cr L Jour 224 (226) 5 Sind L R 16 10 Ind Cas 168, *Ganesh Krishna v Emperor* (Alternative charges for offences under the Penal Code and special laws e.g., Post Office Act, not permissible)

Note 8

1 (44) 31 AIR 1944 Nag 192 (193, 194) 46 Cr L Jour 80 1 L R (1944) Nag 509 215 Ind Cas 265 (DB), *Provincial Government, C P & Berar v Gomay Badri* (Charge under Section 193, Penal Code—Accused can be convicted of abetment if so found)

(44) 31 AIR 1944 Pat 67 (73) 45 Cr L Jour 624 22 Pat 681 212 Ind Cas 293 (DB), *Satyannarayana v Emperor* (Offence alleged one of abetment but constituting actual offence under S 34, Penal Code—Conviction can be sustained under Penal Code, S 34)

(30) 17 AIR 1930 Nag 145 (148) 30 Cr L Jour 224

(31) 18 AIR 1931 Oudh 274 (276)

(29) 16 AIR 1929 Cal 807 (808) . 5

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or

(191 92) 1912 92 Low Bur Ral 300 (301), *Mt N v Queen Empress* (The decision proceeds on the ground that abetment is a minor offence in relation to the substantive offence and that S 236 applies to such a case)

The view taken in the undermentioned cases² that an offence of abetment and the principal offence cannot come within this section is, it is submitted, not correct

9 Alternative charges. — A charge even in the alternative must conform to the provisions of Ss 233, 231, 232 or S 239 and each of the alternative charges must be a legal charge¹

Alternative charges should be framed as in form given in sch V, No 28, sub head II² When the charges are of distinct offences such as kidnapping and abduction, it is desirable that the accused should be charged separately for kidnapping and abduction³ Omission to split up the charge into two parts does not, however, amount to material error, unless the accused is thereby prejudiced in his defence⁴

See also Note *

10 Sentence — Where an accused is convicted of two offences alternatively, the sentence should be considered from the point of view of the maximum sentence provided for the lesser of the two alternative offences¹ This is so even where a person is charged under two parts of the same section, one carrying a higher and the other a lighter punishment²

11. "Series of acts," meaning of — This section justifies framing of charges cumulatively or alternatively only when there is "a single act or series of acts" It cannot apply when there are more than one separate single acts or separate series of acts each of which constitutes a separate offence although it may be doubtful as to which offence will

(35) 22 AIR 1935 Pesh 67 (68) 36 Cri L Jour 1433, *Suraj Bhan v Emperor* (This power is not conferred by S 239 and is not based on the principle that abetment is a minor offence but is conferred by Ss 236 and 237 and depends in every case upon the facts proved)

(32) 1932 Mad W N 1216 (1217) *Ratna Reddi v Emperor*

2 (12) 13 Cri L Jour 293 (223) 14 Ind Cas 319 (Mad) *In re Krishnan Nair*

(12) 13 Cri L Jour 203 (203) 14 Ind Cas 203 (Mad) *Singaravelu Pillai v Emperor*

(24) 11 AIR 1924 Bom 432 (432) 25 Cri L Jour 1135 *Emperor v Raghya Naghya*

(29) 16 AIR 1929 Nag 325 (378) 30 Cri L Jour 944, *Assandas v Emperor*

(21) 60 Ind Cas 999 (1000) 22 Cri L Jour 311 (Pat), *Darbari Chowdhury v Emperor*

(27) 14 AIR 1927 Cal 63 (64) 28 Cri L Jour 2 *Hulaschand v Emperor* (Section 237 was not referred to but the case proceeded under S 238)

(20) 7 AIR 1920 Cal 834 (834) 22 Cri L Jour 419, *Rajah Khan v Emperor*

(20) 7 AIR 1920 Pat 512 (513) 21 Cri L Jour 41 *Mt Shooratni v Emperor*.

(74) 11 Bom H R C 240 (241 242) *Neg v Chand Nur*

(23) 10 AIR 1923 Cal 453 (455) 50 Cal 41 24 Cri L Jour 763, *Emperor v Profulla*

(10) 11 Cri L Jour 49 (49) 5 Ind Cas 145 33 Mad 264, *Padmanabha Pany v Emperor*

(28) 15 AIR 1928 Lah 382 (390) 30 Cri L Jour 18 *Pritchard v Emperor*

(29) 16 AIR 1929 Nag 325 (378) 30 Cri L Jour 944, *Kisan Das v Emperor*

Note 9

1 (38) ...

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3 (27) . .

4 (30) .

(34) 21 .

frame distinct charges to avoid prejudice to accused)

(33) 20 AIR 1933 Cal 676 (677) 60 Cal 1394 34 Cri L Jour 1919, *Rajabuddin v Emperor*

(34) 21 AIR 1934 Sind 161 (166, 167) 36 Cri L Jour 231, *Allahrahtio v Emperor*

Note 10

1. (17) ...

(20) . . or

(88) . . Emperor

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be constituted in each case¹ It has been held in the undermentioned case² that a statement made in the evidence in a civil suit and a statement made in the evidence in a criminal case cannot be considered to be a "series of acts" within the meaning of the section and that the person making such statement cannot therefore be prosecuted under this section for giving false evidence on the basis of such contradictory statements It is submitted that this view cannot be accepted as correct If, as the decision concedes, a statement before the police and a subsequent statement before the Magistrate could form a "series of acts," it is difficult to see how a statement in a civil Court and a statement in a criminal Court are not a "series of acts"

237.* (1) If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it

(2) [Omitted by the Code of Criminal Procedure (Amendment) Act, 1923, (18 [XVIII] of 1923), section 63]

Illustration

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be) though he was not charged with such offence

Synopsis

- 1 Legislative changes
- 2 Scope of the section
- 2a Illustration
- 3 Conviction for offence requiring complaint by specified persons
- 4 Powers of appellate Court. See S 423 and Notes thereon

NOTE to the Synopsis See the Notes indicated for the following topics

- Abetment and principal offences See S 236 Note 8
- Cognate offences See S 236 Note 1
- Conviction for offences not charged See Note 2
- Different offence — Conviction for See Note 2
- Distinct offences See Note 2

1 Legislative changes

Changes made in the Code of 1898 —

Sub section (2) was newly added

Changes made in 1923 —

Sub section (2) was omitted and inserted as sub s (2A) to S 236 by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1923

* Codes of 1882 and 1872 — Same as that of sub section (1) sub section (2) was newly added in 1898 which ran thus —

(2) When the accused is charged with an offence, he may be convicted of having attempted to commit that offence, although the attempt is not separately charged

Code of 1861 Ss 56 to 59

Note 11

- 1 (44) 31 AIR 1944 Cal 224 (228) 45 Cr L Jour 666 ILR (1944) 1 Cal 398 213 Ind Cas 401 (DB) *Decharam Mukherji v Emperor* (A inducing B to deposit money in three separate banks and to get accounts opened in their joint names—A then—) 13 — banks on various dates—He v d with the three banks and was not justified under the sec. „,

- 2 (24) 11 AIR 1924 Sind 1 (3 4) 16 Sind L R 285 25 Cr L Jour 1195, *Saleh Shah v Emperor*.

2. **Scope of the section** — The general rule is that an accused person cannot be convicted of an offence of which he was not charged and of which consequently he has had no notice. This section and the next are, however, two exceptions to the above rule.¹ This section enables the Court to convict a person of an offence which is disclosed in the evidence and for which he *might have been charged under the provisions of section 236*, although he was *not charged with it*. The reason of the rule is that the facts relied upon by the prosecution at the beginning of the trial, of which he has notice, are sufficient notice of all offences which such facts will constitute.

The section will apply, therefore, only in cases falling within s 236.² For cases in which a conviction has been given under this section without framing a charge therefor, see Note 1 on s 236. In cases where s 236 has no application as for instance, where the offence disclosed in evidence is *distinct from the offence charged*,³ or where there is no *doubt* on the facts which can be proved as to which of several offences the facts will constitute⁴ this section has no application, and a conviction without a charge is not legal. The Court may in such cases frame a new charge under the provisions of Section 227 and proceed further in accordance with the provisions of ss 228 and 229. But where, in such cases, the Court without framing a charge as it ought to have done, convicts the accused, the conviction is not *ipso facto* void on that ground only unless, in the opinion of the Court of appeal or revision, a *failure of justice* has, in fact, been occasioned thereby. See Section 535 Note 3.

The question of prejudice or failure of justice will arise, therefore, only in cases not falling within s 237 inasmuch as in cases falling under it the Court is *entitled* to convict the accused of an offence disclosed in the evidence, although he was not charged with it. The High Court of Calcutta has, however, in the undermentioned cases,⁵ held that, though a conviction may be legal under s 237, it may be set aside under s 535 *if it has prejudiced the accused*. It is submitted that this view is not correct. Section 237 clearly shows that a charge need *not be framed* before a conviction is given and what need not be done in law, cannot prejudice the accused. The High Court of Allahabad also has, in two cases⁶ held that ss 227 and 237 necessarily go together, and that it is not the intention

Section 237— Note 2

- 1 (46) 33 AIR 1946 Bom 38 (41) (FD) *Govt of Bombay v Abdul Wahab*
(44) 31 AIR 1944 All 137 (143) 46 Cri L Jour 38 1 LR (1944) All 403 215 Ind Cas 218 (FD), *Zamir Qasbi v Emperor*
- 2 (45) 32 AIR 1945 All 81 (84) 46 Cri L Jour 750 1 LR (1945) All 558 220 Ind Cas 432 *Makhhan v Emperor*
(45) 32 AIR 1945 Pat 376 (379) *Dijo Gope v Emperor*
(39) 26 AIR 1939 All 665 (667) 40 Cri L Jour 948, *Thakur Singh v Emperor*
(39) 23 AIR 1938 Cal 51 (69) 1 LR (1938) 1 Cal 290 39 Cri L Jour 161, *Goloke v Emperor*
(36) 23 AIR 1936 Cal 796 (799) 62 Cal 956 37 Cri L Jour 701, *Ishtahar v Emperor*
- 3 See Note 1 on s 236
- 4 (45) 32 AIR 1945 All 81 (95) 1 LR (1945) All 559 46 Cri L Jour 750 220 Ind Cas 432 *Makhhan v Emperor*
(36) 23 AIR 1936 Cal 796 (799) 62 Cal 956 37 Cri L Jour 701, *Ishtahar v Emperor*
Also see s 236 Note 1
- 5 (27) 14 AIR 1927 Cal 520 (521) 54 Cal 476 28 Cri L Jour 404 *Dibakar v Saktidhar* (Charge under s 379 Penal Code—Conviction under s 143 Penal Code—That these are distinct offences to which s 237 applies)
- 6 (26) 13 AIR 1926 All 227 (229) 27 Cri L Jour 153 *Raghunath Kandu v Emperor*

¹ s 34 of the Police Act—Conviction in the one case under s 279 and in the other case under s 290 of the Penal Code—In both these cases the facts charged did not amount to an offence under s 34 of the Police Act—There could be no doubt, therefore as to “which of several offences the facts charged would constitute”

² (26) 13 AIR 1926 All 227 (229) 27 Cri L Jour 153 *Raghunath Kandu v Emperor*

of the Legislature, even in cases coming under S 237 to empower a Court to convict a person of an offence of which he has not been told anything. The reasoning of these decisions also is not correct and is against the express wording of the section that a conviction can be given 'although he was not charged with it'. The actual decisions both of the Calcutta High Court and of the Allahabad High Court can be supported, however, on the ground that S 237 did not apply to those cases and that a conviction without a charge in cases not falling within S 237 is governed by S 535 and the question of prejudice thus becomes relevant. In the Calcutta case the offence charged and the offence of which the accused was convicted were *distinct offences* to which ss 236 and 237 could not apply. In the Allahabad cases there could be no doubt on the facts charged as to which of several offences such facts would constitute. See also the undermentioned case⁷.

The Chief Court of Oudh has also held that it is not illegal to convict a person of an offence under S 459, Penal Code, in a case in which he has been charged under S 573, in the light of the wording of this section and S 236 but that the question to be decided in each case is whether the accused has or has not been prejudiced in his trial by the fact that the charge was framed under the wrong section⁸.

Where a Court finds it necessary to make use of the section to convict an accused person of an offence with which he has not been charged, it should be particularly careful to formulate in its own mind the charge upon which, had it been duly framed it would be prepared to convict⁹.

2a Illustration — The illustration to the section only applies to the class of cases referred to in S 236 and does not refer to cases in which there is *no doubt* as to what offence has been committed on the facts relied on by the prosecution but it is merely doubtful which offence will be proved (see Note 1 on S 236). This section is, therefore, no authority for holding that in such cases on a charge of one offence, a person can be convicted of a different offence.¹

3 Conviction for offence requiring complaint by specified persons — Where a person is charged with offence A on facts on which he might have been charged also with offence B under S 236 but the latter offence is one which could not be taken cognizance of by the Court in the absence of a complaint by the aggrieved person, it has been held that he could not be convicted of offence B under this section in the absence of such complaint.²

See also Note 6 on Section 199

4 Powers of appellate Court — See Section 423 and Notes thereon

7 (33) 20 AIR 1933 All 30 (31) 34 Cr L Jour 415 *Qabul v Emperor* (Charge for murder—Convicted on under S 194 Penal Code not illegal as it falls under S 237 but the accused should nevertheless

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F
- v *Shankar Dayal*
15 v *Emperor*

Note 2a

1 (36) 23 AIR 1936 Cal 796 (801) 62 Cal 956 37 Cr L Jour 701 *Ishtahar Khondkar v Emperor* (AIR 1930 Privy Council 130 is criticised in this decision as suggesting the contrary—It is doubtful if this interpretation of the Privy Council case is justified)

Note 3

1 (40) 27 AIR 1940 All 201 (201) 41 Cr L Jour 499 *Haridar Ali v Emperor* (Prosecution under Ss 366 and 376 Penal Code—Conviction for offence under S 493 Penal Code not legal in absence of

—Accused charged with theft cannot be convicted under S 199, I P C, is contemplated
(26) 13 AIR 1926 Rang 169 (171) 4 Rang 131 27 Cr L Jour 1075 *U Nyan Nanda v Emperor*.
(Prosecution for offence under S 121A directed — Facts disclosing another offence under Chapter VI of the Penal Code requiring complaint or order under S 196—Convicted on under the latter not valid)

238. (1) When a person is charged with an offence consisting of

When offence several particulars, a combination of some only of which
proved included in constitutes a complete minor offence, and such combination
offence charged is proved, but the remaining particulars are not proved, he
may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

*(2A) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged |

(3) Nothing in this section shall be deemed to authorize a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section

Illustrations

(a) A is charged, under S 407 of the Indian Penal Code with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under S 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under S 406

(b) A is charged under S 325 of the Indian Penal Code with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under S 335 of that Code

a Sub-section (2A) was inserted by the Code of Criminal Procedure (Amendment) Act 1923 (IS [XIII] of 1923), S 64. See Note 1 on S 237

Synopsis

1 Scope and principle of the section

2 'Minor offence'

3 Attempt — Sub section (2A)

4 When minor offence requires complaint—
Sub section (3)

5 Powers of appellate Courts and High Court

NOTE to the Synopsis See the Notes indicated for the following topics

Converse of the section i.e. conviction for major offence not charged. See Note 1

Evidence insufficient for major offence. See Note 1

Grievous hurt and rioting. See Note 2

Major and minor offences — Examples of offences not coming under the category. See Note 2

Trial with assessors. See Note 1

Trial with jury. See Note 1

1 Scope and principle of the section — The section contemplates a conviction of a minor offence included in the offence charged in either of two cases. The first is where the offence charged consists of several particulars a combination of some only of which constitutes a complete minor offence and such combination is proved but the remaining particulars are not proved¹. The second is where facts are proved which reduce the offence

* Code of 1852 — Section same as that of 1893 Code

Code of 1872 S 457

457 When a person is charged with an offence and part of the charge is not proved but the
When offence proved part which is proved amounts to a different offence he may be convicted of
included 'offence' the offence which he is proved to have committed though he was not charged
charged with it

Illustrations

(a) Same as illustration (a) above

(b) A is charged with murder. He may be convicted of culpable homicide or of causing death by negligence

Code of 1861 — Nil

Section 238 — Note 1

1 (38) 25 AIR 1939 Rang 281 (289) 1938 Rang L R 139 39 Cri L Jour 761 *Maung Eay The King* (Charge under S 353 Penal Code of assaulting public servant. Magistrate finding that person assaulted was not public servant—He can be convicted under S 350 Penal Code. Dissenting from 6 Cal W N 992)

charged to a minor offence² Illustration (a) to the section is an example of the first class of cases and illustration (b), of the second³

In *In re Arumugham*⁴ the accused had inflicted a wound with a stabbing instrument in the abdomen of another person and the wound caused the death of such person. The question was whether the accused intended to kill the deceased, in which case the offence would be murder while otherwise the offence would be causing grievous hurt with a dangerous weapon. Discussing the applicability of this section to the case, the learned Judge observed as follows

"I think it is manifest that s 238 (1) cannot apply. The language of that sub-section is quite inappropriate to a case of this kind where the only difference between the offence of murder and the offence of causing grievous hurt is one of the degree of intention."

But the learned Judge held that the case would be covered by ss 236 and 237. The learned Judge apparently considered that the term "particulars" in sub s (1) is inappropriate to describe degree of intention. But there does not appear to be any difficulty in regarding a higher degree of guilt in the criminal's intention as containing an extra factor not contained in the lesser offence. The cases noted below⁵ are instances where murder and grievous hurt are regarded as major and minor offences so as to treat a charge for murder as including a charge for grievous hurt. At the same time such cases may also be conceived of as covered by ss 236 and 237.

The principle on which the section proceeds is that where an offence consists of several particulars, a combination of some only of which constitutes a complete minor offence the graver charge gives notice to the accused of all the circumstances going to constitute the minor offence of which he may be convicted. The latter is arrived at by mere subtraction from the former. But when the circumstances constituting the major charge do not necessarily and according to the definition of the offence imputed by that charge, constitute the minor offence also, the principle no longer applies, because notice of the former does not necessarily involve notice of all that constitutes the latter⁶.

The section is an exception to the rule that a person cannot be convicted of an offence with which he is not charged⁷. Therefore, though under this section an accused person can be convicted of an offence different from that he was accused of, it should be

2 (45) 32 AIR 1945 Bom 110 (111), *Emperor v Abdul Wahab*
(93) 7 C P L R Cr 17 (18) *Empress v Sheodajal* (Trial on charge of murder—Conviction under S 330 Penal Code, without framing charge thereon is incorrect.)

3. (93) 7 C P L R Cr 17 (18) *Empress v Sheodajal*

4 (191) 20 AIR 1914 M-1 747 (748) 15 Cr L J 519 310 12 27

be accepted)

504 (DB), *Janak Singh*
326/149, or 324/149 can

6 (74) 11 Bom HCR 240 (241), *Reg v. Chand Nur* (Charge for murder—Conviction for abetment of it is bad unless the accused is charged specifically with it)

(93) 7 C P L R Cr 17 (18), *Empress v Sheodajal* (Charge under S 302 Penal Code—Conviction under

(21) 11 AIR 1924 Bom 502 (504, 507) 49 Bom 84 26 Cr L Jour 1000, *Emperor v Ranchhod Surasing* (Conviction of accused under S 307 read with S 54 or S 114 is illegal though they were charged only with offences under Ss 304, 148 and 149, Penal Code)

(24) 11 AIR 1924 Bom 432 (432) 25 Cr L Jour 1135, *Emperor v Raghya Naqhya* (Charge under

Emperor v Emperor

(FB), *Zamir*

(25) 12 AIR 1925 Cal 903 (904) 26 Cr L Jour 891, *Nayan Ullah v Emperor*

done only in cases where the accused is not prejudiced in any way by the conviction on the new charge.⁶ Thus where the accused is charged under S 457 Penal Code for criminal trespass with intent to commit theft and where he denies the trespass he cannot be convicted of criminal trespass with intent to commit adultery under S 456 Penal Code because upon the case for prosecution and on the line of defence adopted by the accused the latter cannot be said to have any knowledge of the charge of which he is convicted and would therefore, be prejudiced in his defence.⁷ But where in such a case the accused himself admits trespass but states that it was with the intention of committing adultery and not theft he cannot be held to be in any way prejudiced inasmuch as in order to sustain a conviction under S 456 it is not necessary to specify any criminal intention. It is sufficient if a guilty intention is proved such as is contemplated in S 441 of the Penal Code.¹⁰

Though the section enables a Court to convict a person of a minor offence when charged with a major offence there is no provision of law which allows the converse case, i.e. the conviction for a major offence on a charge of a minor one.¹¹

The powers given by this section are not controlled by the sections of the Code which prescribe the procedure to be followed in trying the offence charged and have nothing to do with the form of the trial nor with the convicting authority.¹² Thus the section empowers a jury empanelled to try an offence triable by a jury to find as an incident that the facts proved amount to a minor offence and return a verdict of guilty or not guilty of such offence¹³ though such offence may not be triable by jury but is triable only with assessors.¹⁴

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be retried)

(13) 14 Cri L Jour 212 (213) 19 Ind Cas 308 (Cal) *Sital Chandra v Emperor* (Charge under S 324, Penal Code — Conviction under S 302—Accused held prejudiced in the circumstances of the case and conviction set aside and retrial ordered)

[See (40) 27 AIR 1940 Lah 112 (113) 41 Cri L Jour 540 *Dhanpat Rai v Emperor*

(36) 23 AIR 1936 Pesh 172 (175) 37 Cri L Jour 1039 *Bawar Shah v Emperor* (Charge of murder and offence under S 396 — Conviction under S 301 (2) and S 379 is not illegal — Accused held not prejudiced in the defence)]

9 (22) 9 AIR 1922 Pat 5 (7) 23 Cri L Jour 114 *Balkesar Singh v Emperor*

(14) 1 AIR 1914 Cal 663 (663) 41 Cal 743 15 Cri L Jour 190 *Mahomed Hossein v Emperor*

10 (17) 4 AIR 1917 Cal 824 (825) 41 Cal 358 17 Cri L Jour 424 *Karab Prasad v Emperor*

Also see S 223 Note 5

11 (99) 1 Bom L R 513 (514) *Queen-Empress v Durgya* (Under S 398 Penal Code on a charge under S 325 Penal Code)

(11) 13 Cri L Jour 429 (430) 1911 Upp Bur Rul 98 14 Ind Cas 973 *Nga Kaung Nyein v Emperor* (Under S 458 on a charge under S 392)

(21) 8 AIR 1921 Low Bur 36 (37) 11 Low Bur Rul 45 *Nga Po Kyn v Emperor* (Under S 468 on a charge under S 465)

(1900-02) 1 Low Bur Rul 287 (289) *Crown v Chit Te*

12 (21) 8 AIR 1921 Bom 59 (60 61) 45 Bom 619 22 Cri L Jour 51 *Changouda v Emperor*

Also see S 223

robbery with grievous hurt—Jury can find accused guilty under S 393 only though no charge is framed under this section or under S 325)

(1865) 3 Suth W R Cr 41 (41) *Queen v Satoo Sheikh*

Also see S 299 Note 5

14 (37) 24 AIR 1937 Pat 682 (684) 39 Cri L Jour 156 *Emperor v Haria Dhoi*

(02) 26 Mad 243 (246 247 248 249) 2 Weir 463 *Pattikadan Ummaru v Emperor* (Verdict under S 325 Penal Code on a charge under Ss 392 397)

(95) 20 Bom 215 (217 218) *Queen-Empress v Deepa Corindaji* (Verdict under S 304 on a charge under S 302)

In the same way, it empowers a Court trying an accused person for an offence with the aid of assessors to convict him for a minor offence triable by jury, care should, however, be taken to frame a charge for the minor offence, where the facts indicate a reasonable possibility of the minor offence being made out, so that from the beginning the trial may proceed according to the provisions of the Code and the parties concerned may have an opportunity to object to the trial if so advised.¹⁵ But the section has no application to cases where there is no conviction by the jury of the minor offence. Thus, where on a charge under s 304, Penal Code, the jury returned a verdict of not guilty, but returned a verdict of "guilty but not voluntarily" under s 326, the verdict amounts to only a verdict of "not guilty" under s 326 and this section has no application to such a case.¹⁶

2 "Minor offence." — The words "minor offence" are not defined anywhere in the Code and ought to be taken in their ordinary sense and not in any technical sense.¹ In the undermentioned case² a single Judge of the Bombay High Court observed as follows:

"I do not think the argument relied upon is sound. It seems to me to proceed on the unwarranted assumption that the test by which an offence is deemed in s 238 (1) to be major or minor is the gravity of the punishment incurred. The sub section does not refer to the gravity of punishment at all it merely refers to the number of particulars constituting the offence. If a number of particulars is needed to constitute the offence, then for the purposes of s 238 (1), it may be called the major offence if a combination of some only of such particulars constitutes a complete offence then that offence is referred to in s 238 (1) as the minor offence. I do not overlook that s 238, sub section (2) speaks of the proof of additional facts reducing an offence to a minor offence, and this does not accord with the view that the minor offence must always consist of fewer particulars than the major offence. But this is only a new form that the situation takes."

It is submitted that the view propounded would make the word "minor" in sub s (1) superfluous, and is not correct. Further, it is not clear what is meant by the last sentence in the above passage. The gravity of the offence must no doubt depend upon the severity of the punishment that can be inflicted but the major and minor offences must be cognate offences which have the main ingredients in common.³ Consequently, a man charged with one offence which is entirely of a different type from the offence which he is proved to have

(01) 25 Bom 680 (689, 693, 694) 3 Bom L R 278 (FB), *King Emperor v Parbhu Shankar* (Verdict under s 326 on a charge under ss 302 and 304)

13 Cr L Jour 739 *In re Adabala Muthayalu* (Verdict

Jour 557, *Narayan Singh v Emperor* (Verdict under

v Emperor (Verdict under

W Bur Rul 274 *S P Gosh v*

Emperor (Verdict under s 326 on a charge under s 392)
Also see s 269 Note 3

15 (21) 8 AIR 1921 Bom 59 (60, 61) 45 Bom 619 22 Cr L Jour 51, *Changouda v Emperor*.
(Conviction under s 326 on a charge under s 302)

16. (08) 7 Cr L Jour 362 (366, 367) 12 Cal W N 530, *Emperor v. Khudiram Das*

Note 2

(45) 32 AIR 1913 Pat 276 (380), *Bijoy Gope v Emperor*.

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committed cannot in the absence of a proper charge be convicted of that offence merely on the ground that the facts proved constitute a minor offence. Thus, for example, a man charged with an offence of murder cannot be convicted for forgery or misappropriation of funds or such offences as do not constitute offences against person.* See the undermentioned cases for illustrations of major and minor offences. As to what are not major and minor

4 (45) 32 AIR 1945 All 81 (85) 1 LAR (1945) All 508 46 Cr L Jour 730 . 220 Ind Cas 432, *Mahkhan v Emperor*

5 In the following cases the first is a minor offence, the second offence charged being the major one

(46) 33 AIR 1946 Bom 35 (42) (1B) *Bombay Government v Abdul Wahab* (Grievous hurt and murder)

(47) 32 AIR 1945 Bom 110 (112) *Emperor v. Abdul Wahab* (Section 304, 324 or S 326, Penal Code—S 302, Penal Code)

v Emperor (Grievous hurt and murder)

(40) 27 AIR 1940 Cal 321 (321) 41 Cr L Jour 744, *Raja Mea v. Emperor* (Sections 323 and 332, Penal Code)

(36) 23 AIR 1936 Bom 193 (197) 60 Bom 485 37 Cr L Jour 703, *Emperor v. Abdul Rahman* (On a charge of cheating, in pursuance of a conspiracy the accused may be found guilty of cheating without a conspiracy — Latter is a minor offence)

(32) 19 AIR 1932 Mad 501 (501) 33 Cr L Jour 593 *Kuppusamy Mudali v Emperor* (Section 143, Penal Code—S 147, Penal Code)

(50) 5 Cal 164 (187) *Bholteram v Heera Kolita* (Section 182, Penal Code—S 211, Penal Code)

(14) 1 AIR 1914 Sind 66 (66, 67) 8 Sind L R 179 16 Cr L Jour 104, *Emperor v Khubomai*. (Do)

(05) 32 Cal 160 (184) 2 Cr L Jour 171, *Emperor v Sarda Prosad* (Do)

(24) 11 AIR 1924 Bom 502 (504 507) 49 Bom 84 26 Cr L Jour 1000, *Emperor v Ranoohod Sursang* (Section 307 read with S 34 or S 114 Penal Code—S 307, Penal Code)

(22) 9 AIR 1922 All 114 (114), *Hanuman v Emperor* (Section 323, Penal Code—S 147, Penal Code)

(23) 10 AIR 1923 Lah 326 (327) 26 Cr L Jour 593, *Indar Singh v Emperor* (Section 323, Penal Code—S 148, Penal Code)

(31) 18 AIR 1931 Lah 566 (568) 33 Cr L Jour 315, *Jogundar Singh v Emperor* (Section 323, Penal Code—S 302 and 149, Penal Code)

(07) 5 Cr L Jour 424 (426) 34 Cal 325, *Dasarath Mandal v Emperor* (Section 323, Penal Code—S 304 or S 323)

(12) 13 Cr L Jour 481 (482) 39 Cal 896 15 Ind Cas 481, *Kunja Bhuniya v Emperor*. (Section 323, Penal Code—S 325, Penal Code)

(28) 15 AIR 1928 Mad 275 (275) . 29 Cr L Jour 351, *Arunnaga Kone v. Emperor* (Section 321, Penal Code—S 434, 392, 397, Penal Code)

(31) 19 AIR 1931 Mad 501 (501) 33 Cr L Jour 593, *Kuppusamy Mudali v Emperor*. (Section

(Section 323, Penal

Code—S 307, Penal Code)

(26) 13 AIR 1926 Cal 895 (896) 27 Cr L Jour 926, *Emperor v G C Wilson* (Section 334 Penal Code—Section 304, Penal Code)

(11) 11 AIR 1921 Mad 275 (275) . 29 Cr L Jour 351, *Arunnaga Kone v. Emperor*. (Section

Code—Section 304, 325 and

ap Ali v Emperor. (Section

(Section 332, Penal Code—

Pillai v Emperor. (Do)

(Section 365, Penal Code—

al Code—S 395, Penal Code)

(1664) 1 Buth WR Cr L 13 (13) (Sections 143 and 148, Penal Code—Section 302, Penal Code)

(95) 1895 Rat 797 (797) *Queen Empress v Bhajya* (Section 392, Penal Code—S 393, Penal Code)

offences, see the cases cited below.⁶ See also Note 1.

- (29) 16 AIR 1929 Sind 147 (148) : 30 Cr L Jour 875, *Haroon v. Emperor*. (Section 403, Penal Code—Section 395, Penal Code)
- (99) 21 All 127 (128) : 1898 All W N 305, *Queen-Empress v. Mathura Prasad*. (Section 403, Penal Code—Section 409, Penal Code)
- (26) 13 AIR 1926 Bom 134 (135) 27 Cr L Jour 650, *Emperor v. Gulabchand Dosoji*. (Section 411, Penal Code—Section 412, Penal Code)
- (67) 7 Suth W R Cr 73 (74), *Queen v. Jogeshur Bagdee*. (Do)
- (28) 15 AIR 1928 All 139 (140) : 29 Cr L Jour 232, *Har Prasad v. King-Emperor*. (Section 411, Penal Code—Section 413, Penal Code)
- (86) 1886 Rat 293 (294), *Queen-Empress v. Balu*. (Section 414, Penal Code—Section 457, Penal Code)
- (23) 12 AIR 1925 Pat 389 (389) : 26 Cr L Jour 682, *Banamali Kumar v. Emperor*. (S 426, Penal Code—S 430, Penal Code)
- (87) 1887 Pun Re No 9 Cr, p. 14 (16), *Alla Bahksh v. Empress* (Section 447, Penal Code—S 457, Penal Code)
- (13) 14 Cr L Jour 424 (425) : 20 Ind Cas 408 (All), *Rup Deb v. Emperor*. (Section 447, Penal Code—S 32 of the Forest Act)
- (17) 4 AIR 1917 Cal 824 (826) : 17 Cr L Jour 424 (426) : 44 Cal 358, *Karali Prasad v. Emperor*. (Section 456, Penal Code—S 457, Penal Code)
- (21) 6 AIR 1921 Pat 217 (218), *Jadab Mahton v. Emperor*. (Do)
- (28) 15 AIR 1928 Oudh 402 (403), 3 Luck 690, 29 Cr L Jour 893, *Emperor v. Shista Datta*. (Section 220, Penal Code—S 278, Penal Code)
- (25) 12 AIR 1925 Oudh 69 (89) 25 Cr L Jour 1087, *Munnay Mirza v. Emperor*. (Section 426, Penal Code—S 452, Penal Code)
- (35) 22 AIR 1935 Pat 129 (130) 36 Cr L Jour 829, *Nihora Kahar v. Emperor*. (Section 441, Penal Code—S 454, Penal Code)
- 12) 13 Cr L Jour 750 (751) : 17 Ind Cas 62 6 Sind L R 116, *Emperor v. Chagan Rajaram*. (S 820 (8), Penal Code—S 304, Penal Code)
6. (45) 82 AIR 1945 All 61 (85) : I L R (1945) All 558 220 Ind Cas 432, *Mahkhan v. Emperor*. (Charge under S 395—Conviction for offence under S 456 or S 323 is not proper as ingredients of the offences are not same)
- (45) 82 AIR 1945 Pat 876 (379, 380), *Byjo Gope v. Emperor*. (Offence under S 147 or S 149 is not minor to an offence of dacoity under S 395 as the particulars necessary for proving these charges are different)
- (39) 26 AIR 1939 All 665 (667) : 40 Cr L Jour 948, *Thakur Singh v. Emperor*. (Section 300, Penal Code—S 385, Penal Code)
- (88) 25 AIR 1938 Cal 51 (69) : I L R (1938) 1 Cal 290 : 39 Cr L Jour 161, *Goloke Behari v. Emperor*. (1) Conspiracy with two different objects alleged—It is not certain that a conspiracy with only one of these objects is a minor offence—(2) Where an offence is alleged to constitute the object of a conspiracy as charged, a conspiracy to commit a minor offence need not be a minor offence (3) An offence alleged to constitute the object of a conspiracy is not necessarily a minor offence to the offence of conspiracy)
- (24) 11 AIR 1924 Mad 375 (376) 47 Mad 61 25 Cr L Jour 554, *In re Sreeramulu*. (Section 160, Penal Code—Ss 147 and 323, Penal Code)
- (12) 13 Cr L Jour 18 (18) : 5 Sind L R 123 13 Ind Cas 206, *Imperator v. Rina*. (Section 202, Penal Code—S 201, Penal Code)
- ror. (Section 302, Penal Code)
- (Sections 301 and 149.
- (29) 1929 Mad W N 185 (185), *In re Ponniah Rowther* (Section 323, Penal Code—S 397, Penal Code)
- (94) 7 C P L R Cr 17 (19), *Empress v. Sheodhaya* (Section 330, Penal Code—S 302, Penal Code)
- (26) 13 AIR 1926 Cal 895 (896) 27 Cr L Jour 926, *Emperor v. G. C. Wilson*. (Section 334, Penal Code—S 352, Penal Code)
- (94) 2 Weir 302 (302), *In re Satara Ayce* (Section 363, Penal Code—S 302, Penal Code)
- (06) 3 Cr L Jour 240 (242) : 8 Bom L R 120, *Emperor v. Sakharani*. (S 366, Penal Code—S 376, Penal Code)
- (30) 17 AIR 1930 Lah 544 (544) : 52 Cr L Jour 301, *Mangloo v. Emperor*. (S 369, Penal Code—S 392, Penal Code)
- a (Ss 360, 456 Penal Code—S 395, Penal Code)
- Amanullah v. Emperor*. (S. 384, Penal Code—S 385, Wallu v. Emperor. (Section 397,
- (1900) 13 C P L R Cr 167 (168), *Empress v. Dongria Gaoi*. (S 404, Penal Code—S 302, Penal Code)
- (20) 13 AIR 1926 Lah 691 (691) : 7 Lah 561 : 27 Cr L Jour 1004, *Ghanus v. Emperor*. (Section 412, Penal Code—S 302, Penal Code)

Abetment — Abetment is not a minor offence having regard to the manner in which sub-s. (2A) expressly makes mention of an attempt to commit an offence and is silent as to abetment of an offence. It, therefore, cannot come under this section.⁷ See also S 236 Note 8

Rioting and unlawful assembly — A charge of rioting under S 147 or of being a member of an unlawful assembly under S 149, does not by itself or by being charged together with a charge of hurt, include as a minor offence an act of violence by an individual accused so as to authorise under this section a conviction under S 323⁹ or S 325⁹ or S 376¹⁰ or for assault under S 352¹¹ or for criminal trespass.¹² The High Court of Madras has however held that a conviction on the substantive charge only, on a charge coupled with S 149 Penal Code, is not necessarily bad, the legality of the conviction depending on

(26) 13 AIR 1926 Lah 132 (134) 26 Cri L Jour 1361, *Achpal v Emperor* (Section 412, Penal Code — S 396 Penal Code)

(30) 17 AIR 1930 Rang 158 (159) 8 Rang 13 31 Cri L Jour 799, *U Ka Doe v Emperor* (Section 427, Penal Code—S 409 Penal Code)

(31) 18 AIR 1931 Cal 414 (414) 59 Cal 8 32 Cri L Jour 892 *Mchar Sheikh v Emperor* (Sections 448 323 Penal Code — S 395 Penal Code)

(22) 9 AIR 1922 Bom 97 (98) 46 Bom 657 23 Cri L Jour 259 *Matubhai M Shah v Emperor* (Section 96 Bombay District Municipal Act — S 97 read with S 155 of the same Act)

(34) 21 AIR 1934 All 872 (872 873) 36 Cri L Jour 766 *Dipchand v Emperor* (Section 353 Penal Code—S 323 Penal Code—Opinion tentatively expressed)

7 (35) 22 AIR 1935 Pesh 67 (68) 36 Cri L Jour 1438 *Suraj Bhan v Emperor* (The power of an Appellate Court to change a conviction of a substantive offence into a conviction of an abetment is not conveyed by S 238 and is not based on the principle that an abetment is a minor offence forming part of the major or substantive offence but is conveyed by Ss 236 and 237 and depends in every case upon the facts proved)

(27) 14 AIR 1927 Cal 63 (64) 28 Cri L Jour 2 *Hulas Chand v Emperor*

(27) 14 AIR 1927 All 33 (36) 49 All 120 27 Cri L Jour 1118 *Mahabir v Emperor*

(24) 11 AIR 1924 Bom 432 (432) 25 Cri L Jour 1135 *Emperor v Raghya Nagya*

Also see S 423 Note 31

the principal offence)

(35) 22 AIR 1935 All 935 (937) 37 Cri L Jour 247 *Samuel John v Emperor* (Charge of rape — Conviction of offence of abetment of rape is legal — Case falls within S 238 (2) — No charge of abetment necessary)

8 (36) 19 Nag L Jour 18 (21) *Gangabishan v Emperor* (Where the charge framed against the accused is one under S 147, he cannot be convicted under S 323 without a specific charge in that behalf)

(07) 5 Cri L Jour 424 (426) 34 Cal 325 *Dasrath Mandal v Emperor*

(18) 5 AIR 1918 Mad 496 (496 497) 18 Cri L Jour 860 *In re Mongalu Dorodhono* (Napier J, contra)

noting does not of itself connote the causing of hurt, where the charge is for rioting there can be no conviction for causing hurt. But what has to be really seen in such cases is the manner in which the charge is framed and whether the accused were aware of the accusation which they had to meet. Where a charge, though it mentioned only S 147, Penal Code also set out that in pursuance of the common object the accused beat the victim the accused could be convicted under S 323 when a conviction under S 147 was not possible owing to absence of proof against the necessary number of accused.)

9 (07) 5 Cri L Jour 427 (432) 34 Cal 698 11 Cal W N 666 *Jatindra v Emperor*

whether the accused has or has not been materially prejudiced by the form of the charge¹³ The Nagpur Judicial Commissioner's Court has also held that a person can be convicted of the offence of causing hurt although the charge is formulated as for the commission of an offence punishable under s 307, Penal Code, read with s 149¹⁴ The Lahore High Court was also inclined to a similar view in the case cited below¹⁵

3. Attempt — Sub-section (2A) — Under Act 18 (XVIII) of 1923, sub s (2) of s 237 has been transferred to this section and is enacted as sub s (2A), as more appropriate here than under s 237

Under this subsection, when a person is charged with an offence, he may be convicted of an attempt to commit such offence although he is not separately charged with the attempt¹

But the subsection does not permit a conviction for an attempt to commit a different offence with which the accused was never charged Thus, an accused charged under s 302, Penal Code, for murdering A cannot be convicted for attempting to murder B²

4. When minor offence requires complaint — Sub-section (3). — This section must be read subject to ss 198 and 199 which require the complaint of the aggrieved person before the Court can take cognizance of offences referred to therein

A person charged with one offence cannot, therefore, be convicted of a minor offence if the latter requires a complaint by a particular person mentioned in ss 198 and 199 of the Code, when there is no such complaint Thus, a prosecution for adultery under s 497 or for enticing away a married woman under s 498 requires a complaint by the husband and, therefore, a person charged with rape or abduction cannot be convicted either under s 497³ or under s 498⁴ in the absence of a complaint by the husband Similarly, no conviction

13. ('25) 12 AIR 1925 Mad 1 (6) 47 Mad 746 25 Cri L Jour 1297 (FB), *In re Theesthimala Gounder* (Sections 149 and 326—Conviction under s 328)

(22) 9 AIR 1922 Mad 110 (111) 23 Cri L Jour 206, *Muthulananaku Pillai v. Emperor* (Section 147—Conviction under s 352)

14. ('36) 19 Nag L Jour 18 (21), *Gangabishan v. Emperor* (The fact that the charge was framed under s 307 read with s 149 will not preclude the Court from convicting the accused of the offence punishable under s 307 or any other minor offence constituted by the same facts)

15. ('25) 12 AIR 1925 Lah 286 (286) 26 Cri L Jour 820, *Rohela v. Emperor* (13 Cri L Jour 502 and 6 Cri L Jour 427, doubted—Actual decision proceeding on evidence)

Note 3

1. ('12) 29 AIR 1912 All 337 (337) 43 Cri L Jour 858 11R (1912) All 899 202 Ind Cas 569, *Chhedri v. Emperor* (Charge under s 420, Penal Code—Conviction for attempt to cheat under s 511, Penal Code)

(36) 23 AIR 1936 Oudh 44 (47) 37 Cri L Jour 12 *Shro Narain Singh v. Emperor*

(75) 12 Bom H C R 1 (7) *Reg v. Ramajirav Jeebajirav*

(90) 26 Cal 222 (1907) 3 Cal W N 572 *Kala Chandra v. Emperor*

Note 4

(07) 5 Cri L Jour 161 (167) 31 Bom 219 9 Bom L R 143, *Emperor v. Isap Mohammed*

(04) 27 Mal 61 (62) 2 Weir 236, *Dangaru Asari v. Emperor*

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can be made under s 493 when the complaint was specifically made under s 497 only.³ So also no conviction can be made under s 500 for defamation in the absence of a complaint by the person aggrieved, where the complaint was under ss 353 and 501⁴ or under s 501, Penal Code.⁵ It has been held in the undermentioned case⁶ that the Court cannot convict an accused person of a minor offence for the taking cognizance of which a complaint under S. 195 is necessary, without such complaint. See also Note 6 on s 190, Note 6 on s 196A, Note 6 on s 198 and Note 6 on s 199.

5. Powers of appellate Courts and High Court.—An appellate Court may exercise the powers under this section and may alter a conviction for a major offence into one for a minor offence.¹ It is competent for the High Court, even in a reference under s 307 of the Code, to convict the accused of any offence of which the jury could have convicted him.² See also Note 31 on S 423 and Note 16 on S 307.

[239. The following persons may be charged
be charged jointly and tried together, namely :—

(a) persons accused of the same offence committed in the course of the same transaction :

* Code of 1893, original S. 239.

239 When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing an offence, and another of abetment of, or attempt to commit such offence, they may be charged jointly.

(12) 23 Cr L Jour 297 (288) : 14 Ind Cas 671 (Dom), *Emperor v. Inayat Khan*

(02) 80 Cal 910 (915). 8 Cal W N 17 (FD), *Tara Prasad Laha v Emperor* (In view of this decision, 20 Cal 483, wherein the deposition of the husband was held to be a complaint, cannot be taken as laying down good law.)

3. ("73) 1873 Pun Re No 18 Cr, p 20 (21), *Sher Singh v Crown*

4 (87) 10 All 39 (42, 43) : 1887 All W N 264, *Queen-Empress v Deokinandan*

5. ('89) 1889 Pun Re No 18 Cr, p 67 (69), *Emperor v Uma Shanker*.

(23) 10 AIR 1923 Oudh 4 (6) : 26 Oudh Cas 44 : 23 Cri L Jour 641, *Gaya Barhai v Emperor*

6. ('25) 12 ATR 1925 All 129 (130) - 47 All 114 : 20 Cr L Jour 446, *Narain Singh v Emperor*

Note 5

1. ('44) 81 AIR 1044 All 137 (143, 156) • ILR (1944) All 304 • 46 Cr L Jour 38 • 215 Ind C 213 (FD), *Zamir Qasim v. Emperor* (Per Mulla J—Power to 'alter finding' under S 423 (1) (b) (2) can only be exercised within limits prescribed by Ss 236, 237 and 238—Iqbal Ahmad C J *contra*)

(39) 26 AIR 1939 All 710 (712) : 41 Cri L Jour 111, *Nand Kishore v Emperor* (The powers conferred upon the appellate Court by S 423 are limited by the provisions of Ss 236, 237 and 238)

(38) 25 AIR 1978 Rang 281 (282) : 1938 Rang LR 139 : 39 Cri L Jour 761, *Mauing Ba v. The King* (Conviction under S 353, Penal Code, for assaulting public servant — Appellate Court finding that person assaulted was not public servant — Conviction can be altered to one under S 353, Penal Code)

(36) 23 AIR 1936 Oudh 44 (47) : 37 Cr L Jour. 12, *Sheo Narain Singh v Emperor* (Do)

(22) 9 AIR 1922 All 143 (143) • 23 Cr L Jour 198, *Hanuman v. Emperor*. (From conviction under S 147, Penal Code, to one under S 373, Penal Code)

Bandhu v Emperor (Conviction under S. 302,

-33 v. Hughes (Conviction under S 366, Penal

violation under S 457, Penal Code, altered into

(24) 14 Aik 1921 Oudh 296 (196). 2 Luck 503-28 Cr L Jour 673, *Jawad Hussain v Emperor*.
(Conviction under S 351, Penal Code, to one under S 169, Penal Code)

2. (77) 3 Cal 189 (192), *Empress v. Haras Mardha* (Conviction under S 143 on charge under Ss 326 and 149, Penal Code)

udakrishna. (Conviction under S 379,

Conviction under S 365.7 on

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- (b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;
- (c) persons accused of more than one offence of the same kind, within the meaning of section 234 committed by them jointly within the period of twelve months,
- (d) persons accused of different offences committed in the course of the same transaction;
- (e) persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence,
- (f) persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence, and
- (g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence,

and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges]

a This section was substituted for original S 239, by the Code of Criminal Procedure (Amendment) Act 18 [XVII] of 1923

Synopsis

- | | |
|--|---|
| 1 Scope and applicability of the section | 11 Delation by different persons |
| 2 Whether Ss 234 235, 236 and 239 are mutually exclusive | 12 Continuing offence |
| 2a Clauses of S 239, if mutually exclusive | 13 Kidnapping and abduction |
| 3 "May be tried together" | 14 Keeping gaming house and using it |
| 4 'Accused of the same offence'—Clause (a) | 15 Charge need not refer to transaction being same |
| 5 Abetment and attempt—Clause (b) | 16 Clause (c) |
| 5a Offences of the same kind—Clause (c) | 17 Clause (f) |
| 6 "Same transaction"—Clauses (a) and (d) | 18 Clause (g) |
| 7 Acts done in pursuance of conspiracy | 19 Simultaneous trials |
| 8 Acts in prosecution of a common object | 20 Criminal breach of trust and receiving stolen property |
| 9 Several persons giving false evidence in the same case | 21 Effect of illegal trial See Note 10 on S 537 and Note 5 on S 233 |
| 10 Printing and publishing seditious matter | 22 Objection as to joinder |

may be charged and tried together or separately, as the Court thinks fit and the provisions contained in the former part of this Chapter shall apply to all such charges

Illustrations

- (a) A and B are accused of the same murder A and B may be charged and tried together for the murder
 - (b) A and B are accused of a robbery in the course of which A commits a murder with which B has nothing to do A and B may be tried together on a charge, charging both of them with the robbery and A alone with the murder
 - (c) A and B are both charged with a theft and B is charged with two other thefts committed by him in the course of the same transaction A and B may be both tried together on a charge charging both with the one theft, and B alone with the two other thefts
- Codes of 1882 and 1872 — S 239 and S 458 respectively, were same as that of 1898 Code
Code of 1861 — N₁

NOTE to the Synopsis See the Notes indicated for the following topics:

Accused need not act together from start to finish See Note 6
 Bribery See Note 8
 Contempts of Court, by different persons See Note 6
 Duresses See Notes 3 and 6
 Different accused tried for different offences in same transaction See Notes 6 and 7
 Different objects See Notes 7 and 8
 Distinct and separate offences See Note 6
 False information See Note 6
 Forgery See Notes 5 and 6
 Forgery and perjury See Note 9

Kidnapping with other offences See Note 6
 Legislative amendments See Notes 16 and 17.
 Local and special Acts See Note 6.
 Murder with other offences See Note 4
 Murder and S 201, I P C See Note 6
 Not in same transaction See Note 19
 Offence under Ss 401 and 413, I P C See Notes 6 and 16
 Recoverers of stolen property—Several and distinct. See Note 17
 Recovering stolen property See Notes 6, 16 and 17.
 Security proceedings See Notes 1 and 6
 Sections 411 and 458, Penal Code. See Note 6.

1. Scope and applicability of the section. — This is the last exception to the rule enacted in S 233 that every offence must be tried separately. It is only under this section that the joint trial of several accused persons is permissible¹

The section applies only to *trials* and not to enquiries. It is not illegal, therefore, to jointly commit several accused persons for offences not falling within the provisions of this section,² though it should, as a matter of prudence, be avoided³

Inquiries under chap VIII stand on a somewhat different footing. Under S 117 (5), where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just. In the cases noted below⁴ it was held that a joint inquiry in cases not permitted by the law was illegal and not merely irregular. But there is a conflict of decisions on the point. For fuller discussion, see S 117 Notes 13 and 14

The section is subject to the rules as to jurisdiction laid down in chapter XV and consequently a Magistrate cannot try persons for offences committed outside his jurisdiction, though otherwise the case may fall within the provisions of this section⁵

The provisions of the section refer to persons *accused*, that is to say, charged. The provisions are, therefore, intended to deal with the position as it exists at the time of charge, and not with the *result* of the trial. Hence, a joint trial of several persons under

Section 239 — Note 1

- 1 (45) 32 AIR 1945 Lah 286 (288) (FD) *Sardara Qasam v Emperor*
 (39) 25 AIR 1938 P C 130 (133) : 39 Cri L Jour 452 : 65 I A 158 : 32 Sind L R 476 : 1 L R (1938)
 3 Cal 293 (PC), *Dabulal v Emperor*.
 (36) 23 AIR 1936 Sind 47 (48) : 37 Cri L Jour 716, *Dholimal v Emperor*
 (08) 8 Cri L Jour 11 (13) : 4 Nag L R 71, *Emperor v. Dalwant Singh*
 2. (42) 29 AIR 1942 Bom 212 (213) : 43 Cri L Jour 773 : 1 L R (1943) Bom 534 : 201 Ind Cas 735.
Emperor v Huseinalli Vilayatalli. (Though one order of commitment may be made in respect of several accused, it is competent to the Sessions or trial Court to order separate trials in order to give effect to the provisions of the Code)
 (97) 1897 Rat 915 (915) *Queen-Empress v Raghu Hari*.
 (02) 26 Mad 592 (594) : 2 Weir 262, *In the matter of Govindu*.
 (19) 6 AIR 1919 Mad 45 (47) : 20 Cri L Jour 379 : 42 Mad 561, *In re Nalluri Chenchiah*.

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this section is not vitiated merely by the fact that at the end of the trial the facts found happen to be different from those on the footing of which the charges were originally framed⁶

2 Whether Sections 234, 235, 236 and 239 are mutually exclusive

Section 239 and Ss 234 to 236 — It has been in some cases held that the provisions of this section and Ss 234 to 236 may be applied cumulatively to a case, so that where two or more persons can be jointly tried under this section for certain offences it is permissible to add as against one of such persons charges which could be added under Ss 234 to 236 if he were being tried alone

Illustrations

- 1 A is accused of theft and B is accused of having received the stolen property. A and B can be tried together under clause (e) of this section. A is also accused of having committed another offence which forms part of the same transaction as the theft. There is no objection to the joinder of a charge for this other offence against A in the same trial. (Section 235)¹
- 2 A and B commit a certain offence and as such are liable to be tried together under clause (a) of this section. There is no objection to joining against A under S 234 another charge for a different offence of the same kind committed by him in the course of the same year.²
- 3 Where A and B are tried together under this section there is no objection to an additional charge being framed against one of them under S 236 (in the cumulative or in the alternative) and tried at the same trial.³

6 (40) 27 AIR 1940 Nag 249 (250) 41 Cri L Jour 731 ILR (1942) Nag 208 189 Ind Cas 837, *Bhagoletal v Emperor*

(40) 27 AIR 1940 Nag 340 (343) ILR (1941) Nag 110 42 Cri L Jour 17 190 Ind Cas 849 *Parid na id v Emperor*

(40) 27 AIR 1940 Pat 499 (501) 41 Cri L Jour 452 *Nathu Chaudhury v Emperor*

(38) 25 AIR 1936 P C 130 (183) 39 Cri L Jour 452 65 I A 158 92 Sind L R 476 ILR (1938) 2 Cal 295 (PC) *Babulal v Emperor*

(65) 25 AIR 1938 Sind 171 (173) ILR (1939) Kar 204 39 Cri L Jour 890 *Emperor v Balumal* (The trial is bad not because the accused has been wrongly convicted but because he has been wrongly charged)

(36) 37 Cri L Jour 728 (729) 62 Cal 946 (950) 162 Ind Cas 943 *Superintendent and Membrancer of Legal Affairs Bengal v Raghu Lal*

(22) 9 AIR 1922 Cal 107 (113) 49 Cal 673 23 Cri L Jour 657 *Abdul Salam v Emperor*

Note 2

1 (36) 23 AIR 1936 All 337 (342, 343) 37 Cri L Jour 791 38 All 695 *Emperor v Mathuri*

[See also (41) 28 AIR 1941 Sind 121 (126, 127) 42 Cri L Jour 715 193 Ind Cas 267 (DB) *Al*

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of all five accused persons held justified under S 239 (d))

2 (34) 21 AIR 1934 All 211 318 319 320 321 322

[See however
of three offence
charges—If B
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3 (43) 30 AIR 1943 Lah 220 (221) 1 L R (1944) Lah 145 45 Cri L Jour 80 200 Ind Cas 117 *Banshu Ram v Emperor* (Accused charged under S 380 or in alternative under S 400—Co-accused jointly tried charged under S 415—Trial held not illegal—A I R 1929 Lah 14 29 Cri L Jour 1050 overruled)

(36) 62 Cal 916 (950) 37 Cri L Jour 723 162 Ind Cas 943 *Superintendent and Membrancer of Legal Affairs Bengal v Raghu Lal* (In case of joint trial under this section Court can convict

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Put a contrary view has been held in the unmentioned cases.⁶

Put the provisions of this section are not controlled by ss 231 to 23⁷ In other words the circumstances under which a joint trial is permissible under this section cannot be restricted by considerations based on ss 231 to 23⁸

See also *Section 234*

Sections 235 and 236 — Sections 235 and 236 may apply to the same case. Thus where several charges have been rightly joined against the same accused under s 235, there can be no objection to one of such charges being in the alternative under s 236⁹

Section 234 and Ss 235 and 236 — A, B and C are offences of the same kind, as for example several acts of breach of trust. D is an offence which forms part of the same transaction as A, as for example, falsification of accounts to conceal the offence A. Similarly E and F are parts of the same transaction as B and C respectively. Under s 231, A, B and C could be tried in one trial as being offences of the same kind. Under s 235 A and D could be tried together as forming parts of the same transaction. So also, E and F and G and H. But can A, B, C, D, E and F be all tried together in the same trial by virtue of s 231 and 235 read together? The general view is that they cannot⁷ Where,

(10) 11 Cr L Jour 244 (215) 5 Ind Cas 769 (Cal) *Jan's v Emperor* (fifteen accused charged under S 235 Penal Code and three of them also charged under Ss 411 and 412—No misjoinder)

(0-) 8 Cr L Jour 191 (173) 3 Sind L R 73, *Emperor v Ghulam* (Accused 1 to 3 charged under S 235 and 4 charged under S 236—No misjoinder)

11 Cr L Jour 244 (215) 5 Ind Cas 769 (Cal) *Jan's v Emperor* (fifteen accused charged under S 235 Penal Code and three of them also charged under Ss 411 and 412—No misjoinder)

4 Cr L Jour 191 (173) 3 Sind L R 73, *Emperor v Ghulam* (Accused 1 to 3 charged under S 235 and 4 charged under S 236—No misjoinder)

allow of three sets of offences committed in the course of three transactions or six offences in all being charged and tried together]

(29) 16 AIR 1920 All 202 (203) 30 Cr L Jour 697 51 All 511, *Janeshar Das v Emperor* (The words at the end of the section are more by way of limitation than extension)

(25) 12 AIR 1925 Lah 537 (538) 26 Cr L Jour 1097, *Chhajju v Emperor* (Where the accused was charged under Ss 413 and 401, Penal Code, with other persons who were charged under S 401 the accused cannot be tried with the others as cl (d) does not apply as the offences are not in the same transaction and clause (c) does not apply as offence under S 401 does not include theft as one of its elements)

(24) 11 AIR 1921 All 316 (317) 46 All 51 25 Cr L Jour 466 *Pulloo Lal v Emperor* (Sections 234 and 239 cannot be combined)

(38) 25 AIR 1938 P C 130 (133) 39 Cr L Jour 152 651 A 153 32 Sind L R 476 1 L R (1938) 2 Cal 295 (PC) *Dabulal v Emperor* (Clause (1) is expressly an exception to S 233 and enables a plurality of offences to be dealt with in the same trial—But it does not import either expressly or by implication the limitation set out in S 234 according to which not more than three offences of the same kind committed within the space of twelve months can be tried together or the limitation contained in s 235 (1) under which more offences than one committed by the same person can only be tried together if they are in one series of acts so connected together as to form the same transaction, in which case there is no specific limit of number)

(38) 25 AIR 1938 Bom 491 (493) 1 L R (1939) Bom 42 40 Cr L Jour 118 *Emperor v Karamalli Gulamalli* (Section 239 not controlled by S 234)

(26) 13 AIR 1926 Oudh 161 (165) 26 Cr L Jour 1602, *Dishambhar Nath v Emperor* (Section 234

11 Cr L Jour 244 (215) 5 Ind Cas 769 (Cal) *Jan's v Emperor* (fifteen accused charged under S 235 Penal Code and three of them also charged under Ss 411 and 412—No misjoinder)

4 Cr L Jour 191 (173) 3 Sind L R 73, *Emperor v Ghulam* (Accused 1 to 3 charged under S 235 and 4 charged under S 236—No misjoinder)

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(24) 11 AIR 1921 All 316 (317) 46 All 51 25 Cr L Jour 466 *Pulloo Lal v Emperor* (Sections 234 and 239 cannot be combined)

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(38) 25 AIR 1938 Bom 491 (493) 1 L R (1939) Bom 42 40 Cr L Jour 118 *Emperor v Karamalli Gulamalli* (Section 239 not controlled by S 234)

(26) 13 AIR 1926 Oudh 161 (165) 26 Cr L Jour 1602, *Dishambhar Nath v Emperor* (Section 234

however, several acts of misappropriation are lumped together in a single charge under s 222 (2), it has been held that the acts of falsification of accounts committed for the purpose of concealing the former offence will constitute parts of the same transaction as such offence and can be tried at the same trial⁵

Where a person is charged with several offences under s 234, it has been held in some decisions that there is no objection to his being tried on additional charges framed under s 235 (2) or s 236⁶. But the matter is involved in a conflict of decisions. These have been more fully considered in s 234 Note 5.

2a Clauses of Section 239, if mutually exclusive. — A and B commit an offence and are liable to be tried jointly under clause (a) of this section. A and C commit different offences in the course of the same transaction. They can be jointly tried for such offences under clause (d). But A, B and C cannot be jointly tried at the same trial by combining clauses (a) and (d). In this sense the clauses of this section are mutually exclusive. But they are not mutually exclusive in the sense that more than one clause may apply at the same time to a case. Thus, where A is accused of an offence and B of the abetment thereof, the case comes under clause (b), but if the offence and the abetment form parts of the same transaction, the case will also fall under clause (d)¹

3 "May be tried together" — Before the amendment of 1923, the section contained the words 'as it thinks fit,' and it was held that it was in the discretion of the Court to adopt, in each case, whichever course it regarded as most conducive to the ends

- (31) 18 AIR 1931 Oudh 86 (87) 32 Cri L Jour 540 6 Luck 441, *Dubri Misir v Emperor*
 (27) 14 AIR 1927 Nag 22 (23) 27 Cri L Jour 1099 *Emperor v Dhaneshram*
 (26) 13 AIR 1928 All 261 (262) 27 Cri L Jour 143 48 All 236, *Fauzdar Mahfo v Emperor*.
 (Two acts of kidnapping and two acts of cheating—Each act of kidnapping and each act of cheating forming a separate transaction.)
 (26) 13 AIR 1928 Bom 110 (111) 27 Cri L Jour 305 49 Bom 892 *Emperor v Manant*
 (23) 8 AIR 1932 All 214 (214) 23 Cri L Jour 258 44 All 540, *Shuja ud din v Emperor*
 (15) 2 AIR 1915 Cal 298 (298) 41 Cal 722 15 Cri L Jour 153, *Raman Behary v Emperor*
 (13) 14 Cri L Jour 428 (429) 40 Cal 318 20 Ind Cas 412, *Emperor v Jiban Krishna*
 (10) 11 Cri L Jour 285 (286) 32 All 219 5 Ind Cas 896 *Sheo Saran v Emperor*
 (09) 8 Cri L Jour 4 (5) 30 All 351 1908 All WN 152 5 All L Jour 400, *Emperor v Mata Prasad*
 (07) 5 Cri L Jour 341 (342) 30 Mad 329 17 Mad L Jour 141 2 M L T 177, *Kasi Viswanathan v Emperor*
 (05) 2 Cri L Jour 34 (36) 1905 Pun Re No. 2 Cr 1905 Pun L R No 44, *Bhagnati Dial v King Emperor* (Where the accused was charged, tried and convicted in the same trial for (a) forgery of three cheques (b) cheating in respect of each cheque and (c) falsifying account books to conceal the forgery of each cheque — Held that the trial was illegal.)
 [See also (03 04) 2 Low Bur Rul 10 (11 14), *Nga Lun Mg v King Emperor*
 (92 96) 1 Upp Bur Rul 33 (33) *Nga Po Chun v Queen Empress*]
 [But see (42) 29 AIR 1942 Pat 401 (405) 43 Cri L Jour 625 21 Pat 113 200 Ind Cas 380 (DB) *Jogenaranath v Mahanlal* (Three offences under Penal Code, s 477A, and offence under Penal Code s 409, forming part of same transaction as any of the offences under s 477A can be tried together but not 28 offences under s 477A and offence under s 409, where they all do not form part of same transaction AIR 1934 Pat 232 13 Pat 170 35 Cri L Jour 876 followed)
 (34) 21 AIR 1934 Pat 232 (234) 35 Cri L Jour 876 13 Pat 170, *Ram Kishoon Pershad v Emperor* (Sections 234 and 235 can be treated as cumulative)]

[But see (00) 20 AIR 1900 No. 110 (101) 31 Nag L R 331 36 Cri L Jour 1216 *Ram Sheshan*

1 (38) 25 AIR 1938 Sind 164 (167) : 39 Cri L Jour 891 ILR (1939) Kur 64, *Chuharmal v Emperor*.

of joint offence. The omission of the said words in the present section does not, however, make a difference and the words may be read together and show that it is still in the discretion of the Court to adopt whichever course it thinks best.² The manner in which this discretion is to be exercised depends on the facts of each case.³ Wherever the applicability of the section is doubtful it is far better that it should not be applied than that it should.⁴ Nor should joinder of charges be resorted to when there is a risk of embarrassing the defence by such joinder.⁵ Where four offences were committed at four different places within two years and the accused fourteen in number were alleged to have taken part in one or more of them it was held that it would have been more proper to try them separately for the same offence than to try them jointly for an offence under S 400, Penal Code.⁶

An exercise of discretion under the section even if improper will not be interfered with unless it has occasioned a failure of justice.⁷

Note 3

- (1) 11 AIR 1924 All 231 (234) 27 Cr L Jour 103 *Abdu Lali v Emperor*
- (2) 10 AIR 1923 All 91 (107) 43 All 226 25 Cr L Jour 497, *Emperor v Har Prasad*
- (3) 76 Ind Cas 966 (967) 25 Cr L Jour 294 (Cal) (DB), *Emperor v Charu Chunder*
- (4) 2 AIR 1915 Cal 688 (689) 16 Cr L Jour 3 (4) *Superintendent and Memembrancer of Legal Affairs, Bengal v Memmahan Dey* (Section 239 is merely an enabling section)
- (5) 13 Mad 426 (427) 1 Weir 290 *Queen Empress v Simi*
- (6) 7 All. 1910 Nag 255 (256) 16 Nag J R 9 21 Cr L Jour 769 *Gounda Sambhuji v Emperor* (Omitted in AIR 1937 Nag 17 11 R (1917) Nag 315 39 Cr L Jour 251 (FD) on another point)
- (7) 32 AIR 1915 Lah 946 (284) (11) *Sardara Qasim v Emperor* (Discretion is a judicial one and has to be exercised according to certain well established principles.)
- (8) 25 AIR 1934 Bom 491 (493) 40 Cr L Jour 118 11 R (1930) Bom 42, *Emperor v Karamalli*
- (9) 24 AIR 1937 Cal 22 (22) 38 Cr L Jour 750, *Phola Sardar v Emperor*.
- (10) 23 AIR 1936 Cal 753 (759) 38 Cr L Jour 545 *Rash Behari v Emperor* (Even where Ss 235 and 239 jointly apply it should not be resorted to if there is a risk of embarrassment to the defence AIR 1925 Cal 341 52 Cal 257 26 Cr L Jour 497, relied on)
- (11) 23 AIR 1936 S and 47 (48) 23 Cr L Jour 716 *Dholmal Karonmal v. Emperor* (Trying Magistrate should exercise the discretion judicially — High Court is competent to interfere if discretion is exercised arbitrarily)
- (12) 36 AIR 1936 Cal 753 (759) 39 Cr L Jour 545 *Rash Behari v Emperor* (The High Court, on a consideration of the circumstances of the case, has power to hold that the accused should not have been tried jointly and can set aside the conviction and sentences without directing a retrial should it think fit)
- (13) 2 All. 1915 Cal 743 (743) 16 Cr L Jour 318 *Dwarika Singh v Emperor*
- (14) 36 AIR 1936 Rang 474 (475) 38 Cr L Jour 163, *Nga Po Htwe v Emperor* (Separate trials should be ordered — Acquitting one of the accused is wrong)
- (15) 14 AIR 1927 Mad 177 (178) 60 Mad 735 27 Cr L Jour 1381, *Samsullah v Emperor*
[See also (34) 25 AIR 1938 S and 164 (165) 39 Cr L Jour 891 11 R (1933) Kat 64 *Ghuhar Mat v Emperor* (Offence in S 239 includes minor and alternative offences under Ss 235 and 236 33 Bom 221 9 Cr L Jour 226, followed)]
- (16) 45 AIR 1945 Lah 286 (288 289) (FB) *Sardara Qasim v Emperor*
- (17) 29 AIR 1941 Cal 707 (713) 43 Cr L Jour 339 11 R (1912) 2 Cal 319 198 Ind Cas 499 (DB), *Hugh Francis Bellgard v Emperor*
- (18) 28 AIR 1941 Mad 339 (349) 193 Ind Cas 375 42 Cr L Jour 411 *In re Balam Paleyya* (The usual course to adopt in a case of very large number of counts is to ask the Public Prosecutor to select what he considers to be the best case from his point of view and to try that case first and leave the other charges to be tried if necessary later on after the result of the first trial is known)
- (19) 26 AIR 1939 Cal 321 (322) 40 Cr L Jour 619 *Naula Ghosh v Emperor* (Girl confined in accused's house and ravished at night by him — Later, girl taken out along with other accused angle transac

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4 "Accused of the same offence" — Clause (a) — The word 'offence' has been defined in S 4 (1) (c) as meaning any act or omission made punishable by any law for the time being in force. The words 'same offence' would therefore signify one and the same physical act of crime and not different acts constituting crimes called by the same name or punishable under the same section¹. Thus several persons being together in possession of the same stolen property² or several persons together subscribing their names to a false written statement³ commit the same offence. See also the undermentioned cases⁴. Where five or more persons actuated by a single motive made several attacks against certain persons it was held that they committed a single riot and not a number of separate riots⁵.

The term 'offence' under this section has been held to include minor and alternative offences⁶. See also Note 2.

In the undermentioned case⁷ when A made a false charge against X of stealing goats and next day B made a false charge against X of stealing the same goats it was held that A and B committed the same offence. It is submitted that this is not correct. A and B cannot be said to have committed the same act of crime though they may be said to have committed similar acts forming part of the same transaction. The same observations will apply to the case cited below⁸.

Where a single offence has been committed and the allegation of the prosecution is that either A or B committed the crime it cannot be said that A and B committed the same offence. They cannot therefore be tried together at one trial under this section⁹. So

(22) 9 AIR 1902 Cal 107 (112) 49 Cal 578 23 Cr L Jour 657 *Abdul Salim v Emperor*

Note 4

1 (39) 43 Cal W N 196 (197) *Durgam v Dassi v Emperor* (There is no provision of law under which persons charged under S 368 Penal Code, for separate acts of concealment of the same girl can be tried together.)

(89) 26 AIR 1930 Rang 390 (391) 41 Cr L Jour 153 *Nga Sar Kee v The King* (The same offence means an offence.)

Emperor
or

and Cas 255 *Wazir Singh*
S 408 and S 409/109—

Case is covered by cl (a).)

(38) 25 AIR 1938 Mad 615 (616) 89 Cr L Jour 816 *In re Veera Reddi* (Proceedings under S 110 Cr P C—Four charges of attempt to commit rape framed against A, B and C for which they were jointly responsible—Joint trial of all is desirable—Addition of other charges of a trivial nature not material where accused not prejudiced.)

(19) 6 AIR 1919 Cal 367 (368) 46 Cal 712 20 Cr L Jour 120 *Kailash Chandra v Emperor* (Two persons together cheating another.)

(17) 4 AIR 1917 Mad 524 (525) 17 Cr L Jour 30 (31) *Appadurai Iyer v Emperor* (Three persons jointly entrusted with money and committing criminal breach of trust in respect thereof in collusion.)

(Complaint of dacoity)

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8 17 AIR 1917 Mad 524 (525) 17 Cr L Jour 30 (31) *Appadurai Iyer v Emperor*

Emperor

(34) 21 AIR 1934 Rang 193 (194) 35 Cr L Jour 1312 *Intaj Khan v Emperor*

also where A is charged with committing murder by stabbing X while B is charged in the alternative with abetting X in stabbing X and with stabbing X himself, A and B should be tried separately.¹⁰

The section says that in the cases covered by it, several accused may be charged and tried together. When some persons accused of an offence are committed to take their trial before a Sessions Court and subsequently some absconding accused charged with having committed the same offence in the course of the same transaction are committed to take their trial before the same Court, a joint trial of the two sets of accused persons so separately committed is not illegal and without jurisdiction, provided that the joint trial has caused no prejudice to the accused and both sets of accused persons were made aware by the committing Magistrate in each case that those committed had committed the same offence jointly with the others and the evidence recorded in each enquiry discloses that the same offence was committed jointly by them all¹¹

5. Abetment and attempt — Clause (b). — Under clause (b), persons accused of an offence and persons accused of abetment¹ or of an attempt to commit such offence,² may be jointly tried. The trial of offenders and their accomplices would therefore come under this clause,³ so also would a trial of two persons, one for attempt to commit an offence and another for abetment of the offence.⁴

Where the principal offence and abetment constitute the same transaction a joint trial of the principal offender and abettor will also be justified under clause (a).⁵

5a. Offences of the same kind — Clause (c). — A and B are accused of jointly committing two distinct offences of the same kind but not forming part of the same transaction. Can they be tried together? Under the section as it stood before the amendment of 1923 there was no provision corresponding to clause (c) of the present section.

Note 5

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and there was a divergence of opinion on the question. According to one set of cases,¹ the words at the end of the section "and the provisions contained in the former part of this chapter shall apply to all such charges" did not refer to Ss 234 to 238 but only to Ss 231 to 232, that therefore the word "person" in S 234 could not be read as including "persons" that neither S 234 nor S 239 consequently applied to the case and that therefore they could not be tried together. According to another class of cases,² the words quoted above include also Ss 234 to 238, that in this view the word "person" in S 234 must be read as including "persons" and that the joint trial was not bad. Clause (c) now makes it clear that such a trial is permissible.³ For the clause to apply, the offences charged must be of the same kind⁴ and they must have been committed by the accused persons jointly.⁵

Offences under S 41 (b) and (j) of the Factories Act, 1911, are offences of the same kind within the meaning of this section.⁶

A and B are accused of two offences alleged to have been committed by them jointly in the course of the same year. In the case of each offence the charge is framed in the same alternative form, viz., for an offence under S 390 or S 411 of the Penal Code. In such a case, the offences charged cannot be said to be of the same kind, though the transactions are of the same kind.⁷ See S 231, Note 5.

6 "Same transaction" — Clauses (a) and (d).—Where A commits offence *x*, B commits offence *y* and C commits offence *z*, and *x*, *y* and *z* form parts of the same transaction, A, B and C can, at one trial, be tried for the offences *x*, *y* and *z* respectively.¹ There is no limit to the number of offences which can be charged when

Note 5a

- 1 (17) 4 AIR 1917 Lah 78 (79) 1917 Fun Re No 17 Cr 18 Cr L Jour 282, *Tulsi v Emperor*
Rahman Bibi v. Mubarak Mondal
v. Dalwant Singh
 44 7 Low Bur Rul 272, *Po Mya v Emperor*
Shyad Lal v Emperor
 (06) 8 Cr L Jour 128 (128) 33 Cal 292 10 Cal W N 32, *Budhai Sheikh v Tarah Sheikh* (A and B
 looting on two occasions)
 (11) 12 Cr L Jour 266 (267) 10 Ind Cas 331 (Lah), *Mahbub Ali v Emperor*

3 (39) 1933 Mad W N 1253 (1253), *In re Kandari*

4 (38) 25 AIR 1938 Sind 164 (165) 39 Cr L Jour 881 ILR (1939) Kar 64 Cr L Jour 1000, *Emperor v. Emperor*

Note 6

- 1 (42) 29 AIR 1942 Bom 121 (122) 200 Ind Cas 261 43 Cr L Jour 621, (FB) *Emperor v Mahadeo Tatya* (One accused taking girl to room of another — Rape of girl by latter in room—Former escorting girl back to her house and cheating her of ornaments on way—Joint trial for rape and cheating is legal)
 (40) 27 AIR 1940 Nag 249 (250) I L R (1942) Nag 208 189 Ind Cas 382 41 Cr L Jour 734, *Bhagole Lal v Emperor*
 (38) 25 AIR 1938 All 91 (95) 39 Cr L Jour 364, *Musa Zahid Beg v Emperor* (Where the offence of causing death and the offence of destroying evidence relating thereto are closely connected in point of time, there is no misjoinder of charges, if a joint trial of the several accused takes place in respect of them)

they come under clause (d) of this section* but they should all form part of one and the same transaction³ The words "same transaction" have the same meaning as they have in s. 235⁴ As seen in Note 2 on that section the test whether the several offences are parts of the same transaction is to see whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts, as to constitute one continuous action⁵ Where there is such continuity of purpose or design and continuity

- (35) 22 AIR 1933, Rang 299 (300) 36 Cri L Jour 1318 *Nga Tha Aye v Emperor* (Murder and grievous hurt in course of same transaction)
 (32) 19 AIR 1932 All 25 (26) 54 All 337 33 Cri L Jour 122 *Kashinath v Emperor* (Several charges rightly joined against same accused under S 235 (1)—There is no objection to another accused being joined under S 239 as regards one of those charges)
 (19) 6 AIR 1919 Cal 367 (368) 46 Cal 712 20 Cri L Jour 122, *Kailash Chandra v Emperor*
 (08) 8 Cri L Jour 75 (80) (Lab) *Ishar Das v Emperor*
 (05) 8 Cri L Jour 191 (195, 200) 1 Sind L R 73, *Emperor v Ghulam* (Sections 201 and 302)
 (05) 2 Cri L Jour 5-2 (534) 7 Bom L R 637 *In re Shrinivas Krishna*
 (27) 14 AIR 1927 Cal 149 (152) 53 Cal 929 27 Cri L Jour 1268, *Ashutosh v Watson* (Section 72, Provincial Insolvency Act and S 102 Presidency Towns Insolvency Act)
 (29) 16 AIR 1929 Mad 450 (450) 52 Mad 532 30 Cri L Jour 983 *Sriramulu Naidu v Emperor* (Where a person commits forgery and another abets forgery and uses the forged document as genuine, the offences are parts of the same transaction)
 (05) 2 Cal L Jour 47n (47n) *Kunja Behari v Emperor* (Sections 663 and 372, Penal Code)
 (29) 16 AIR 1929 Cal 160 (161) 30 Cri L Jour 619 *Kals Kumar v Nawab Ali* (All the offences committed by persons whether substantive offences or abetment of those offences can be tried together provided they were committed by the persons in the course of the same transaction)
 (28) 15 AIR 1928 All 20 (21) 50 All 412 28 Cri L Jour 1001, *Darab v Emperor* (Some persons are charged with offences punishable under Ss 3 and 4, Gambling Act, and others are charged under S 4 only—Their joint trial is legal)
 (10) 11 Cri L Jour 90 (33, 35) 4 Ind Cas 700 (Mad) *In re Loganatha Iyer* (Persons associated from the first in the series of acts which form the same transaction)
 (08) 4 Cri L Jour 176 (179) 1906 P L R No 113 p 364, *Chhail Dihar v Emperor* (C, who held a licence for sale of opium allowed B, who did not hold licence, to sell opium—The accused can be jointly tried and convicted of an offence under S 9 Opium Act)
 [See also (31) 1931 Mad W N 397 (399) *Govindaraja Mudaliar v Emperor* (Sections 5 and 6 and R 27C, Motor Vehicles Act and S 337, Penal Code)]
 2 (38) 25 AIR 1938 P C 130 (133) 39 Cri L Jour 452 65 I A 159 32 Sind L R 476 I L R (1938)
 2 Cal 293 (1C), *Babulal v Emperor*

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- 4 (31) 18 AIR 1931 Pat 52 (53) 32 Cri L Jour 476 *Ganesh Prasad v Emperor*
 5 (42) 29 AIR 1942 Oudh 100 (103) 42 Cri L Jour 833 196 Ind Cas 262 *Balak Ram v Emperor* (Offences under Ss 211, 323 and 342 held committed in course of same transaction—Fact that one accused is convicted under S 211 and rest are acquitted does not prevent them from being tried together for other offences)
 (41) 28 AIR 1941 Sind 121 (126 127) 42 Cri L Jour 715 195 Ind Cas 267 (DB), *Moujals v Emperor* (Five persons charged under S 366, Penal Code kidnapping girl in order that she should submit to illicit intercourse After being kidnapped, girl forced to illicit intercourse with accused who was one of aforesaid five persons—Accused charged under S 376 Penal Code, also—Offences under Ss 366 and 376 Penal Code held committed in course of same transaction)
 (40) 27 AIR 1940 Nag 249 (250) 41 Cri L Jour 734 I L R (1942) Nag 208 189 Ind Cas 382, *Biagolal v Emperor* (Association and community of purpose among the accused)
 (40) 27 AIR 1940 Pat 499 (501) 187 Ind Cas 361 (363) 41 Cri L Jour 452, *Nathu v Emperor*
 (38) 25 AIR 1938 Nag 283 (285) 40 Cri L Jour 197 I L R (1939) Nag 686, *Nana v Emperor*
 (37) 24 AIR 1937 Lab 793 (794) 39 Cri L Jour 141, *Khasan v Emperor* (One of the accused charged and tried for

(Person escaping from lawful custody with rescuer's help—Intention of all is to secure release—Various acts bringing about escape form part of same transaction)

- (05) 2 Cri L Jour 578 (581) 38 Bom 49 7 Bom L R 633, *Emperor v Datto Hanmant*
 (27) 14 AIR 1927 Sind 39 (45) 21 Sind L R 107 27 Cri L Jour 1233, *Emperor v Lukman*

of action, the different acts may be regarded as a transaction⁶ Where there is no identity or community of purpose and no concert but the accused persons separately commit offences, whether of the same kind or not, they cannot be regarded as parts of the same transaction and a joint trial is bad⁷ As has been seen in the same Note, proximity of

- (20) 7 AIR 1920 Pat 230 (231, 232) · 5 Pat L Jour 11 · 21 Cri L Jour 161, *Gobinda v. Emperor*.
 (33) 20 AIR 1933 Nag 136 (140) 29 Nag L R 251 34 Cri L Jour 505, *Mrs Rego v. Emperor* (Murder, the fabrication of evidence to suggest burglary and false information given by one of them are so connected together as to form one transaction)
 (08) 8 Cri L Jour 191 (195) 1 Sind L R 73, *Emperor v. Ghulam*
 (05) 2 Cri L Jour 480 (497) 29 Bom 449 7 Bom L R 527, *Emperor v. Jethalal*
 (10) 5 Ind Cas 847 (849) 33 Mad 502 11 Cri L Jour 258, *Choragudi v. Emperor*
 6 (46) 33 AIR 1946 Pat 40 (43, 44) 24 Pat 501, *Harday v. Emperor*. (If several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it)
 (42) 29 AIR 1942 Oudh 89 (92) 43 Cri L Jour 153 · 17 Luck 353 197 Ind Cas 255, *Wazir Singh v. Emperor* (Manager and accountant charged under S 408 and S 409/109—Community of design and object suggested—Joint trial permissible under Cls (a) and (b) of S 239)
 (39) 26 AIR 1939 Nag 263 (264) 11LR (1939) Nag 644 · 41 Cri L Jour 27, *Provincial Government, C P & Berar v. Dinanath* (Prosecution alleging unity of criminal behaviour actuated by common intention on the part of all accused to extort confession — All accused are triable jointly—Necessity of a joint trial is strengthened if there is the additional element of proximity in time as well)
 (35) 25 AIR 1938 Oudh 216 (216) 39 Cri L Jour 853, *Wali Jan v. Emperor*. (Quarrel between three accused on one side and one G on other side — G beaten, and while going to thana for reporting, her buffalo forcibly taken by three accused and another to cattle pound—Held, incidents formed part of the same transaction — Joint trial by joining charges under S 323, Penal Code, and S 22, Cattle trespass Act, in one trial held not illegal)

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- (33) 20 AIR 1933 Nag 136 (140) 34 Cri L Jour 505 29 Nag L R 251, *Mrs Rego v. Emperor*
 (18) 5 AIR 1918 Bom 117 (121) 43 Bom 147 20 Cri L Jour 71, *Emperor v. Madhav Lazman* (Hulkarni and Patil of village conspiring and cheating certain persons on same day by asking them to pay in excess of what was legally due as assessment—Joint trial not illegal as offences form part of same transaction)
 (17) 4 AIR 1917 Lah 78 (79, 80) 18 Cri L Jour 282 (283 284) · 1917 Pun Re No 17 Cr, *Tulsi v. Emperor*. (Sections 467, 472 and 420)
 (19) 6 AIR 1919 Mad 487 (493) 20 Cri L Jour 354, *Kumaramuthu Pillai v. Emperor* (Sections 349 and 390)
 [See (40) 27 AIR 1940 Nag 340 (343) 11LR (1941) Nag 110 42 Cri L Jour 17; 190 Ind Cas 849, *Parmanand v. Emperor*. (Joinder of charges under Ss 302 and 331 with charges under S 330 held justified)

quences that went to make up the transaction)]

7. (45) 32 AIR 1945 Pat 388 (389) 24 Pat 303 221 Ind Cas 312 (DB), *Chintaram Rai v. Emperor* (Killing

of two persons; separate charges were framed against each of the two sets of accused, but they were tried jointly at one trial and convicted. It was not found that there was any intent on each set common

to the same purpose or result cannot be said to be acts committed in the course of the same transaction)

- (41) 28 AIR 1941 Mad 339 (342) · 42 Cri L Jour 114 1941 Ind Cas 114

(33) 20 AIR 1933 Sind 352 (353) 35 Cr L Jour 153, *Parano Lakho v. Emperor* (Joint trial of person charged under Ss 215 and 411, Penal Code, with another under S 411, there being no connexion between the two, is illegal)

(07) 12 Cal W N xv (xvi), *Jagnaram v. Emperor* (Sections 224, 342, 225 and 147)

(05) 2 Cr L Jour 393 (394) 1 Cal L Jour 475, *Emperor v. Esua Sheikh*, (Distinct and separate offences committed by separate sets of persons at different times)

(14) 1 AIR 1914 Low Bur 263 (264) 16 Cr L Jour 44 (45) 7 Low Bur Rul 272, *Po Mya v. Emperor*, (Illegal trespass)

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(06) 4 Cr L Jour 479 (480) 3 Low Bur Rul 214, *Emperor v. Madhub Chandra* (Section 188, Penal Code read with S 3 of the Epidemic Diseases Act, and S 419, Penal Code)

(25) 12 AIR 1925 Cal 413 (414) 26 Cr L Jour 467, *Surendra Lal v. Emperor*, (Joint trial of one charged under S 201 and another under S 304, Penal Code, was held illegal)

(08) 4 Nag L R 71 (73 74) 8 Cr L Jour 11, *Emperor v. Balwanting*

(34) 21 AIR 1934 Pesh 112 (113 114) 35 Cr L Jour 1410 *Fais Alam v. Emperor* (Accused charged under S 211, Penal Code, tried along with other persons charged with attempting to bribe doctor—Joint trial held not legal)

(30) 17 AIR 1930 Rang 114 (116, 117) 7 Rang 821 31 Cr L Jour 387, *Maung Ba Chit v. Emperor*, (Sections 120B, 379 and 413, Penal Code)

(34) 21 AIR 1934 Lah 630 (631) 36 Cr L Jour 676, *Dhan Singh v. Emperor* (Section 174 and S 406)

(18) 5 AIR 1916 Nag 139 (140) 20 Cr L Jour 7, *Shyad Lal v. Emperor*

(32) 19 AIR 1932 Lah 466 (466) 63 Cr L Jour 584, *Arjan Das v. Emperor* (Sections 401 and 413)

(06) 83 Cal 292 (294) 10 Cal W N 32 3 Cr L Jour 126, *Budhas Sheik v. Emperor*

(06) 8 Cr L Jour 78 (76 77) 1905 Pun Re No 51 Cr *Jagga v. Emperor* (Sections 411 and 456 Penal Code)

(05) 2 Cr L Jour 30 (31) (Lah), *Gurdilla v. Emperor* (Sections 411 and 457)

() to caste of girl—Transactions cannot be said to be same)

(82) 1882 All W N 215 (215), *Empress v. Daya Ram* (Sections 457 and 411)

(17) 4 AIR 1917 Lah 191 (192) 18 Cr L Jour 112 (112) *Muhammad v. Emperor*, (Sections 411 and 457)

(24) 11 AIR 1924 All 316 (317) 46 All 54 25 Cr L Jour 466, *Putto Lal v. Emperor*, (Sections 623 and 342)

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(Sections 302 and 303, Penal Code) v. Emperor.

(16) 3 AIR 1916 Mad 571 (571, 572) 16 Cr L Jour 298 (299), *In re Mekalakati, Subbadu* (Offences in different villages on different nights)

(25) 12 AIR 1925 Lah 537 (538) 26 Cr L Jour 1097, *Chhajju v. Emperor* (Sections 401 and 413)

(26) 13 AIR 1926 Lah 132 (133) 26 Cr L Jour 1361, *Achpal v. Emperor* (A person cannot be tried upon a charge under S 412, jointly with others who are being tried for the offence of dacoity under S 396)

(03) 1903 Pun Re No 17 Cr, p 44 (47) 1903 P L R No 149, *Singhara v. King-Emperor* (Sections 353 and 419, Penal Code)

Kahar v. Emperor (Two persons giving

same accused persons tried independently and made

(21) 8 AIR 1921 Lah 236 (236) 22 Cr L Jour 145, *Ghasita Mal v. Emperor*,

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time is not essential to constitute the acts, parts of the same transaction.⁸ Nor is it necessary that the accused should have acted together from start to finish.⁹ On the other hand, the mere fact that several offences of the same kind, such as dacoity, are committed at about a particular time, will not necessarily make them parts of the same transaction.¹⁰

What does or does not form part of the same transaction is a question of fact in each particular case.¹¹

In order to say whether several persons can be jointly tried as having committed offences forming parts of the same transaction, the Court has to look to the accusation, i.e., the prosecution case as set forth in the charges themselves, and if according to that case the offences are such as could be regarded as parts of the same transaction, it would be justified in holding a joint trial. It need not consider what the final result of the case

(25) 12 AIR 1925 All 301 (303) : 26 Cri L Jour 731, *Tufail Ahmad v. Emperor*. (Injury caused by firing fireworks in public road—Persons causing injury cannot be tried together)

(82) 1882 All W N 180 (180), *Empress v. Dalla*. (Six persons tried for six dacoities committed on different dates, the dacoities do not form part of the same transaction)

(21) 8 AIR 1921 All 408 (409) : 22 Cri L Jour 397, *Ram Sahas v. Emperor*. (Five dacoities were committed in the same district within the period of one week—In each dacoity some persons were common but others were not)

(11) 12 Cri L Jour 208 (209) : 10 Ind Cas 63 (Lab), *Karam Singh v. Emperor*. (A cheating X, B cheating Y and C cheating Z)

(102) 1902 Pun Re No. 16 Cr, p 45 (46), *Khushala v. Emperor*. (Cheating different persons at different times)

(12) 13 Cri L Jour 506 (507) : 15 Ind Cas 650 (Cal), *Girwar Narain v. Emperor*. (Two persons charged for criminal misappropriation)

be tried jointly)

8. (46) 33 AIR 1946 Pat 40 (44) : 24 Pat 501 (DB), *Hriday Singh v. Emperor*

(42) 29 AIR 1942 Bom 121 (122) : 43 Cri L Jour 621 200 Ind Cas 261 (FB), *Emperor v. Mahadeo Taiya*.

(If a woman is taken to a room and raped, and then on the way back from the room to her home she is cheated out of her ornaments, the two charges cannot be tried together merely because they took place within a short time of each other. But in the special circumstances of this case, a joint trial was held legal.)

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would be¹² Similarly, where the *accusation* is not that the several offences were committed in the course of the same transaction a joint trial cannot be justified under this clause merely because the offences are subsequently found to have been committed in the course of the same transaction¹³

See also Note 2 on Section 235

7 Acts done in pursuance of conspiracy. — It has been seen in Note 2 on S 235 that where there is a conspiracy having a definite object in view, and several offences are committed in pursuance of such conspiracy, the several offences will generally form parts of the same transaction. This principle will also apply where the several offences are committed by *different persons*¹

12 (45) 32 AIR 1945 Nag 1 (3) · 46 Cri L Jour 448 1 L R (1945) Nag 151 : 218 Ind Cas 294 (DB), *Baliram Tikaram v Emperor* (Accused tried on same charges as members of unlawful assembly — Accused linked together by allegation of common object which each shared with others — Joint trial not invalid though conspiracy is not proved)

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possible for a Magistrate to decide the question of joinder after the case has been opened by the Public Prosecutor)

(37) 24 AIR 1937 Cal 269 (270) 33 Cri L Jour 1013, *Sanyasi Gait v. Emperor*. (But the accusation must be real and not a mere excuse for joinder of charges)

(36) 23 AIR 1936 Bom 379 (381) 33 Cri L Jour 9, *Baburao v. Emperor*

(25) 12 AIR 1923 Mad 690 (699) · 26 Cri L Jour 1513 49 Mad 74, *In re Mallu Dora* (Provided that the accusation is a real one and not a mere excuse for a joinder of charges which cannot otherwise be charged)

(06) 30 Bom 49 (54) 2 Cri L Jour 578 7 Bom L R 633, *Emperor v Datto Hanmant*

(24) 11 AIR 1924 All 233 (236) 27 Cri L Jour 193, *Abdullah v. Emperor*

(34) 21 AIR 1934 All 61 (65) : 35 Cri L Jour 1349, *Ram Das v Emperor* (Legality of joint trial depends upon accusation and not upon result of trial)

(29) 16 AIR 1929 Bom 128 (129, 130) 30 Cri L Jour 588 53 Bom 344, *Emperor v. Gopal Raghnath*

(22) 9 AIR 1922 Cal 107 (113) 23 Cri L Jour 657 49 Cal 573, *Abdul Salim v. Emperor*.

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Note 7

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the others AIR 1938 P C 130 39 Cri L Jour 452 · 32 Sind L R 476 · 65 Ind App 153 : 1 L R (1938) 2 Cal 295 (PC) followed)

(30) 26 AIR 1939 Bom 129 (140) 40 Cri L Jour 579, *Panchandra Rango v Emperor*.

In *Bibulal Chaukhan v Emperor*,² the Privy Council observed as follows

If several persons conspire to commit offences and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators) these acts are committed in the course of the same transaction which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it.

The offence of conspiracy and acts done in pursuance of the conspiracy form one and the same transaction.³ The transaction continues so long as the conspiracy continues.⁴ But separate acts of crime not committed in pursuance of the conspiracy but being isolated acts committed individually during the continuance of the conspiracy are not parts of the same transaction with the conspiracy itself and acts alleged to be the subject of the conspiracy. In other words a conspiracy and acts done in furtherance of its common object have no community with separate acts which may be committed by a conspirator for individual gain.⁵

8. Acts in prosecution of a common object — All offences committed in prosecution of a common object will generally be parts of the same transaction.¹ Where

(37) 24 AIR 1937 Cal 269 (271) 38 Cri L Jour 1018 *Sanyasi Gani v Emperor* (Accused tried in same trial for murder and for conspiracy also along with others—Existence of conspiracy proved—Evidence showing that conspirators took part in certain occurrences as result of conspiracy—Inclusion of such occurrences in one trial and joint trial of accused held not illegal)

(36) 23 AIR 1936 Cal 753 (759 760) 38 Cri L Jour 545 *Rash Behari v Emperor*

(27) 9 AIR 1922 Cal 107 (112) 23 Cri L Jour 657 49 Cal 573 *Abdul Salim v Emperor*

(15) 2 AIR 1915 Lah 16 (22) 16 Cri L Jour 354 (398 399) 1915 Pun Re No 17 Cr, *Balmol and v Emperor*

(91) 16 All 89 (93) 1894 All W N 23 *Queen Empress v Moss* (Sect on 416 Penal Code)

(29) 16 AIR 1919 Bom 128 (130) 30 Cri L Jour 588 53 Bom 344 *Emperor v Gopal*

(24) 11 AIR 1924 Rang 98 (99) 2a Cri L Jour 270 1 Rang 604 *Emperor v Nga Aung Gjaw* (Conspiring to boycott)

(18) 5 AIR 1918 Bom 117 (119 121) 20 Cri L Jour 71 43 Bom 147, *Emperor v Madhav*

2 (38) 25 AIR 1938 P C 130 (133) 39 Cri L Jour 450 32 Snd L R 476 65 I A 158 1 L R (1938) 2 Cal 293 (FC) (There is no limit of number of offences specified in S 239 (d))

3 (38) 25 AIR 1938 Cal 258 (260) 39 Cri L Jour 596 1 L R (1938) 1 Cal 588, *Ahli Dandhu v Emperor* (Conspiracy and offences committed in pursuance of conspiracy)

(38) 25 AIR 1938 Sind 171 (174) 39 Cri L Jour 890 1 L R (1939) Kar 204 *Emperor v Dalumal*

(38) 23 AIR 1938 Cal 753 (760) 38 Cri L Jour 515 *Rash Behari v Emperor*

(16) 3 AIR 1916 Cal 168 (196) 42 Cal 957 16 Cri L Jour 497 *Ashtatal v Emperor* (If A, B and C conspire to make or have in their possession or under control an explosive substance within the meaning of the Explosive Substances Act and if in pursuance of such conspiracy, A makes or has in his possession and B and C use and tried together under

ur 387 *Maung Da Chit v*

Emperor

4 (46) 33 A I R 1946 Pat 40 (43 45 46) 24 Pat 501 (DB) *Hriday Singh v Emperor* (Dacoity—Carrying away booty and its concealment etc., may in some cases be treated as all forming part of same transaction)

(15) 2 AIR 1915 Cal 719 (724) 16 Cri L Jour 9 (10) 42 Cal 1153 *Harsh Nath v Emperor* (The term 'transaction' is not synonymous with the term 'offence')

5 (37) 24 AIR 1937 All 714 (717 718) 1 L R (1937) All 779 39 Cri L Jour 38 *Emperor v Bishan Sahai*

Note 8

1 (39) 26 AIR 1939 Nag 263 (261) 1 L R (1939) Nag 644 41 Cri L Jour 27, *Provincial Government C P and Berar v Dinanath* (Where several persons are accused of wrongful confinement and the use of force in order to extort a confession, the unity of criminal behaviour and the common intent on prompting it would render all that was done in furtherance of the common object as a part of one transaction. The acts of violence done are so related to one another in point of purpose, as to constitute one continuous act on)

A, B and C, Police Inspectors, received bribes on different occasions from D and E with the same object, namely, to hush up the case against them, it was held that A, B, C, D and E could be tried at one trial for the offences of taking and giving bribes respectively.²

Where two opposite parties, each consisting of five or more persons, attack each other, each of the parties forms an unlawful assembly, with a different common object and they cannot be tried together as one unlawful assembly.³ Similarly, where A as well as B

(‘38) 25 AIR 1938 Nag 283 (285, 286) : 40 Cri L Jour 197 : 1 L R (1938) Nag 686, *Nana v. Emperor*. (Accused tried for rioting, charged with having attacked exercise party seeking to make raid on certain houses in village—Whole affair taking place in the village, one event succeeding another rapidly—Joint trial of accused is illegal.)

(‘37) 24 AIR 1937 Lah 793 (794) : 39 Cri L Jour 141, *Khazan v. Emperor*. (Illegal possession of revolver as a preparation for committing dacoity—Charge under S. 399, Penal Code, can be tried with offence under S 19 (f), Arms Act)

(‘36) 23 AIR 1936 Bom 379 (382) : 38 Cri L Jour 9, *Baburao v. Emperor*. (Criminal breach of trust by two persons in respect of same sum of money—Complaint suggesting community of design and objective—Such persons can be charged and tried jointly)

(‘36) 23 AIR 1936 Pat 20 (23) : 37 Cri L Jour 240 : 15 Pat 138, *Ajablal v. Emperor*. (Intention of all the accused persons to secure release of a man from custody—Various acts which bring about such escape form part of the same transaction.)

(‘24) 11 AIR 1924 All 233 (234) : 27 Cri L Jour 193, *Abdullah v. Emperor*. (Joint trial for murder committed by members of an unlawful assembly in prosecution of common object of assembly is legal.)

(‘28) 15 AIR 1928 All 222 (227) : 30 Cri L Jour 530, *Emperor v. Jhabbar Mal*. (Successive articles were written in a newspaper in pursuance of a common policy and all the persons who had a hand in the publication are jointly triable)

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(‘31) 18 AIR 1931 Mad 223 (226) : 32 Cri L Jour 753, *Sambasua Mudaher v. Emperor*. (Where the accused, six in number, were charged with having opened a sluice in the feeder channel of a river against an order of the P. W. D. first in the evening, and again in the next morning)

(‘16) 8 AIR 1916 Cal 41 (42) : 18 Cri L Jour 120 (121) : 42 Cal 760, *Deputy Superintendent and Remembrancer of Legal Affairs, Bengal v. Kaulash Chandra*. (Wrongful confinement of X on several dates with the object of extorting money)

[See (‘36) 25 AIR 1938 Mad 858 (861) 40 Cri L Jour 353, *Arumugam v. Emperor*. (All members of a gang of persons who were consciously associated for the express purpose of committing theft can be tried together for being members of a gang—it does not matter how and when they were arrested)]

Also see S 235, Note 2.

[But see (‘43) 30 AIR 1943 Mad 207 (207) : 205 Ind Cas 158 : 44 Cri L Jour 272, *In re Mahomed Meera Sahib* (Rioting to secure release of arrested person—Theft by one rioter was held to have been committed in course of same transaction)]

2 (‘29) 16 AIR 1929 Bom 296 (299) : 53 Bom 479 : 31 Cri L Jour 65, *Emperor v. Ring*.

3 (‘69) 12 Suth W R Cr 75 (76), *Queen v. Surroop Chunder Paul*

(‘66) 4 C. L. Jour 110 (111) : 110 C. L. Jour 110

(‘67) 8 Suth W R Cr 47 (52) : Beng L R Sup Vol Cr 750 (751), *Queen v. Sheikh Basu*.

cause hurt to each other in a fight, they cannot be tried together for the offence of causing hurt to each other⁴. The fighting cannot be considered as a "transaction"⁵. It was, however, held in the undermentioned case⁶ that, where the object of two opposite parties is to take forcible possession of the same piece of land, they could both be tried together in one trial. It is submitted that this view is not correct. It has also been held in the case cited below⁷ that a mere common purpose, e.g. to drive the complainant out of a house, is not sufficient to make two perfectly distinct offences parts of the same transaction. Where two motor buses coming from opposite directions collided and some persons were injured thereby, it was held that though the accused the drivers of the two buses, had no similar or identical purpose in view, the transaction was the same and they both could be tried together⁸.

In the undermentioned case⁹ several persons were charged with being members of an unlawful assembly and having in prosecution of the common object, committed various offences and they were tried jointly. In the course of the trial it was found that the common object was not established. It was held that there was no justification for a joint trial once it was found that the common unlawful object had not been established. It is submitted that the decision is incorrect, as the provisions relating to joinder are intended to deal with the position as it exists at the time of the charge and not with the result of the trial and the propriety of a joint trial depends on the case as set forth in the charges. See Note 6.

9 Several persons giving false evidence in the same case. — Where A and B each gives false evidence in the same case the offences cannot, without anything more, be said to form parts of the same transaction¹. But where the giving of false evi-

[See (40) 1940 M W N 97 (99) *Pategyia v Emperor* (Sudden clash between rival communities not the result of any previously concerted action—Number of attacks in various places in village at different times of the day—All events cannot be regarded as parts of same transaction—Joint trial is illegal)]

Also see S 233, Note 6

4 (1902) 2 L W R 108 (107) *Mac O'Rourke v Mac O'Rourke*

7 (32) 19 AIR 1932 Bom 277 (278) 33 Cr L Jour 619 *Krishnaji v. Emperor*

8 (31) 1931 Mad W N 556 (557, 558) *N K Ballah v Emperor*,

9 (39) 26 AIR 1939 Mad 406 (407) 40 Cr L Jour 855, *Avanashi Goundan v Palani Madari*.

Note 9

1 (36) 23 AIR 1936 Nag 263 (265) ILR (1937) Nag 102 38 Cr L Jour 455 *Nathuramgh v Emperor*.

(12) 13 Cr L Jour 23 (24) 13 Ind Cas 215 5 Sind L R 199 *Imperator v Ali*

(84) 10 Cal 405 (407) *Nathu Sheikh v Queen Empress* (Where four persons were charged with perjury in the same proceeding and the Sessions Judge while professing to try each of them separately heard the evidence of the witnesses only once, held that this was substantially a joint trial of all the accused and was an improper mode of procedure)

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dence by A and B is in furtherance of one sustained and continuous plot for screening the offender and is an incident in the whole transaction, A and B can be tried together.² In other words, if the offences of giving false evidence by each of several persons form parts of the same transaction, they can be tried together.³

10. Printing and publishing seditious matter. — In cases of sedition, the printer and publisher are concerned in the same transaction in regard to the publication of the seditious matter and can be tried at one trial.¹

11. Defamation by different persons. — Where A filed one petition and B filed another making the same defamatory allegations against the complainant, and both the petitions were signed by the same pleader, it was held that the acts formed part of the same transaction.¹ Where A and B associate together in circulating on different occasions defamatory statements, the object of both of them being to defame the complainant about the same matter, they can be tried jointly at one trial under this section.² But where two persons were tried for no fewer than six offences of defamation, but in only one they were alleged to have acted jointly, their joint trial was held to be illegal.³

12. Continuing offence. — It has been held by Spencer, Offg C J, in the undermentioned case¹ that if an offence is a continuing one, such as waging war, it can be

(70) 2 N W P H C R 21 (23), *Queen v Ruttee Ram*

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in a statement to sustain a charge of conspiracy against them, particularly when the witnesses were trying to prove different facts which might have, if taken either jointly or severally, led to the conclusion that the accused in the case were innocent.}}

3. (36) 23 AIR 1936 Nag 263 (264) 39 Cri L Jour 455 ILR (1937) Nag 102, *Nathusingh v Emperor* (Perjury can be committed in course of one transaction and then joint trial is legal — Persons verifying false statement and witness perjury in pursuance of same design — Offence committed is in the course of the same transaction — Joint trial is valid)
- (27) 14 AIR 1927 Bom 177 (181 183) 51 Bom 310 28 Cri L Jour 373, *Sajmal Punam Chand v Emperor* (Common purpose to make a false statement joint trial of two accused is legal)
- (26) 13 AIR 1926 All 334 (336, 337) 48 All 325 27 Cri L Jour 445, *Raja Uz Zaman v. Chholey Lal*. (There was identity of purpose though not community of purpose)

Note 10

- 1 (28) 15 AIR 1928 Bom 139 (139) 29 Cri L Jour 681, *Shantaram Mirjekar v Emperor*

Note 11

- 1 (22) 9 AIR 1922 Cal 76 (77) 23 Cri L Jour 285 D

- 2 (42) 1942 Nag L
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- (40) 27 AIR 19
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(100), *Dwijendra Nath v.*

Note 12

1. (25) 12 AIR 1925 Mad 630 (632, 637) 49 Mad 74 26 Cri L Jour 1513, *In re Mallu Dora*.

regarded as a continuous or same transaction. Reilly, J., in the same case has taken a contrary view, namely, that a continuing offence may or may not be a single transaction. Krihnan, J. to whom the case was referred on difference of opinion between these two Judges, has held that the waging of war is really a continuing offence, which begins with the first act of war and goes on till the war is ended, but the various incidents in a war may be so disconnected as to form different transactions, the question whether they form parts of the same transaction or not being one to be judged on the facts of each case.

13. Kidnapping and abduction — In the undermentioned cases,¹ a joint trial of A for an offence under S 366 and of B for an offence under S 368 has been held to be bad, while a contrary view has been taken in the cases cited below.² The question is, however, really one of fact depending upon the facts of the particular case as to whether the two offences could be regarded as parts of the same transaction.

14. Keeping gaming house and using it. — It has been generally held that a person keeping a common gaming house and persons using it could be tried together as the two offences are interdependent and form a complement of each other.¹

15. Charge need not refer to transaction being same. — It is not necessary that the charge should contain a statement that the transaction is one and the same. It is the tenor of the accusation and not the wording of the charge that must be considered as the test.¹

16. Clause (c) — This clause was newly added in 1923. Before its introduction it was held that the joint trial for theft and receiving the stolen property was illegal unless they formed parts of the same transaction.¹ Now such a joint trial is expressly provided

Note 13

- 1 (33) 20 AIR 1933 Cal 563 (564) 34 Cri L Jour 632, *Mozam Dafadar v Emperor* (29) 16 AIR 1929 Lah 496 (496), *Nawabkhan v Emperor* (Distinguishing AIR 1928 Lah 751 29 Cri L Jour 496 and AIR 1924 Cal 399 50 Cal 1001 25 Cri L Jour 1082)
- 2 (41) 28 AIR 1941 Cal 315 (317) 42 Cri L Jour 649 195 Ind Cas 12 (DB), *Kamala Prasad v Emperor* (As long as the offences charged are committed in the course of the same transaction it is immaterial that one offence was complete before the other was committed)
- (36) 23 AIR 1936 All 253 (254) 37 Cri L Jour 496, *Dhawani Pathak v Emperor* (Accused charged under Ss. 366 and 344/109, Penal Code — Another accused charged under Ss. 368 and 314 — Acts forming parts of same transaction — Accused can be tried in one trial)
- (32) 19 AIR 1932 Oudh 28 (29) 33 Cri L Jour 275, *Emperor v Zamin*
- (13) 15 AIR 1928 Lah 751 (751) 29 Cri L Jour 496, *Dosa v Emperor* (AIR 1924 Cal 399 50 Cal 1001 25 Cri L Jour 1082 followed) Distinguished in AIR 1929 Lah 496)
- (24) 11 AIR 1924 Cal 399 (391) 50 Cal 1001 25 Cri L Jour 1082, *Kushav v Emperor* (Do)
- (32) 19 AIR 1932 Lah 203 (203) 33 Cri L Jour 199, *Pratam Singh v Emperor* (Quere)

Note 14

1 (1930) 10 AIR 177 22 Cri L Jour 100 1930 Ind Cas 177 22 Cri L Jour 100

(Dissenting from AIR 1914 Lah 566 1914 Pun Re No (Cr) 33 10 Cri L Jour 220 27 Ind Cas 814 and 11 Cri L Jour 211)

(22) 9 AIR 1922 Lah 458 (458) 3 Lah 359 23 Cri L Jour 621, *Ahluwalia Ram v Emperor*,

(13) 14 Cri L Jour 293 (294) 19 Ind Cas 919 9 Nab L R 69, *Shrikh Moti v Emperor*

(23) 10 AIR 1923 All 88 (88) 24 Cri L Jour 15, *Ganesh Lal v Emperor*

[See also (26) 13 AIR 1926 Bom 195 (193) 50 Bom 314 37 Cri L Jour 503, *Emperor v Abasbhai Abdul Husain*]

Note 15

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Note 16

- 1 (13) 14 Cri L Jour 121 (125) 18 Ind Cas 694 (AU), *Durga v Emperor*

for by this clause² A receiver from a receiver of stolen property should not be tried with the receiver of the property and the thieves, as the former is likely to be prejudiced by the course adopted³

This clause applies only to offences mentioned therein. An offence which includes theft means an offence of which theft is a necessary and essential ingredient⁴. So, where an accused was charged under S 413, Penal Code, with other persons who were charged under S 401, Penal Code, it was held that this clause did not apply, as an offence under S 401, Penal Code, could not be said to include theft⁵. Similarly, persons charged under Ss 457 and 460, Penal Code, are not persons charged with offences which include theft, and they cannot, therefore, be properly tried with persons charged with receiving stolen property which was stolen in a theft which was committed as part of the transaction involving the other offences⁶. But an offence of dacoity (Penal Code, S 395) includes theft and hence a joint trial of several persons for offences under Ss 395 and 412 is legal⁷. Where an accused, charged with an offence under S 380, Penal Code, and, in alternative under S 420, Penal Code, is jointly tried with a co accused who is charged with an offence under S 414 their joint trial is not illegal simply because the alternative offence under

(19) 6 AIR 1919 Cal 249 (250) 48 Cal 741 20 Cr L Jour 394, *Oh Bhutan Adikari v Emperor* (Proceeds of stolen property received at different times by different persons — Persons cannot be tried together)

61, *Jang v Emperor*

31 Cr L Jour 480 *Emperor v Jethalal* (But see

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not illegal)

Three of these charged under Ss 411 and 412, Penal Code on the strength of an incident forming part

2 (1907) 6 Cal 240 (251) 31 Cr L Jour 128 162 Ind Cas 943 *Superintendent and Remembrancer of Legal Affairs, Bengal v Raghulal Brahma* (Persons charged under S 380, Penal Code, can be tried along with the

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4 (36) 23 AIR 1936 All 337 (342) 37 Cr L Jour 794 58 All 695 *Emperor v Mathuri*

5 (25) 12 AIR 1925 Lah 537 (538) 26 Cr L Jour 1097, *Chhajju v Emperor*

6 (36) 23 AIR 1936 All 337 (342) 37 Cr L Jour 794 - 58 All 695 *Emperor v. Mathuri*

{But see (17) 24 AIR 1927 Lah 109 (109) 28 Cr L Jour 1167, *Emperor v Terhi*.

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(36) 23 AIR 1936 Oudh 109 (109) 36 Cr L Jour 1167, *Emperor v Terhi*.

S. 420 does not include theft.⁴

17 Clause (f) — This clause was newly added in 1923. As pointed out by Mullick, J., in *Mt Guljania v Emperor*,¹ the following cases may arise when stolen property is found in the possession of different persons

- (1) There may be one or more thefts and the several persons may have received the property jointly i.e., at one and the same time, e.g., when one person receives the property as agent of another. This case is not governed by clause (f) but independently of it, a joint trial of persons receiving stolen property is clearly permissible.²
- (2) There may be different thefts and several persons may have received the property at different times. This case also is not governed by clause (f). There is no community of purpose between the persons who have so received, and their joint trial is bad.³
- (3) There may be one theft and the several persons may have received the property at different times. Before the introduction of clause (f), it had been held in several decisions that a joint trial in such cases was illegal.⁴ Clause (f) was intended to meet such cases and a joint trial would now be permissible.⁵ The phrase, "possession of which has been transferred by one offence," refers to the

8 (43) 30 AIR 1945 Lah 220 (221) 45 Cri L Jour 80 ILR (1944) Lah 145 209 Ind Cas 117 (DB), *Banshi Ram v Emperor* (AIR 1929 Lah 142 29 Cri L Jour 1080 overruled)

Note 17

- 1 (29) 15 AIR 1928 Pat 89 (39) 6 Pat 583 23 Cri L Jour 962
- 2 (04) 1 Cri L Jour 330 (330) 28 Bom 412 6 Bom L R 361, *Emperor v Keshav Krishna* (Case was taken to fall under clause (d))
- (12) 13 Cri L Jour 59 (60) 13 Ind Cas 395 (UB) *Nga Po Shat v. Emperor* (Do)
- 3 (39) 25 AIR 1939 Cal 525 (527) 39 Cri L Jour 739, *Ram Khetawan v Emperor* (No evidence that stolen properties were proceeds of same theft—Joint trial is illegal)
- (35) 22 AIR 1935 Oudh 327 (328) 36 Cri L Jour 602 *Bhaggan v Emperor*
- (29) 15 AIR 1928 Pat 39 (39) 6 Pat 583 23 Cri L Jour 962, *Mt Guljania v Emperor*
- (27) 14 AIR 1927 Lah 737 (738) 29 Cri L Jour 459, *Emperor v Panhuddin*
- [See (04) 1 Cri L Jour 971 (971) (Lah), *Bhagat Singh v Crown*]
- 4 (16) 3 AIR 1916 All 103 (102) 17 Cri L Jour 477 (477), *Emperor v Balgound* (Acts of receiving stolen property by different persons on different occasions at different places are different transactions)

No connexion between accused—Joint trial is illegal

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ror (Where possession

of different properties is under joint control and is due to concert among the accused, the joint trial is not illegal)

- (21) 8 AIR 1921 Pat 291 (291, 292) 21 Cri L Jour 619, *Padma Nabh v Emperor*
- [See also (16) 3 AIR 1916 Pat 250 (250) 1 P L J 64 17 Cri L Jour 234 *Jadunandan Prasad v Emperor* (Portions of stolen property found in possession of two accused acting in concert—Joint trial is proper)
- (01) 28 Cal 104 (106) *Kumudini Kanta v Queen Empress*. (Joint trial for receiving stolen property and under S 414 for assisting in concealing or disposing of it—Transactions held distinct and separate against each)]
- 5 (28) 15 AIR 1928 Pat 38 (39) 8 Pat 583 23 Cri L Jour 962, *Mt Guljania v Emperor*.
- (32) 19 AIR 1932 Bom 201 (202) 33 Cri L Jour 394 *Emperor v Lakha Amra*
- (35) 22 AIR 1935 Oudh 475 (476) 36 Cri L Jour 1206, *Shakur v Emperor*

original theft of stolen property and not to the transfer of possession from the thief to the person receiving stolen property⁶

The provisions of this clause cannot, however, be extended by analogy to a trial of persons accused of offences other than those specifically mentioned therein. Therefore, the joint trial of the accused both charged under S 41^a Penal Code,⁷ or the joint trial of a person under S 411 Penal Code and another who has purchased the same from one of the accused,⁸ is illegal. See also the undermentioned case⁹ which falls under the same principle, viz., that the provisions of this clause cannot be extended by analogy.

18 Clause (g) — In order that persons accused of an offence under Chapter XII of the Penal Code relating to counterfeit coin can be tried under this clause with persons accused of any other offence under the same chapter, or of abetment of or attempting to commit any such offence all the offences must *relate to the same coin*. So, where two persons are charged one with uttering a counterfeit coin and the other with being in possession of *different* counterfeit coins, they cannot be jointly tried together under this clause¹.

19. Simultaneous trials — Simultaneous but separate trials of different accused persons for offences committed by them and not forming part of the same transaction are not bad unless the accused are prejudiced by the course adopted¹.

20 Criminal breach of trust and receiving stolen property. — A person committing a criminal breach of trust and another who receives the stolen property can be tried together¹.

21 Effect of illegal trial — See Note 10 on Section 537 and Note 5 on Section 233

22 Objection as to joinder — An objection as to joinder can be taken in a Court of revision or appeal though it was never taken in the Court of first instance¹.

When an objection as to joint trial is made and it appears likely that the objecting parties will be prejudiced by such joint trial it is advisable for the Court to accept the objection even if the joint trial would in fact be legal².

6 (32) 19

7 (25) 12

8 (23) 12

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[See (08) 6 Cri L Jour 11 (14) 4 Nag L R 71 *Emperor v Dalwant Singh*]

9 (45) 49 Cal W N 535 (536) *Krishna Das Saha v Emperor* (Where the acts of possession of the different accused charged under S 3 of Ordinance 33 [XXVII] of 1943 cannot be connected in any way so as to justify a joint trial within terms of S 239 such trial is not permissible on analogy of provisions of clauses (c) and (f) of S 239)

Note 18

1 (33) 20 AIR 1933 Lab 228 (229) 34 Cri L Jour 1203 *Abdul Hamid v Emperor*

Note 19

1 (20) 12 AIR 1920 Pat 152 (153) 25 Cri L Jour 1018 *Shafayet Khan v Emperor* (Trials of cross-cases)

(20) 7 AIR 1920 Pat 177 (179) 21 Cri L Jour 733, *Dhakosingh v Emperor* (Simultaneous trial in counter cases are not barred—Such trial is not joint trial and if prejudice is caused trial can be set aside)

(04) 1 Cri L Jour 199 (204) 8 Cal W N 344 *Sahadeo Akur v Emperor* (Cross-cases of rioting—Simultaneous trials not bad)

Also see S. 233 Note 6

[See however (83) 13 Cal L R 275 (278 279), *Chakravarti Lall v Moti Kurmi* (Such a trial is, however, open to serious objections)]

Note 20

1 (04) 1 Cri L Jour 381 (385) 6 Bom L R 516 *Emperor v Balabhai* (1 Cal W N 35 dissented from)

Note 22

1 (37) 41 Cal W N 251 (254) *C S Joseph v Emperor*

2 (37) 24 AIR 1937 Cal 22 (22) 38 Cri L Jour 750, *Ehola Sardar v Emperor*

240.* When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

Synopsis

- 1 Scope and applicability of the section
- 2 Conviction has been had
- 3 On one or more of them
- 4 With the consent of the Court
- 5 Effect of withdrawal or stay of trial

NOTE to the Synops. See the Notes indicated for the following topics
 Charges in same case and not in different cases See Note 1
 No withdrawal after verdict See Note 3
 Powers of appellate Court or Court of rev. on See Notes 1 and 4
 Safe course is to convict for all offences and pass concurrent sentences See Note 3
 Withdrawal when available See Note 3

1 Scope and applicability of the section — Where a person is committed to the Court of Session on a number of charges the Sessions Judge must record some order in respect of them and should not dispose of some of the charges alone without recording any order in regard to the others¹ Under this section he can stay the trial on some of the charges or allow them to be withdrawn on conviction being had on another charge²

It has been held that this section applies only to a case where a person is accused of several distinct offences. Thus it applies to a case where there are charges of several distinct offences constituted by separate acts or series of acts like those which fall under ss 234 and 235 subs (1) but not where there are several charges founded on the same act as those which fall under s 235 subs (2) and (3) and s 236³

This section applies again only to charges framed in the *same case* and not to *separate charges* for distinct offences in different cases. Thus the prosecution cannot on

* Code of 1882—The section began: When more charges than one are made against the same person in other respects it was the same as that of 1899 Code

Code of 1872 S 459

of several charges. prosecution may with the consent of the Court withdraw or the Court of its own accord may suspend the inquiry into the remaining charge or charges.

Code of 1861 — N 1

Section 240—Note 1

- 1 (39) 26 AIR 1939 Pat 35 (36) 39 Cri L Jour 997 18 Pat 8^o *Emperor v Sadanbo Majhi*
- 2 (39) 26 AIR 1939 Pat 35 (36) 39 Cri L Jour 997 18 Pat 8^o *Emperor v Sadanbo Majhi*
- 3 (89) 1899 Pun Re No 24 Cr p 79 (80) *Amir Chand v Queen Empress*.
 [See also (81) 1881 All W N 69 (68) *Empress v Fair Ilahi*]
 [But see (29) 18 AIR 1929 All 899 (900) 51 All 977 30 Cri L Jour 1089 *Ghamandi Nath v Dabu Lal*]

conviction of the accused in one case withdraw a charge against him in another case⁴ Nor can the Court pending an appeal against the conviction in one case stay the trial of charges in respect of other cases⁵ As to withdrawal of charges by the Court see Notes on S 227

2 "Conviction has been had" — The section contemplates a withdrawal or stay of trial of charges only when a conviction *has been had* on one or more of them. So where a person is charged with murder under S 302 of the Penal Code and with causing disappearance of the evidence of murder under S 201 Penal Code but before the trial begins in the Court of Session the Public Prosecutor withdraws the charge for the offence under S 201 Penal Code this section has no application to such a case. A trial on the charge under S 201 Penal Code could not therefore be proceeded with under this section when the conviction of the charge under S 302 Penal Code is set aside on appeal¹

3 "On one or more of them" — Where a person is convicted on one or more of the charges against him it is only before the other charges are tried that they could be withdrawn. But when all the charges have been tried and the accused found guilty no withdrawal can be made of any charge. In such cases if the Court considers a certain term of imprisonment adequate to meet the offence under each head the practice is not to convict on one head and drop the others but to convict on each head and pass concurrent sentences.¹ See also S 35 Note 10 and S 377 Note 3

4 "With the consent of the Court" — The word Court in the section is not restricted merely to the trial Court but includes every grade of Court including the High Court in revision and in appeal. Thus when a charge containing more heads than one is framed against the same person and he had been convicted on one or more of them and the complainant applies in revision praying for infliction of sentence on the others but subsequently withdraws the application the withdrawal amounts to the withdrawal of the complaint with regard to such charges with the consent of the Court¹ Again where an accused is charged with an offence under S 408 Penal Code in respect of ten receipts and is tried and convicted in respect of three of them the High Court's direction in the appeal that no further proceedings be taken in respect of the other receipts amounts to a stay of the trial with regard to those charges within the meaning of this section²

5 Effect of withdrawal or stay of trial — A withdrawal of charges¹ or a stay of enquiry or trial thereof² under this section has the effect of an acquittal on such charge or charges unless the conviction be set aside³ If the conviction is set aside the Court

4 (188) 1888 Rat 360 (362) *Queen Empress v Sadia*
(97) 10 C P L R Cr 1 (6) *Empress v Bansidhar Deyra*
S (09) 9 Cr L Jour 495 (496) 2 Ind Cas 128 (Mad) *In re Mantri Kamaraju*
(96) 1898 Rat 977 (978) *Queen Empress v Govinda*

Note 2

1 (05) 2 Cal L Jour 18 : (18n) *Affuluddi v Emperor*

Note 3

1 (69) 1869 Rat 19 (20) *Reg v Ramchandrar*
(86) 1886 Rat 288 (288) *Queen Empress v Nadiarya*
(86) 1886 Rat 286 (286 287) *Queen Empress v Lungo*

Note 4

1 (29) 1 " " " "
2 (09) 1 " " " "

1 (29) 16 AIR 1929 All 899 (900) 51 All 977 30 Cr L Jour 1089 *Ghamandi v Babu Lal*
2 (05) 12 AIR 1905 Pat 603 (604) 4 Pat 503 27 Cr L Jour 259 *Jeobaran Singh v Ramkishan Lal*
2 " " " "

in terms the accused upon such charge—Held the act on of the Magistrate might be taken as a stay of the trial of such charge under S 240 and the subsequent trial was not barred]]

(subject to the order of the Court setting aside the conviction) may proceed with the trial or inquiry in respect of the other charges.

CHAPTER XX.

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES

Procedure in **241.*** The following procedure shall be observed by
summons-cases. Magistrates in the trial of summons-cases.

Synopsis

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|---|--|
| <p>1 "Summons case," meaning of See S 4 (1) (v) and (w)</p> <p>2 Joint trial of summons and warrant-cases</p> <p>3 Applicability of Chapter XIX of the Code to the trial of summons-cases</p> | <p>4 Trial of summons-case as warrant case—Effect.</p> <p>5 Commitment to sessions See Notes on Section 347</p> <p>6 Change of procedure at what stage permissible</p> |
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NOTE to the Synopsis See the Notes indicated for the following topics

- | | |
|---|--|
| <p>Absence of complainant — Discharge and not acquittal. See Note 2</p> <p>Counsel and admission — Conviction illegal See S 243, Note 3 S 205, Note 7</p> | <p>Joint trial of summons and warrant-cases—Charges should be framed for both See Note 2</p> <p>Procedure different from warrant and sessions cases. See S 242, Note 1</p> |
|---|--|

1 "Summons-case," meaning of. — See Section 4 (1) (v) and (w)

2 Joint trial of summons and warrant cases — Where there is a joint trial of two offences, one of which is triable as a summons case and the other as a warrant case, the Magistrate must follow the procedure of warrant cases with regard to both the offences,¹ the reason being that, in such cases, the procedure applicable to the graver charge should be followed in preference to the more summary procedure appropriate to the less serious offence See also Section 247, Note 3

3. Applicability of Chapter XIX of the Code to the trial of summons-cases — The principles underlying the provisions of Chapter XIX apply to the trial of summons cases also though there is no provision for the framing of a formal charge in such cases.¹

4. Trial of summons-case as warrant-case — Effect. — If a Magistrate trying a summons case tries it as a warrant case and finds that no case is made out against

* Code of 1882 S 241 and Code of 1872 S 203 para 1 — Same as that of 1898 Code
Code of 1861 — Nil

Section 241 — Note 2

- 1 (18) 5 A I R 1918 Mad 371 (372) 41 Mad 727 19 Cri L Jour 613, *Raghavulu Navar v. Singaram* (Absence of complainant — Discharge under S 259 and not acquittal under S 247 is proper procedure)
- (06) 3 Cri L Jour 350 (350) 3 Low Bur Rul 113, *Emperor v Maung Gale* (Formal charges should be framed for both.)

be taken to mean voluntarily causing hurt on provocation and theft)

(02) 29 Cal 481 (482) 6 Cal W N 599, *Hoosain v Kalu* (Offence in the summons-case should form

(Accused
— Along

1. (05) 2 Cri L Jour 739 (743 744) 3 Low Bur Rul 53 (FB), *Emperor v San Dun*
Also see S 233, Note 1 and S 242, Note 6

the accused and lets him go unconditionally, he must be taken to have acquitted him though he may style his order of acquittal an order of discharge and tack on to it the number of some section of the Code which deals with discharge¹

5 Commitment to sessions — See Notes on Section 347

6 Change of procedure at what stage permissible. — In *Rajaratnam Pillai v Emperor*¹ it was held by King J., of the High Court of Madras that once a Magistrate has taken cognizance of an offence as a summons case, he cannot afterwards take cognizance of an offence which is triable as a warrant case and change the procedure accordingly. The same learned Judge, in the undermentioned case,² observed that the above proposition as stated by himself lacked in precision and held that a Magistrate can, before he begins to inquire into a summons case, reconsider the offence disclosed by the complaint and, if necessary, adopt the procedure provided for warrant cases. But in a later case³ of the same High Court, Burn, J., held that if a Magistrate begins a trial as a summons case and then finds that an offence triable only under warrant case procedure has been committed, he is bound to apply warrant case procedure thenceforward. Where the complaint alleges an offence triable under the warrant case procedure but the Magistrate considers that the offence is only a minor offence to which the summons-case procedure could be applied it is open to him to adopt a summons case procedure and he may proceed with the case as if the complaint was one of the minor charge only⁴

242.* When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge

Synopsis

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|--------------------------------|---|
| 1. Scope of the section | 5. Plea of accused |
| 2. "When the accused appears" | 6. Joinder of charges |
| 3. Particulars of the offence | 7. Joint trial of a summons case and a warrant-case. See Notes on S 241 |
| 4. No formal charge necessary. | 8. Effect of non-compliance with the section. |

NOTE to the Synopsis See the Notes indicated for the following topics

'Shall be stated to him' See Note 8

Summons case trial with the warrant case—Charges for both needed See S 241, Note 2

Trial of European British subject See S 445, sub-section (5)

1 Scope of the section. — This section which relates to the commencement of the trial of a summons case may be compared with the corresponding provisions relating to the trial of warrant cases and sessions trials. In the trial of a summons-case, the particulars of the offence are stated to the accused and his plea is recorded at the very commencement of the trial, whereas in warrant cases, the trial commences with the taking of the evidence for the prosecution, and the framing of the charge and recording of the

* 1882 S 242, 1872: S 203, para 2 S 206, 1861. S 265

Note 4

1. (10) 11 Cr L Jour 350 (350) 6 I C 385 (Mad), *Sessions Judge of Tinnevely v Venkatrama*
Also see S 245, Note 4 and S 247, Note 3

Note 6

1. (10) 11 Cr L Jour 350 (350) 6 I C 385 (Mad), *Sessions Judge of Tinnevely v Venkatrama*
2. (10) 11 Cr L Jour 350 (350) 6 I C 385 (Mad), *Sessions Judge of Tinnevely v Venkatrama*
3. (10) 11 Cr L Jour 350 (350) 6 I C 385 (Mad), *Sessions Judge of Tinnevely v Venkatrama*
4. (42) 29 A I R 1942 Mad 594 (593) 43 Cr L Jour 760 . 201 Ind Cas 451, *Arunachala Peddy v Sellamuthu Goundan*

accused's plea are postponed till after the prosecution evidence has been recorded. In this respect the commencement of a sessions trial resembles that of a summons case rather than that of a warrant case because in sessions trial also (S 271) the charge is read and explained to the accused and his plea is recorded at the very commencement of the trial.

The primary object of the proceeding prescribed by this section is to determine whether the accused pleads guilty to the charge or demands to be tried.¹

2 "When the accused appears" — As to the right of the accused to appear in person see S 303 and Notes thereon.

3 Particulars of the offence — The section requires that the particulars of the offence charged must be stated to the accused. A general reference to the terms of the marginal note of a section is not sufficient.¹ It is not necessary that the Magistrate should make a record of what he has stated to the accused in explaining the offence.² But there must be some indication in the record to show that the provisions of this section were complied with.³ However the omission to make a note to the effect that the particulars of the offence were explained to the accused is only an irregularity.⁴ In the undermentioned case⁵ the accused was sent up by the police on certain allegations. It was held that on such allegations being found not to amount to any offence, it was not open to the Magistrate to proceed against the accused on some other footing which would inculpate him. Where the accused is prosecuted for an offence of which he is not proved to be guilty he cannot be convicted for another offence without being called upon to show cause why he should not be convicted of such other offence.⁶

4 No formal charge necessary — Under this section it is not incumbent upon a Magistrate to frame a formal charge in a summons case. It has however, been held in the undermentioned case¹ that when a prosecution is for an offence under an Act of very recent date with the provisions of which the litigants as well as the lawyers are not quite familiar it would be proper for a Magistrate to frame a formal charge.

As to cases where the Magistrate frames a charge in a summons case and the accused is misled into believing that he will be given an opportunity to further cross examine the prosecution witnesses see Notes on Section 256.

5 Plea of accused — In summons cases the Magistrate must record the accused's plea at the commencement of the trial.¹ See Section 213.

Section 242 — Note 1

1 (41) 28 AIR 1941 Pesh 9 (10) 42 Cr L Jour 420 193 Ind Cas 365, *Dost Muhammad v Haripur Hazara Municipality*

Note 3

1 (03) 28 Bom 129 (142) 5 Bom L.R. 80, *Espier v Allooiaja* (Section 4 of the Bombay Prevention of Money Laundering Act)

h v Emperor
hat the offence

was and asked him to show cause)

3 (38) 25 A I R 1938 Pat 55 (57) 16 Pat 97 39 Cr L Jour 391 *Sul hdeo Prasad v Emperor*
(It has been complied with.)

Emperor
Mit Lal n v Khushal

Emperor

Note 4

1 (38) 25 AIR 1938 Pat 440 (442) 39 Cr L Jour 610 *Dehari Ram v Emperor* (Prosecution under the Sugar Excise Duty Act of 1931)

Note 5

1 (12) 15 Ind Cas 488 (489) 40 Cal 71 13 Cr L Jour 488 *Anath Nath Dey v Mohendra Nath*. (It is not clear how an offence under S 506 Penal Code, can be tried as a summons-case)

6 Joinder of charges — Though this section provides that in summons cases it is not necessary to frame a formal charge the provisions of the Code relating to the joinder of charges and the joint trial of accused persons apply to the trial of summons cases also¹

7 Joint trial of a summons case and a warrant case — See Notes on Section 241

8 Effect of non compliance with the section. — Does the omission to state the particulars of the offence to the accused as required by this section amount to an illegality or to a mere irregularity curable under s 537? On this question there is a conflict of decisions. On the one hand it has been held by the Calcutta High Court¹ that such an omission is an illegality and not a mere irregularity covered by s 537. On the other hand it has been held by the High Court of Madras² and the Judicial Commissioner's Court of Nagpur³ and Peshawar⁴ that such an omission is only an irregularity which under s 537 does not vitiate the trial unless it has occasioned a failure of justice. In the undermentioned Patna case⁵ the view of the Calcutta High Court was adopted but in the undermentioned case⁶ the opposite view was followed.

243. If the accused admits that he has committed the offence of

Conviction on admission of truth of accusation which he is accused, his admission shall be recorded as nearly as possible in the words used by him, and, if he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly.

Synopsis

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|---|---|
| <p>1 Legislative changes</p> <p>2 Conviction on admission of truth of accusation</p> <p>3 Admission by pleader See Section 205 Note 7</p> <p>4 Record of admission</p> <p>5 One admission for several accused</p> | <p>6 Warrant case tried as a summons case—Conviction on plea of accused See Sect on 203 and Notes thereon</p> <p>7 Whether order for security for keeping the peace may be based on consent of person sought to be bound See Section 117 Note 8</p> <p>8 'If he shows no sufficient cause why he should not be convicted'</p> |
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* 1882 S 243, 1872 S 206 para 1, 1861 S 265

(30) 17 AIR 1930 Sind 64 (65) 80 Cri L Jour 1077 *Mahomed Jamal v Emperor* (Offence under the Motor Vehicles Act)

Note 6

Emperor (2 Cri L Jour 739)

Note 8

v Matilal Singh

Emperor v Sankara

6 (48) 20 AIR 1938 Lat 65 (51) 16 Pat 97 39 Cri L Jour 321 *Sukhdeo v Emperor*

NOTE to the Synopsis. See the Notes indicated for the following topics :

Comparison between sessions and warrant-cases See S 242 Note 1

Conviction on confession is discretionary See Note 2

Record of actual words See Note 4

1. **Legislative changes.** — The words "may convict" have been substituted for the words "shall convict" by the Code of Criminal Procedure (Amendment) Act, 18 of 1923, thereby restoring the language of the Codes of 1872 and 1861

2. **Conviction on admission of truth of accusation.** — This section empowers a Magistrate to convict an accused person when he admits that he has committed the offence of which he is accused and does not show any sufficient cause why he should not be convicted¹ But a mere admission of the truth of all or any of the facts alleged against him does not amount to an admission of guilt unless such facts constitute an offence in the eye of the law, and in case such facts do not constitute an offence the accused cannot be convicted on such an admission² Further, the admission referred to in the section is the admission made *before* the trying Magistrate by an accused in pursuance of the questions put to him under S 242 Therefore, where there has been no plea of "guilty" before the trying Magistrate, he cannot rely upon an admission alleged to have been made by the accused in some other case and at some other time³

Under the Code as it stood prior to the amendments of 1923, a Magistrate was bound to convict an accused person if he pleaded guilty.⁴ The section in its present form, however, leaves it to the discretion of the Magistrate whether to accept the accused's plea of guilty or not. If he exercises his discretion by not accepting the plea of guilty and proceeds to hear the evidence, he must satisfy himself that the evidence justifies a conviction. If the evidence does not prove the charge, he is bound to acquit the accused. It is not open to him to go back to the plea of guilty and convict the accused on that plea.⁵ Nor is it open to him to take from the accused a further plea of guilty and relieve himself of the duty of examining the remaining witnesses cited on behalf of the prosecution⁶

Section 243 — Note 2

(15) 2 AIR 1915 Cal 153 (153) 15 Cr L Jour 703 (703), *Gaya Roy v Emperor*. (Section 13B, Calcutta Police Act, 1866 — Mere admission of possessing four annas in contravention of S. 13 is not sufficient

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(15) 2 AIR 1915 Cal 153 (153) 15 Cr L Jour 703 (703), *Gaya Roy v Emperor*. (Section 13B, Calcutta Police Act, 1866 — Mere admission of possessing four annas in contravention of S. 13 is not sufficient

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(15) 2 AIR 1915 Cal 153 (153) 15 Cr L Jour 703 (703), *Gaya Roy v Emperor*. (Offence under

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Also see S 244, Note 3.

A Magistrate may call for evidence even after he has accepted the plea of guilty made by the accused, with the object of acquainting himself with the facts of the case in order to pass an adequate sentence.⁷ A plea of "guilty" can be allowed to be withdrawn if the accused was, at the time of making it, enfeebled by illness and undefended.⁸

3 Admission by pleader — See Section 203 Note 7

4 Record of admission — This section requires that an admission of an accused should be recorded as nearly as possible in the words used by him.¹ Further an admission should be recorded immediately it is made and not afterwards from rough notes or memory.

5 One admission for several accused — The law requires that each accused should be questioned separately and that the answers given should be taken as nearly as possible in the words used by each accused. Therefore, where a Magistrate records one admission for a number of accused persons the admission is bad.¹

6 Warrant case tried as a summons-case — Conviction on plea of accused — See Section 202 and Notes thereon

7 Whether order for security for keeping the peace may be based on consent of person sought to be bound — See Section 117 Note 3

8 "If he shows no sufficient cause why he should not be convicted" — These words are to be read along with the earlier part of the section and not as a distinct and separate part. Where an accused does not admit his guilt, he cannot be convicted merely because he does not show sufficient cause against his conviction.¹

244.* (1) If the Magistrate does not convict the accused under the preceding section or if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take all such evidence as he produces in his defence.

Procedure when no such admission made

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directing him to attend or to produce any document or other thing

* 1882 S 244, 1872 Ss 207 361 1861 Ss 262, 266

7 (31) 18 AIR 1931 Bom 195 (198) 32 Cr L Jour 719 (FB) *Emperor v Janardhan*

8 (15) 2 AIR 1915 Lah 487 (493) 16 Cr L Jour 207 (263) (FB) *Emperor v L C E Shuldham*

Note 4

Calcutta

[See (73) 20 Sat W R Cr 55 (56) *In the matter of Mohesh Chunder*]
2 (9) 15 Mad 83 (97) 2 Weir 326 *Empress v Erugañu*

Note 5

1 (39) 19 A I R 1939 Sind 211 (212) 26 Sind L R 345 34 Cr L Jour 67, *Tejmal Hassomal v Emperor*

Note 8

1 (01) 1 Low Bar Rul 95 (96) *Vadmalaswamy v Crown*

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(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

Synopsis

- 1 Legislative changes
- 2 Shall proceed to hear the complainant
- 3 Evidence in support of the prosecution
- 4 Duty of prosecution
- 5 Cross examination
- 6 Extra judicial information

- 7 Evidence of the accused
- 8 May issue summons
- 9 Re-issue of summons
- 10 Adjournment for procuring attendance of witnesses
- 11 Process fees See Notes on S 544

NOTE to the Synopsis See the Notes indicated for the following topics

- Closing of the case by a party See Note 3
 Compulsion of attendance of witnesses See Note 9
 Connected cases — Cases — Depositions not to be used See Note 3
 Conviction of complainant See Note 2
 Conviction on evidence recorded in another case See Note 2
 Costs of adjournment by accused See Note 9
 Discretion to summon witnesses See Note 8
 Documents filed by accused See Note 7

- Duty to take all evidence of prosecution See Notes 2 and 3
 Duty to take evidence for accused See Note 7
 Evidence in presence of accused See Note 2
 Evidence of co accused witness See Note 3
 Examination of accused See Note 7
 Exhibiting documents See Note 3
 Non-examination of complainant See Note 2
 Subsequent plea of guilt See Note 3
 Supplementary witnesses See Note 10
 Witnesses residing in foreign territory See Note 8

1. Legislative changes

Changes made by Act 18 [XVIII] of 1923 —

- (1) The words "If the Magistrate does not convict the accused under the preceding section or which have been added at the commencement of sub s (1) are in keeping with the amendment of S 243 whereby the Magistrate is no longer obliged to convict on a plea of guilty but may notwithstanding such plea record evidence before convicting the accused
- (2) The proviso to sub s (1) is new and provides for a case where a complaint is made by a Court
- (3) In sub s (2) for the words "process to compel the attendance of any witness or the production of the words 'a summons to any witness directing him to attend or to produce' have been substituted¹

2 "Shall proceed to hear the complainant" — When an accused person denies the truth of the complaint made against him the Magistrate ought to hear the complainant and his witnesses in support of the prosecution and also the accused and his witnesses¹ He is bound to hear the complainant and take all evidence that he produces in support of the prosecution before he can acquit the accused² An order of acquittal passed

Section 244 — Note 1

- 1 (26) 13 AIR 1926 Mad 361 (361) 27 Cri L Jour 76 *Sethamuthu v Chinnappan Chettiar* (Magistrate is not bound to re-issue the summons if the witness summoned by him does not care to attend)

Note 2

- 1 (66) 6 Suth W R Cr 75 (75) *In re Allad Moies Dossee*
 (70) 14 Suth W R Cr 20 (20) *Queen v Chooramoni*
 (71) 15 Suth W R Cr 6 (6) 6 Beng L R App 83 *In re C G D Dells* (Conviction on evidence recorded in another case)
 (21) 8 AIR 1921 Oudh 147 (147) 21 Oudh Cas 267 23 Cri L Jour 765 *Emperor v Kanha Ja La* (Magistrate passing orders on the result of his inspection without giving parties opportunity of producing evidence—Order set aside)
 (07) 6 Cri L Jour 424 (425) 9 Bom L R 1316 *Emperor v Soabhai Nathabhai* (The Magistrate is equally bound even where the accused admits all the facts alleged by the prosecution but pleads not guilty)
 2 (91) 1891 Rat 539 (539) *Queen Empress v Toulman*

without this being done is illegal,³ and the High Court may set it aside in revision.⁴

The accused cannot be convicted except upon the evidence that he did commit the offence, the latter part of S 243 must not be read as distinct and separable from the first part.⁵ A conviction is illegal which is arrived at without the recording of the prosecution evidence.⁶ Similarly, where the accused was convicted upon a statement of the complainant not made on oath before a Magistrate, the conviction was held to be illegal.⁷

This section does not make the examination of the complainant himself absolutely necessary, so as to vitiate a conviction if such examination does not take place.⁸ But when a complainant's evidence is taken it should be in the presence of the accused. The common practice of not examining the complainant at the trial but only under S 200 of the Code is contrary to law.⁹

A Magistrate while enquiring into the complaint cannot, in the same case, convict the complainant himself because the evidence discloses that he too was a party to an affray. If the complainant is to be convicted it can only be in separate proceedings taken against him.¹⁰

Criminal Courts have no authority to order the accused to pay the complainant costs of an adjournment on the failure of the accused to appear on the day fixed for hearing of the complaint.¹¹

3 Evidence in support of the prosecution—The language of the section is compulsory and the Magistrate is bound to take all such evidence as may be produced in support of the prosecution.¹ Even when the complainant declines to be examined, it is the duty of the Magistrate to proceed to take the evidence of his other witnesses before dismissing the complaint, although in any event a strong preliminary presumption against the truth of the complainant's case would arise from his contumacious refusal to be examined.² In summons cases, the parties have an undoubted right to examine their witnesses and their

(95) 2 Weir 305 (305) *Naranapier v Ramaswami Aiyar* (Magistrate cannot dispense with any witness whom complainant wishes to examine)

(97) 20 M.A. 222 (222) *Atiyar v. Aiyar* was not disposed

() the complainant

() Court refused to

4 *Emperor v Nga*

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Also see S 245 Note 2

5 (01) 1 Low Bur Rul 95 (96) *Vadveloosamy v Crown*

6 (66) 6 Suth W R Cr 92 (92) *In re Sameeroodden*

(05) 2 Cr L Jour 532 (534) 9 Cal W N 816 *Emperor v Mohunt Ram Das* (Magistrate convicting merely on admission made to a police officer—Police officer ought to have at least been examined)

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intimation report)

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Mohamud Khan v Emperor (Obiter)
191 v Sarafdar Hazi (Section only requires

Note 3

- 1 (32) 19 AIR 1932 All 188 (188) 51 All 416 34 Cr L Jour 18 *Ali Husain v Lachmi Narain*
2 (27) 14 AIR 1927 Nag 210 (211) 28 Cr L Jour 511, *Damdo v Harba*

right could only be curtailed by the Court upon the ground that the examination of these witnesses will delay and possibly defeat the ends of justice³ But where a complainant after examining some of the witnesses named by him did not apply to the Magistrate to issue summons to other witnesses it was held that the Magistrate was not wrong in deciding the case on evidence before him⁴ A Magistrate has no jurisdiction to refuse to examine a witness who is deaf but who is able to speak and write Such refusal is materially prejudicial and vitiates the trial⁵

A Magistrate should always be chary of taking upon himself the duty of deciding on behalf of the parties which witnesses should be examined⁶ Generally it is not the province of the Court to examine the witnesses and as a rule the Court should leave the witnesses to the parties to be dealt with as provided for in S 138 of the Evidence Act Section 433 sub s (3) also tends in the same direction⁷

It is no doubt ordinarily the duty of the prosecution if they rely on documents to tender them in evidence together with such formal proof as may be necessary But where documents actually on the file of the proceedings are not formally exhibited and put on record as evidence the Magistrate should in the exercise of a wise discretion before the close of the prosecution case draw the attention of the prosecution to the fact that the documents have not been exhibited or ascertain whether they are to be regarded as having been produced as evidence for the prosecution under S 244⁸

But a Magistrate cannot after the trial is closed and while writing judgment admit in evidence a document without giving the accused an opportunity of raising objection to its relevancy and admissibility⁹

The closing of the case for the prosecution is no mere form but with certain exceptions closes the door to any further evidence against the accused The prosecution cannot reopen the case and make additions to it except such voluntary addition as the accused can himself make¹⁰ A statement by a party that he has closed his case should bear the signature of the party In the absence of such signature it is not recorded in accordance with law and there is no presumption of its correctness¹¹

Statements made by a defence witness against accused persons other than the one who called him as a witness cannot be considered as if it were evidence led on behalf of the complainant¹²

Where a Magistrate adopts the procedure prescribed by this section on the footing that there was no admission of guilt on the part of the accused person he is not competent to take a further plea of guilty from the accused and relieve himself of the duty of examining other prosecution witnesses¹³

In connected cases it is not proper to take the depositions in one case and have them copied and used in the other¹⁴

3 (21) 8 AIR 1921 Pat 308 (310) 22 Cri L Jour 430 *Biswanath Mahapatra v Shivanand Saraswathi*

4 (71) 15 Su h W R Cr 87 (87) *In re Notobur Bera*

5 (24) 11 AIR 1924 Cal 511 (511) 24 Cri L Jour 688 *Ganoda Dassya v Srimanta Ghosh*

6 (10) 2 AIR 1915 Mad 825 (825) 16 Cri L Jour 156 (157) *Venkatappaya v Venkataramanayya*

7 (24) 11 AIR 1924 Oudh 371 (379) 27 Oudh Cas 246 25 Cri L Jour 1926 *Janaia v Sheo Naam Singh*

8 (69) 10 Cri L Jour 408 (409) 3 S ed L R 84 3 Ind Cas 895 *Emperor v Ghulam Hussein*

9 (16) 3 AIR 1916 Mad 1084 (1084) 16 Cri L Jour 458 (459) *In re Kelappa Naik*

10 (23) 10 AIR 1923 All 372 (323) 43 All 323 25 Cri L Jour 305 *Mahadeo v Emperor*

11 *See S 254*

12
able to use against accused

v Emperor

Also see S 243 Note 2

14 (23) 10 AIR 1923 Cal 196 (197) 50 Cal 223 24 Cid L Jour 193 *Mosahur v Emperor*

Also see S 257 Note 5

4 Duty of prosecution — The duty of the prosecution is to prove all the relevant facts essential to establish the guilt of the accused¹ Irrelevant evidence should be excluded and the prosecution must be confined to simple and true evidence and no attempt should be made to hide essential facts or to embroider the case²

The prosecution cannot be permitted at the last moment to change its ground.³
See also S 296, Note 13

5 Cross examination — The section does not contain any express provision for cross-examination but a cross examination must certainly be allowed at some stage and hence the right is exercisable under this section¹ In the procedure laid down for the trial of summons-cases the accused has no right to postpone the cross examination of any prosecution witnesses as in the trial of warrant cases But if the cross examination is postponed in accordance with the direction of the Magistrate he is bound to give the accused a further opportunity to cross examine the witnesses Without such examination the evidence will not be legally admissible and the irregularity will vitiate the trial²

6 Extra-judicial information — It is extremely improper for a Magistrate in disposing of a case to rely in any way on statements made to him out of Court¹

7 Evidence of the accused — The evidence of the accused should be taken after that of the complainant¹ But where no prejudice was caused it was held that the fact of a Deputy Magistrate having recorded some evidence of the defence before the close of the case for the prosecution would be no ground for reversing his decision²

The section makes it obligatory on the Magistrate to hear the accused and record the evidence which he adduces in his defence after the prosecution evidence is recorded³ When the section says that the Magistrate shall hear the accused, it certainly means that he should ask the accused what he has to say in his own defence against the charge which has been brought against him and in explanation of the evidence which has been led to support the charge⁴ But the examination need not be recorded with the same formality as in warrant cases or preliminary enquiries⁵ As to the applicability of S 312 to summons cases see Note 3 on S 312

No Criminal Court can shut its eyes to the statement of an accused person when that statement refers to certain documents to which the accused is a party The Court may not be satisfied with the statement or may require further proof but it cannot brush aside the documents to which the accused are parties when the accused themselves file those

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Note 5

1 (31) 18 AIR 1931 All 621 (623) 51 All 212 33 Cr L Jour 310 *Lachmi Narain v Emperor*

2 (22) 9 AIR 1922 Pat 296 (298) 23 Cr L Jour 410 *Parmeshwar Lal v Emperor*

Note 6

1 (90) 14 Bom 572 (573) *Queen Empress v Saladoo Fularam*

Note 7

1 (25) 12 AIR 1925 All 614 (614) 47 All 341 26 Cr L Jour 905 *Bechan Tel v Emperor*

2 (82) 8 Cal 154 (156) 10 Cal L R 51, *Empress v Kalicharan* (Defence witnesses examined before cross-examination of some of the prosecution witnesses who were not in attendance)

3 (21) 8 AIR 1921 Bom 374 (375 377) 45 Bom 672 22 Cr L Jour 17 *Fernandes v Emperor*
(Section 34^o Cr P C is appl cable to summons cases)

(63) 9 Suth W R Cr 62 (63) *Queen v Bissessar Seem*

(70) 13 Suth W R Cr 63 (64) *In re Ameerschand Nohalla* (Point for and against the accused in witnesses)
(Obiter)

documents in Court along with their statements. As the accused cannot be examined on oath, they can only file a statement or refer to some documents to which they have been parties.⁶

Where, after closing hours the Magistrate insisted on going on with the case and the accused's counsel wanted an adjournment to examine the witnesses who were in attendance and the adjournment was refused, one ground being that no defence list had been filed, it was held that the ground for refusal was wrong and the convictions were set aside.⁷

It is the duty of Magistrates when dealing with ignorant individuals accused of technical offences to go very thoroughly into the evidence, and where they are not defended by advocates, to give them some assistance in putting up obvious defensive pleas.⁸

As to the effect of refusal by a Magistrate to examine a witness, on the conviction of the accused see S 337, Note 27.

8. "May issue summons" — Under the Code of 1861, s 263, it was in the discretion of the Magistrate to summon the witnesses "if he considered the evidence essential to the just decision of the case," and incumbent on him to summon them only if it appeared to him that they were likely to give material evidence and that they would not voluntarily appear for the purpose of being examined.¹

Under the present section also, the Magistrate is under no obligation to issue process to compel the attendance of any witness either on the application of the complainant or the accused. He has a discretion in the matter.² However, he must consider the application. He cannot ignore it completely,³ nor can he exercise the discretion to the detriment of the applicant in an arbitrary manner.⁴ The arbitrary exercise of discretion does not necessarily amount to acting without jurisdiction so as to justify the High Court's interference in all cases, but where the refusal to issue process amounts to a denial of justice, the High Court would interfere.⁵ Thus, when the accused was a police constable and it was not improbable that the witnesses for the prosecution would not voluntarily appear, it was held that it was just such a case in which the Magistrate should have exercised his discretion and issued summons.⁶ Where, on the other hand, no prejudice is caused, the High Court will not interfere with the order of the Magistrate.⁷

Though there is no provision for securing the attendance of witnesses residing in a foreign territory, the Magistrate is bound to make all reasonable efforts to procure their

6 (28) 15 AIR 1929 Mad 1135 (1136) 29 Cr L Jour 1011, *Muhammed Salia v Emperor*

Also see S 256, Note 12

7. (02 03) 7 Cal W N 714 (716), *Emperor v Keso Singh*.

8. (30) 17 AIR 1933 Rang 349 (350); 32 Cr L Jour 296, *Ala Hussain v. Emperor*

Also see S 340, Note 4

Note 8

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5. (03) 30 Cal 508 (515) 7 Cal W N 401, *Surya Kanta v. Hem Chunder*.

(21) 15 S. 11 W. 11 C. 11

attendance⁸

Where an accused who was called upon to let in evidence applied for, and obtained the summoning of his witnesses on his behalf, it was held that he had exhausted the power of summoning witnesses for the defence and all that he could do was to move the Magistrate to summon any other witnesses whom he might deem necessary under S 540⁹

An application for summoning witnesses cannot be granted by a Magistrate not seized of the case¹⁰

An application for summoning witnesses must be made without unnecessary delay. An accused is not entitled to wait till the close of the prosecution case and then apply for summons to witnesses. A Magistrate will be justified in refusing an application for summons made after undue delay¹¹

9. Re-issue of summons — It was held by the Calcutta High Court in cases decided prior to the amendment of sub s (2) that there was no discretionary power given by S 214 to a Magistrate to refuse to compel the attendance of witnesses upon whom processes had already been issued¹. This view has also been adopted by the Patna High Court subsequent to the amendment². But the Madras view is that the change in the new Code by the substitution of the words "may issue summons to any witness" for the words "may issue process to compel the attendance of any witness," renders it no longer obligatory on a Magistrate to compel the attendance of a witness who has received the summons³.

But every endeavour should be made to secure attendance of witnesses who have been summoned,⁴ and a Court should see that its summons and warrants are duly executed⁵.

When a Magistrate is unable to record the evidence of witnesses in attendance on the date fixed and the case is adjourned, the witnesses should be told to appear on the adjourned date, a party should not be required to repeatedly summon his witnesses on payment of fresh process fees merely because the Magistrate is unable to record their evidence on the date originally fixed⁶.

10. Adjournment for procuring attendance of witnesses. — The terms of the section apparently suppose that the defence witnesses attend voluntarily and accompany the accused¹. The law intends that as a general rule the prisoner should have his witnesses present on the day of trial². If a summons is necessary to procure the attendance of any witness, it should be applied for before the date fixed for hearing. When no such application is made a Magistrate does not exercise his discretion wrongly in refusing an adjournment asked for at the trial³. On the other hand, however, it is not an irregularity

8 (1911) 1872 P. & F. 111 (1872) P. & F. 111

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Note 9

1 (1912) 20 C. 1181 (1912) P. & F. 111

2 (1912) 20 C. 1181 (1912) P. & F. 111

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6 (12) 13 Cr. L. Jour 176 (176) 13 Ind. Cas 928 (Lah) *Balmohand v Nana Chaud*

Note 10

1 (1911) 10 S. 111 (1911) P. & F. 111

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3 (1911) 10 S. 111 (1911) P. & F. 111

4 *v Emperor*.

to adjourn a trial for the purpose of enabling accused to procure the attendance of his witnesses.⁴

The section no doubt imposes an obligation on parties of procuring their evidence in summons cases but the Court should before convicting an accused in such a case, take the precaution of ascertaining from the accused whether he has any witnesses and if he has but they are not present should consider whether he should not be allowed a further opportunity of bringing or summoning his witnesses through Court, where this was not done a conviction was set aside.⁵ But a Court is not bound to do this and although the Magistrate may not have exercised a wise discretion in not sending for the defence witnesses the High Court held in a case that it was unable to say that there was any illegality requiring it to quash the conviction.⁶

11 Process fees — See Notes on Section 514

245.* (1) If the Magistrate upon taking the evidence referred to in Acquittal section 244 and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.

*(2) Where the Magistrate does not proceed in accordance with the Sentence provisions of section 349 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law }

a. Sub-section (2) has been substituted for original subs (2) by the Code of Criminal Procedure (Amendment) Act 18 [XXIII] of 1923

Synopsis

- | | |
|---|---|
| <p>1 Legislative changes</p> <p>2 When to acquit</p> <p>3 'If he thinks fit'</p> <p>4 Effect of dismissal of complaint or discharge</p> | <p>5 Trial of warrant case as summons case and acquittal — Effect</p> <p>6 Sentence</p> <p>7 Whether Magistrate can find accused guilty while acting under Section 349 See Section 349 and Notes thereon</p> <p>8 Committal to sessions</p> |
|---|---|

1 Legislative changes — Sub section (2) has been amended by adding the words 'where the Magistrate does not proceed in accordance with the provisions of S 349 or Section 562' see Note 6

Similar amendments are effected in Ss 258 and 306

2 When to acquit — A Magistrate is not empowered to record an order of acquittal until he has heard all the prosecution and defence evidence. An order of acquittal passed before the evidence on both sides is over is not in accordance with law and is liable to be set aside.¹ Where a Magistrate refuses to proceed with a complaint on a legal objection raised by the defence as for instance the want of sanction of a particular

* 1882 S 245 1872 S 211 paras 1 and 2 1861 S 272

4 (71) 16 Suth W R Cr 21 (92) *In re Dinoo Poy*

5 (84) 1884 1 Lun Re No 7 Cr p 9 (9 10) *Express v Jena & Singh*

6 (63 69) 4 Mad H C R App 2212 (2213)

Section 245 — Note 2

1467

8. Committal to sessions —As to the legality of committing to sessions offences triable as summons cases see Note 4 on Section 31*

246. A Magistrate may, under section 243 or section 245, convict a person not letted by the accused of any offence triable under this Chapter on complaint or summons which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons.

1 Scope of the section —The section is analogous to s 227 and enables the Magistrate to convict the accused of any offence which from the facts proved or admitted, he appears to have committed though it is different in its nature from the offence originally charged. But it is necessary that both the original offence and the offence of which the accused is sought to be convicted are triable as summons cases¹. The fact that the offence originally charged was one under a local or special law and that the offence of which the accused is sought to be convicted is under the Penal Code does not affect the applicability of the section provided that both are triable as summons cases.

When convicting an accused person under this section for a different offence from that originally charged it is not necessary to reopen the trial and to follow again the procedure prescribed by s 243 and 244². But this does not mean that a Magistrate can convict an accused person of an offence in respect of which he has had no opportunity of defending himself³. Further the section refers to the nature of the offence and not to the date on which the offence was committed. Hence the section does not empower a Magistrate in a summons case to convict an accused person of an offence alleged to have been committed on a date different from that of the offence originally charged⁴.

Comparison with s 227

* 1882 S 246 1872 S 203 para 2 1851 — 5

Section 246 Note 1

247. If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

Synopsis

- 1 Legislative changes
- 2 Scope object and applicability of the section
- 3 Applicability of section to cases consisting both of offences triable as summons cases and offences triable as warrant cases
- 4 Upon the day adjourned
- 5 The complainant does not appear
- 6 Death of complainant

- 7 'The Magistrate shall some other day
- 8 Whether acquittal under this section bars fresh trial under S 403 See Notes on S 403
- 9 Complaints by public servants—Proviso
- 10 Review See S 369 and Notes thereon
- 11 Power to restore a case in which accused has been acquitted under this section See Notes on S 369
- 12 Revision

NOTE to the Synopsis See the Notes indicated for the following topics

Absence of accused immaterial See Note 4

Acquittal mandatory unless hearing is adjourned See Notes 2 and 7

Adjournment not legally made See Notes 5 and 7

Complainant absent but his wakil present See Note 5

Date for arguments See Note 4

Date for judgment See Note 4

Discretion as to acquittal See Note 7

Discretion as to adjournment See Note 7

Issue of summons on complaint See Note 2

Non applicability to Workman's Breach of Contract Act See Note 2

Non payment of process fees See Note 5

Non service of summons on accused See Note 4

Order of striking off or dismissal See Note 7

Transfer without knowledge of complainant See Note 7

Warrant cases See Notes 2 and 3

1 Legislative changes — In the Code of 1861 (Ss 259 and 260) the procedure was to *dismiss* the complaint¹ on the failure of the complainant to appear on the day of hearing. In the Code of 1872 it was provided that on default of appearance of the complainant on the date of hearing the complaint might be dismissed and that the effect of such a dismissal was the same as an acquittal². In the later Codes it was provided that in such circumstances the accused shall be acquitted.

The proviso to the section was added for the first time in the 1893 Code.

2 Scope, object and applicability of the section — This section provides that if on the day of hearing the complainant does not appear the accused shall be *acquitted* unless the Magistrate thinks fit to adjourn the case. The object of the section is to prevent the complainant from being dilatory in the prosecution of the case¹. The section applies only to *summons cases*. In warrant cases the Magistrate has no jurisdiction to

* 1882 S 247 1872 S 205 S 208 para 3 S 212 1861 Ss 259 269

acquit an accused on the ground of the absence of the complainant² As to the procedure to be followed in such cases if the complainant absents himself on the date of hearing see S 259 But where the Magistrate treats a case throughout as a summons case and follows the procedure prescribed for such cases, he is at liberty to acquit the accused under this section although the complaint mentioned offences triable as warrant cases³ As the opening words of the section show, the section does not apply unless the proceedings have been instituted on a complaint⁴

Inquiries under S 1 of the Workmen's Breach of Contract Act 1859 are not criminal proceedings and the section does not apply to them⁵

3 Applicability of section to cases consisting both of offences triable as summons cases and offences triable as warrant-cases—As seen in Note 2 on S 241, where a case consists of two charges one of which is a summons case and the other a warrant case the procedure prescribed for the trial of the graver offence should be followed and the case ought to be tried as a warrant case Hence, in such a case if the complainant absents himself on the date of hearing the Magistrate cannot acquit the accused under this section but can only discharge him under section 259¹

Where, however, a case is begun as a warrant case but a charge is framed only for an offence triable as a summons case, it has been held by the Madras High Court that the accused is entitled to acquittal under this section on the complainant's absence on the day of hearing This view proceeds on the ground that this section confers a substantive right on the accused of which he cannot be deprived merely by reason of the adoption of a particular procedure by the Magistrate² See also Note 4 on S 241

4. "Upon the day . . . adjourned"—The section refers to the absence of the complainant on the date fixed for the appearance of the accused or to which the hearing has been adjourned If the Magistrate under a mistake takes up the case on a day to which it was not posted and dismisses the complaint this section does not apply¹ The section applies though the case has been posted only for arguments, because in such a case the

2 (42) 29 AIR 1942 Mad 594 (595) 43 Cri L Jour 760 20t Ind Cas 451 *Arunachala Peddi v Sellamuthu Goundan* (Complaint under S 427, Penal Code—Magistrate without giving reasons ordering petition to be taken on file for offence under S 426 Penal Code and acquitting accused under this section—Held Magistrate acted without jurisdiction)

(41) 28 AIR 1941 Rang 202 (203) 42 Cri L Jour 801 (1941) Rang L R 224 196 Ind Cas 51 L Tin *Maung v The King*

(34) 21 AIR 1934 All 340 (341) 56 All 750 36 Cri L Jour 65 *Swaj Dahi v Emperor*

(1900) 4 Cal W N 26 (27) *Ram Coomar v Ramjee*

(23) 10 AIR 1923 Mad 439 (439 440) 24 Cri L Jour 469 *Venktaraya Aiyer v Sundram Pillai* (But the right of acquittal is not denied to the accused simply because the Magistrate follows a warrant

5 (13) 14 Cri L Jour 404 (404) 20 Ind Cas 278 9 Low Bar Rul 35 *Krishna Perdan v Pasand* (23) 10 AIR 1923 Mad 719 (720) 46 Mad 723 24 Cri L Jour 465, *Ramamma v Gurunatha*

Note 3

1 (40) 27 AIR 1940 Bom 413 (413) 42 Cri L Jour 153 191 Ind Cas 397 (D B) *Kanji Vajpal v Pandurang Keshav* (Order of discharge cannot be construed as discharge in regard to warrant-case and acquittal in regard to summons-case—Fresh complaint in regard to same facts not barred)

aidler v Surdaram

et Surdaram P. 31

Note 4

1. (34) 21 AIR 1934 All 1025 (1026) 36 Cri L Jour 378, *Mahadeo v Emperor*

while the High Courts of Bombay⁶ and Patna⁷ and the Judicial Commissioner's Court of Nagpur⁸ have doubted whether the section applies. If it be held that the section applies to such cases it is open to the Magistrate either to acquit the accused⁹ or to adjourn the case to enable another person to continue the prosecution¹⁰. If it be held that the section does not apply it is conceived that the Magistrate has no power to acquit the accused but must go on with the case¹¹.

7 "The Magistrate shall some other day"—If the complainant does not appear on the day of hearing the accused is entitled to be acquitted¹ unless the Magistrate for some reason thinks it proper to adjourn the case². The Magistrate has no power to dispense with the appearance of the complainant³ or compel him to appear and go on with the case⁴. Where the Magistrate neither acquits the accused nor adjourns the case but goes on with the trial of the case the procedure is entirely illegal⁵. But unless an order of acquittal is actually passed by the Magistrate, the mere absence of the complainant on the day of hearing does not *ipso facto* result in the acquittal of the accused⁶. The exercise of discretion in favour of the complainant once by adjourning the hearing does not deprive the Magistrate of the power of acquitting the accused on the non appearance of the complainant at a subsequent hearing⁷.

The following cases are illustrative of the circumstances under which a Magistrate would be exercising his discretion under the section properly by adjourning the case and

- 6 (26) 13 AIR 1926 Bom 178 (179) 27 Cri L Jour 491 *Mahomed Azam v Emperor*
 7 (16) 3 AIR 1916 Pat 152 (153) 37 Ind Cas 519 (521) 1 Pat L Jour 264 18 Cri L Jour 151 *Jitan Dussadh v Domoo Sahoo*
 [See also (38) 30 AIR 1913 Pat 379 (380) 45 Cri L Jour 331 211 Ind Cas 200 *Panchu Suam v Emperor* (Prosecution for offence under S 323 Penal Code—No abatement by death of complainant)]
 8 (82) 19 AIR 1932 Nag 72 (73) 26 Nag L R 49 33 Cri L Jour 407, *Anand Rao v Gad*
 9 (15) 2 AIR 1915 Cal 708 (709) 16 Cri L Jour 322 *Puran v Dengar*
 10 (16) 3 AIR 1916 Pat 152 (154) 1 Pat L Jour 264 16 Cri L Jour 151 *Jitan v Domoo Sahoo*
 [But see (28) 15 AIR 1928 Mad 167 (168) 29 Cri L Jour 257 51 Mad 339 *In re Appala Naidu* (Magistrate cannot adjourn case)]
 11 (32) 19 AIR 1932 Nag 72 (73) 26 Nag L R 49 33 Cri L Jour 407 *Anand Rao v Gad*
 [See (16) 3 AIR 1916 Pat 152 (154) 16 Cri L Jour 151 1 Pat L Jour 264 *Jitan Dussadh v Domoo Sahoo*]

Note 7

v Laxmi Prasad

- 2 (46) 33 AIR 1946 Oudh 15 (17) 47 Cri L Jour 22 220 Ind Cas 493 *Tej Singh v Kailoo* (Ordinary rule is to acquit estate agent filing complaint on behalf of master and subsequently leaving servant—Master cannot be substituted as complainant)
 (41) 28 AIR 1941 Rang 202 (203) 42 Cri L Jour 801 1941 Rang L R 224 196 Ind Cas 54 *U Tan Maung v The King* (General procedure is to acquit accused but Magistrate has discretion to adjourn in proper cases)
 (40) 27 AIR 1940 Nag 357 (359) 1940 Nag L Jour 399 (401) 41 Cri L Jour 919 *Emperor v Laxmi Prasad*
 (36) 23 AIR 1936 All 658 (659) 37 Cri L Jour 1026 *Parag Lal v Rustam Singh* (Ordinary course is to acquit the accused)
 3 (42) 29 AIR 1942 Pat 46 (47) 43 Cri L Jour 27 196 Ind Cas 548 *Sudhar Kumar Neogi v Emperor*

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giving the complainant a further opportunity instead of acquitting the accused —

- (1) when the complainant is not definitely informed of the place of trial,⁸
 - (2) when the complainant is prevented by heavy floods from appearing,⁹
 - (3) when the case is transferred from the file of one Magistrate to another without notice to the complainant and he is present in the original Court in ignorance of the transfer,¹⁰
 - (4) after repeated unnecessary adjournments and after the accused is put on his defence on a day to which no legal adjournment is made,¹¹
 - (5) when the adjournment is not made in the presence and hearing of the parties,¹²
 - (6) when all the evidence for the complainant is taken and he is not specially directed to appear¹³
 - (7) when the case is adjourned several times to suit the convenience of the Court and the complainant is only temporarily absent for a short time on the day the accused is acquitted,¹⁴
 - (8) when the complainant is prevented by illness from appearing¹⁵
- See also the undermentioned case¹⁶

The following cases show under what circumstances the Magistrate would be exercising his discretion under the section properly if he acquits the accused instead of adjourning the case —

- (1) where the complainant has gone abroad and will not be available for some considerable time,¹⁷
- (2) where the accused is charged for repairing a public road without permission when the repair is admittedly for the public good¹⁸

The section only contemplates an order of *acquittal* or of adjournment. An order striking off a case or dismissing a complaint is not within the terms of the section. But such an order if passed in the circumstances mentioned in the section will amount to an order of *acquittal*.¹⁹

is taken in the presence of the accused and the case is postponed for evidence of defence witnesses, the

¹⁸ (67) 7 Buth W R Cr 31 (3rd) *Queen v Bholanath Banerjee*

v Emperor

Magistrate

[But see (68) 8 Cr L Jour 139 (140) 10 Bom L R 678 *In re S E Dubash* (Upon failure of complainant to appear Magistrate recording order Struck off s 247 —Held that words " struck off " were not same as acquitted — Hence there was no order of *acquittal*.)]

Where a case is *adjourned* the fact that the Magistrate examined some witnesses on that day does not vitiate the proceedings⁹⁰

8 Whether acquittal under this section bars fresh trial under section 403.—See Notes on Section 403

9. Complaints by public servants — Proviso — The section does not, by virtue of the proviso, apply to cases where the complainant is a public servant and the Court deems it fit to dispense with his personal attendance¹

10 Review — See Section 369 and Notes thereon

11. Power to restore a case in which accused has been acquitted under this section — See Notes on Section 369

12. Revision. — The High Court can interfere in revision with an order of acquittal under this section¹ But it cannot convert the order of acquittal into one of conviction, it can only direct the case to proceed according to law.² It will, however, very rarely interfere and set aside an acquittal especially when there is no error of law on the face of the record³ See also Note 12 on Section 439

As to the power to order further enquiry into a case, disposed of under this section, see Notes on Section 436

248.* If a complainant, at any time before a final order is passed

Withdrawal of in any case under this Chapter, satisfies the Magistrate that complaint there are sufficient grounds for permitting him to withdraw his complaint the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

Synopsis

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|--|---|
| 1. Legislative changes | 7 "Satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint" |
| 2 Scope of the section | 8 "Shall thereupon acquit the accused" |
| 3 Withdrawal of complaint and compounding of offences—Difference between | 9 Withdrawal of complaint against one of several accused—Effect |
| 4 "Complaint" | 10 Power to order further inquiry |
| 5 "At any time before a final order is passed" | 11 Re-trial of accused, whether barred |
| 6 "In any case under this Chapter" | |

* 1882 S 248, 1872 S 210, 1861 S 271

20 (20) 7 AIR 1920 Cal 68 (69) 21 Cr L Jour 252, *Amir Misa v Sarafdi Hasi*
Note 9

1 (36) 23 AIR 1936 All 658 (659) 37 Cr L Jour 1093, *Pirag Lal v Rustam Singh*

(30) 17 AIR 1930 Nag 33 (34) 25 Nag L R 194 31 Cr L Jour 382, *Nanha v Municipal Committee, Jubbulpore*

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Note 12

- 1 (39) 26 AIR 1939 Sind 75 (75, 76) 11R (1939) Kar 335 40 Cr L Jour 524, *Mt Sona v Kishnomal*
(38) 20 AIR 1938 Lah 121 (122) 39 Cr L Jour 293, *Md Hayat v Daulat Khan*
(36) 23 AIR 1936 All 658 (659) 37 Cr L Jour 1028, *Pirag Lal v Rustam Singh*

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NOTE to the Synop: See the Notes indicated for the following topics:

Applicability only to summons cases See Note 6

Cases on complaint by Courts See Note 7

Consent of accused See Note 3

Consent of public servants See Note 4

Inapplicability before issue of process against

accused See Note 5

Magistrate and police See Notes 4 and 7

Withdrawal operates as acquittal See Notes 3 and 8

Withdrawal of warrant cases See Note 6

Withdrawal with Magistrate's permission See Notes 3 and 7

1. **Legislative changes.** — The clause at the end of the section "and shall thereupon acquit the accused" was substituted in the Code of 1882 for the words "a complaint withdrawn under this section shall not again be entertained" which occurred in the corresponding sections of the Codes of 1861 and 1872

2. **Scope of the section.** — This section provides that under the circumstances specified therein a complaint may be *withdrawn* with the permission of the Court and that upon such withdrawal the accused must be acquitted. The section, however, applies only to summons cases. (See Note 6) An analogous provision is made in § 491 for the withdrawal of prosecution by the *Public Prosecutor* with the permission of the Court. That section applies to *all* offences and is not confined like the present one to summons cases. Section 315 provides for the *compounding* of offences. As to differences between withdrawal of complaint under this section and compounding of an offence under § 315, see Note 3

Section 537 of the Calcutta Municipal Act, 1923, which authorises the Corporation of Calcutta to withdraw legal proceedings, must be read subject to the provisions of this section and unless the Magistrate is satisfied that there are sufficient grounds for permitting a complaint to be withdrawn, the Corporation cannot withdraw a criminal complaint¹

As to *abandonment* of criminal proceedings, see the undermentioned cases²

See also Notes on Sections 491 and 333

3. **Withdrawal of complaint and compounding of offences—Difference between.**

1. "Compounding" implies the *consent of the accused*, whereas such consent is not necessary for the withdrawal of a complaint under this section¹

2. The right to withdraw a complaint under this section applies only to offences triable as *summons cases* (see Note 6). But the right to compound an offence under § 315 applies both to summons as well as to warrant cases provided they relate to the offence specified in that section

3. Under this section a complaint can be withdrawn in respect of *all* offences which are triable as summons cases. But under § 315 the right to compound applies only to certain offences specified in that section

4. In the case of withdrawal of complaint under the section, the *permission of the Court* is necessary in all cases. But under § 315 there are several offences which are

Section 248 — Note 2

1931, *Siskar Kumar Mitter v. Corpo-*

Lal Guha v. Corporation of Calcutta

(Calcutta Municipal Act, 1899, ss 230 and 313 — Prosecution under § 575 kept pending for nearly three years for negotiation with Corporation—Prosecution revived and daily fine for some period during pendency imposed — Fine held invalid)

(23) 10 AIR 1923 Cal 725 (727) 25 Cri L Jour 492, *Shermull v. Corporation of Calcutta* (Interval of three years between filing of complaint and trial—Procedure held defective though not illegal—AIR, 1920 Cal 315, 21 Cri L Jour 558, distinguished)

Note 3

compoundable without the permission of the Court and such permission is necessary only with reference to *certain* offences

5 The withdrawal of a complaint under this section does not by itself result in the acquittal of the accused, unless the Court passes an order acquitting the accused. But the compounding of an offence under S 345 by itself results in the acquittal of the accused

See also Section 315, Note 3

4. "Complaint" — Under this section, a complaint can be withdrawn with the permission of the Court, by a *complainant*. Thus, where the sanction of a certain public servant is necessary for the criminal proceedings in question and a complaint is filed with the sanction of such public servant, the complaint can be withdrawn by the *person filing* it and the sanction of the public servant is not necessary for such withdrawal¹

But, the power to withdraw is *confined* to the complainant. Thus, where a complaint with reference to an offence under the Municipal law is filed by the Municipal Secretary, the complaint cannot be withdrawn by the Municipal Council². Moreover, the term "complainant" is used in the restricted sense of a person who files a "complaint" as defined by S 4 (1) (b). Hence, the term does not apply to a person who sets the police in motion by making a complaint to them. Therefore, where a person makes a complaint to the police and the police make a report to the Magistrate who takes cognizance of the offence on such report, he cannot act under this section and acquit the accused on the application for "withdrawal" by the person who made the complaint to the police³.

5. "At any time before a final order is passed" — A complaint can be withdrawn under this section at any time¹ before a final order is passed in the case. But this does not mean that a complaint can be withdrawn and the accused can be *acquitted*, so as to bar a re trial of the accused under S. 403, even before any process is issued against the accused².

6. "In any case under this Chapter." — This section applies only to offences triable as summons cases and does not apply to offences triable as warrant cases. In warrant cases there is no provision in the Code which provides for the termination of the proceedings on the complainant offering to withdraw his complaint¹. An offence under

Note 4

1. (71) 1871 Rat 45 (45), *Reg v Jeejibhai Nathu* (Offences under S 188, Penal Code)

[But see (1878) 2 Bom 653 (653, 654), *In re Musa Ali Adam* (Complaint can be withdrawn only by

Nakara Dass
v Elias Aza
ce of case upon complaint

(Ss 143, 501, Penal Code)

Note 5

- 1 (33) 20 AIR 1933 Lah 884 (885) 35 Cri L Jour 86 *Mehr Singh v Emperor*

- 2 (13) 14 Cri L Jour 559 (561, 562) 38 Mad 315 21 Ind Cas 159, *In re Muthia Moopan*

Note 6

- 1 (69) 1869 Rat 23 (24), *Reg v Jagjivan* (Section 325, Penal Code)

- (27) 14 AIR 1927 Rang 174 (174, 175) 5 Rang 136 28 Cri L Jour 649, *Maung Thu Daw v U Po Nyun*

v Ranchod Bawla

S 24 of the Cattle trespass Act being triable as a summons case, a complaint of such an offence can be withdrawn under this section²

7. "Satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint"—The withdrawal of a complaint under this section is permissible only if the *Magistrate* is satisfied that there are "sufficient grounds" for permitting such withdrawal¹ But where a complaint of offences under Ss 183 and 185 of the Penal Code is made by a Court and such Court subsequently finds that it made a mistake in filing the complaint and wishes to withdraw it, the Magistrate will scarcely be justified in refusing to allow a withdrawal³

The power to allow a complaint to be withdrawn under this section rests entirely with the Magistrate. The *police* have no power to entertain an application for withdrawal of a complaint³

Under this section it is competent to a Magistrate in a proper case to treat an application to the effect that the offence has been compounded as an application for withdrawal of complaint⁴

8 "Shall thereupon acquit the accused."—Upon the withdrawal of a complaint, the Magistrate has no power to dismiss the case or discharge the accused but must *acquit* the accused¹

9. Withdrawal of complaint against one of several accused.—Effect.—Where there are several accused persons in a case and the complaint is allowed to be withdrawn as against one of the accused, the withdrawal does not enure to the benefit of

[71] 1871 Pan Re No 8 Cr p 9 (10), *Mohun v Gunsham* (Section 498 Penal Code)

[33] 20 AIR 1933 Lah 393 (324) 34 Cr L Jour 718 *Dogar Singh v Budh Singh* (Order allowing proceedings to be dropped though technically incorrect was not interfered with in revision in the particular circumstances of the case)

[09] 10 Cr L Jour 14 (15) 1903 Upp Bur Bul Cr 15 *Nga Maung Gyn v Nga Lu Gale*

[29] 16 AIR 1929 Mad 7 (8), *Narasimhalu Naidu v Naina Pillai* (Withdrawal cannot by itself end the case—The accused can only be discharged by the Magistrate for want of sufficient evidence)

[65] 1888 Rat 391 (392), *Queen Empress v Moti Das* (The order of a Magistrate in a warrant case permitting the withdrawal of a complaint of a non compoundable offence is equivalent to an order of discharge under Section 253)

Also see S 258, Note 3

[But see (87) 1887 Rat 330 (330) *Queen Empress v Vithoba* (Withdrawal from the prosecution may be allowed in a proper case)]

[63] 5 Bom H C B Cr 27 (29), *Reg v Ramlo Jorio* (Trial before Sessions Court for adultery—Sessions Judge discharging accused on husband of woman intimating that he was not willing to proceed further—High Court refused to interfere)]

2 (19) 6 AIR 1919 All 31 (31) 42 All 202 21 Cr L Jour 305 *Emperor v Julua*,

Note 7

1 (26) 13 AIR 1926 Cal 786 (788) 53 Cal 631 27 Cr L Jour 984 *Sisir Kumar v Corporation of Calcutta* (Section 537 Calcutta Municipal Act, 1973 is subject to the provisions of S 249, Criminal Procedure Code)

2 (27) 14 AIR 1927 Oudh 51 (51) 2 Luck 395 27 Cr L Jour 1217 *King Emperor v Ram Nath Buz Singh*

3 (75) 1875 Rat 91 (91) *Surat District Magistrate's Letter No 306*

Also see S 169 Note 6 and S 170, Note 4

4 (19) 6 AIR 1919 All 31 (31) 42 All 202 21 Cr L Jour 305, *Emperor v Julua*

Note 8

1 (24) 11 AIR 1921 Lah 595 (596) 5 Lah 239 25 Cr L Jour 679, *Anantia v Emperor* (Per Harrison, J)

[01] 25 Bom 492 (428) 2 Bom L R 1095, *Queen Empress v Hussein Haji* (Offence under S. 4, Bombay Gambling Act 1887—Prosecution against two accused withdrawn under S 491 Cr P C.—Mistaken order of discharge held to be one of acquittal and mistake held covered by S 537, Cr P C.)

the other accused and they are not entitled to acquittal under this section.¹

10 Power to order further inquiry. — As to the power to order further inquiry into the case of an accused person acquitted under this section see S 436 and Notes thereon

11. Re trial of accused, whether barred — As to whether a fresh trial of an accused acquitted under this section is barred under S 403, see Notes on that section

249. In any case instituted otherwise than upon complaint, a Power to stop proceedings when no complainant Presidency Magistrate, a Magistrate of the first class, or with the previous sanction of the District Magistrate, any other Magistrate, may for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused.

1 "In any case instituted otherwise than upon a complaint" — This section applies only to cases instituted *otherwise* than upon a complaint¹ Further, a Magistrate can proceed under this section only in summons cases² If he proceeds under this section in a warrant case his order will be void and the case will be deemed to continue on the file of the Court³

2 Revival — On general principles the Magistrate who passed an order of stay under this section may, for sufficient reasons remove the stay and proceed further¹ But an order stopping further proceedings under this section does not operate as an order of discharge and there is no power under S 436 to order further inquiry into a case in which such an order has been passed² At the same time the order is expressly excluded by the explanation to S 403 from being an acquittal and hence it does not act as a bar to fresh proceedings against the accused with reference to the same matter³

* Code of 1882 — S 249 was newly added in 1882 and was same as that of 1898 Code

Note 9

1 (10) 27 AIR 1910 Mad 693 (694) 41 Cri L Jour 454 *South Indian General Insurance Co, Ltd v Registrar of Life Insurance Companies, Madras*

(AIR 1911

ror (Per La

Re-signal J Harrison J contra)

Section 249 — Note 1

1 (10) 7 AIR 1910 Pat 469 (469 470) 21 Cri L Jour 181 *Nathu Thakur v Emperor* (Case started on police report—Section applies)

(10) 13 Cri L Jour 860 (861) 1913 Pan Re No 9 Cr 17 Ind Cas 796 *Achhru v Emperor*

2 (26) 13 AIR 1926 Pat 292 (293) 5 Pat 243 • 27 Cri L Jour 693 *Firangi Singh v Durga Singh*

3 (26) 13 AIR 1926 Pat 292 (294 295) 5 Pat 243 27 Cri L Jour 693 *Firangi Singh v Durga Singh*

Note 2

1 (10) 29 Mad 126 (142 146) 3 Cri L Jour 274 16 Mad Low Jour 79 (TD) *In re Chinna Kaliappa Goundan*

2 (12) 13 Cri L Jour 860 (861) 17 Ind Cas 796 1913 Pan Re No 9 Cr, *Achhru v Emperor*

(34) 21 AIR 1934 All 17 (19) 35 Cri L Jour 561 *Emperor v. Sriyal*

Also see S 436 Note 10

3 (10) 13 Cri L Jour 860 (861) 17 Ind Cas 796 1913 Pan Re No 9 Cr *Achhru v Emperor*

Frivolous Accusations in Summons and Warrant Cases.

250. (1) If in any case instituted upon complaint or upon information given to a police-officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid

(2) The Magistrate shall record and consider any cause which such complainant or informant may show and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded, direct that compensation to such amount not exceeding one hundred rupees or, if the Magistrate is a Magistrate of the third class, not

* Code of 1898, original S 250

250 (1) If in any case instituted by complaint as defined in this Code or upon information given to a police-officer or to a Magistrate a person is accused before a

or to each of the accused where there are more than one such compensation not exceeding fifty rupees, as the Magistrate thinks fit

Provided that before making any such direction the Magistrate shall —

(a) record and consider any objection which the complainant or informant may urge against the making of the direction and

(b) if the Magistrate directs any compensation to be paid state in writing in his order of discharge or acquittal his reasons for awarding the compensation

(2) Compensation of which a Magistrate has ordered payment under sub-section (1) shall be recoverable as if it were a fine

Provided that if it cannot be recovered the imprisonment to be awarded shall be simple and for such term not exceeding thirty days as the Magistrate directs

(3) A complainant or informant who has been ordered under sub-s (1) by a Magistrate of the second or third class to pay compensation to an accused person may appeal from the order in so far as the order relates to the payment of the compensation as if such complainant or informant had been convicted on a trial held by such Magistrate

(4) Where an order for payment of compensation to an accused person is made in a case which is a subject to appeal under sub-s (3) the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed or if an appeal is presented before the appeal has been decided

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter the Court shall take into account any compensation not paid or recovered under this section

Code of 1882 S 250

250 If in any case instituted upon complaint a Magistrate acquits the accused under S 246 or

frivolous or vexatious S 247 and is of opinion that the complaint was frivolous or vexatious he may in his order of acquittal direct the complainant to pay to the accused or to each of the accused where there are more than one such compensation not exceeding fifty rupees as the Magistrate thinks fit

The sum so awarded shall be recoverable as if it were a fine provided that if it cannot be recovered the imprisonment to be awarded shall be simple and for such term not exceeding thirty days as the Magistrate directs. At the time of awarding compensation in any subsequent civil suit relating to the same matter the Court shall take into account any sum paid or recovered as compensation under this section

the other accused and they are not entitled to acquittal under this section.¹

10 Power to order further inquiry — As to the power to order further inquiry into the case of an accused person acquitted under this section, see S 436 and Notes thereon

11. Re-trial of accused, whether barred — As to whether a fresh trial of an accused acquitted under this section is barred under S 403, see Notes on that section

249. In any case instituted otherwise than upon complaint, a

Power to stop pro
ceedings when no
complainant

Presidency Magistrate, a Magistrate of the first class, or with the previous sanction of the District Magistrate, any other Magistrate, may for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused

1 "In any case instituted otherwise than upon a complaint" — This section applies only to cases instituted *otherwise* than upon a complaint¹ Further a Magistrate can proceed under this section only in summons cases² If he proceeds under this section in a warrant case his order will be void and the case will be deemed to continue on the file of the Court³

2 Revival — On general principles the Magistrate who passed an order of stay under this section may for sufficient reasons remove the stay and proceed further¹ But an order stopping further proceedings under this section does not operate as an order of discharge and there is no power under S 436 to order further inquiry into a case in which such an order has been passed² At the same time the order is expressly excluded by the explanation to S. 403 from being an acquittal and hence it does not act as a bar to fresh proceedings against the accused with reference to the same matter³

* Code of 1882 — S 249 was newly added in 1882 and was same as that of 1893 Code

Note 9

- 1 (40) 27 AIR 1940 Mad 623 (624) 41 Cri L Jour 451 *South Indian General Insurance Co., Ltd v Registrar of Life Insurance Companies Madras*
 (22) 9 AIR 1927 Oudh 140 (146) 23 Cri L Jour 271, *Roht Singh v Mahbubul Kaimur* (AIR 1911 All 35 22 Cri L Jour 668 followed 7 Cal W N 176 distinguished)
 (24) 11 AIR 1924 Lah 590 (599) 5 Lah 239 25 Cri L Jour 679 *Anantia v Emperor* (Per Lord Russell J Harrison J contra)

Section 249 — Note 1

- 1 (20) 7 AIR 1900 Pat 469 (469 470) 21 Cri L Jour 181 *Nathu Thakur v Emperor* (Case started on police-report—Section applies)
 (12) 13 Cri L Jour 860 (861) 1913 1 Pun Re No 9 Cr 17 Ind Cas 796 *Achhru v Emperor*
 2 (26) 13 AIR 1906 Pat 297 (293) 5 Pat 243 27 Cri L Jour 698 *Pirang Singh v Durga Singh*
 3 (76) 13 AIR 1906 Pat 297 (291 295) 5 Pat 243 27 Cri L Jour 698 *Pirang Singh v Durga Singh*

Note 2

- 1 (06) 29 Mad 126 (142 146) 3 Cri L Jour 274 16 Mad Low Jour 79 (FD) *In re Chinna Kaliappa Gounda*
 2 (19) 13 Cri L Jour 860 (861) 17 Ind Cas 796 1913 Pun Re No 9 Cr, *Achhru v Emperor*
 (31) 21 AIR 1934 All 17 (19) 35 Cri L Jour 561 *Emperor v Sripal*
 Also see S 436 Note 10
 3 (12) 13 Cri L Jour 860 (861) 17 Ind Cas 796 1913 Pun Re No 9 Cr *Achhru v Emperor*

Frivolous Accusations in Summons and Warrant Cases.

250. (1) If in any case instituted upon complaint or upon information given to a police-officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid

(2) The Magistrate shall record and consider any cause which such complainant or informant may show and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded, direct that compensation to such amount not exceeding one hundred rupees or, if the Magistrate is a Magistrate of the third class, not

* Code of 1898, original S 250

250 (2) If in any case instituted by complaint as defined in this Code or upon information given to a police-officer or to a Magistrate a person is accused before a Magistrate of any offence triable by a Magistrate and the Magistrate by whom the case is heard discharges or acquits the accused and is satisfied that the accusation against him was frivolous or vexatious the Magistrate may, in his discretion by his order of discharge or acquittal, direct the person upon whose complaint or information the accusation was made to pay to the accused, or to each of the accused where there are more than one such compensation not exceeding fifty rupees, as the Magistrate thinks fit

Provided that before making any such direction the Magistrate shall —

(a) record and consider any objection which the complainant or informant may urge against the making of the direction and

(b) if the Magistrate directs any compensation to be paid state in writing in his order of discharge or acquittal his reasons for awarding the compensation

(2) Compensation of which a Magistrate has ordered payment under sub-section (1) shall be recoverable as if it were a fine

Provided that if it cannot be recovered the imprisonment to be awarded shall be simple, and for such term not exceeding thirty days as the Magistrate directs

(3) A complainant or informant who has been ordered under sub-s (1) by a Magistrate of the second or third class to pay compensation to an accused person may appeal from the order, in so far as the order relates to the payment of the compensation as if such complainant or informant had been convicted on a trial held by such Magistrate

(4) Where an order for payment of compensation to an accused person is made in a case which is a subject to appeal under sub-s (3) the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed or, if an appeal is presented before the appeal has been decided

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter the Court shall take into account any compensation paid or recovered under this section

Code of 1882 S 250

250 If in any case instituted upon complaint a Magistrate acquits the accused under S 213 or S 247, and is of opinion that the complaint was frivolous or vexatious he may, in his discretion by his order of acquittal direct the complainant to pay to the accused, or to each of the accused where there are more than one such compensation not exceeding fifty rupees, as the Magistrate thinks fit

The sum so awarded shall be recoverable as if it were a fine provided that if it cannot be realized the imprisonment to be awarded shall be simple, and for such term not exceeding thirty days, as the Magistrate directs. At the time of awarding compensation in any subsequent civil suit relating to the same matter the Court shall take into account any sum paid or recovered as compensation under this section

exceeding fifty rupees, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.

(2A) The Magistrate may, by the order directing payment of the compensation under sub section (2), further order that, in default of payment, the person ordered to pay such compensation shall suffer simple imprisonment for a period not exceeding thirty days.

(2B) When any person is imprisoned under sub-section (2A), the provisions of sections 68 and 69 of the Indian Penal Code shall, so far as may be, apply

(2C) No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter

(3) A complainant or informant who has been ordered under sub-section (2) by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal from the order, in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate

(4) When an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided and, where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.

a Sub-sections (1) to (2C) were substituted for the original sub-sections (1) and (2) by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1923

Code of 1872 S 209

209 A Magistrate may dismiss the complaint as frivolous or vexatious and may, in his discretion by his order of dismissal, award that the complainant shall pay to the accused person such compensation not exceeding fifty rupees as to such complaints Magistrate seems just and reasonable

In such cases if more persons than one are accused in the complaint the Magistrate may in like manner, award compensation not exceeding fifty rupees to each of them

The sum so awarded shall be recoverable by distress and sale of the moveable property belonging to the complainant which may be found within the jurisdiction of the Magistrate of the District, and such order shall authorize the distress and sale of any moveable

Code of 1872 S 209

2*

Magistrate
amends it
and certifies
reasonable

the sum so awarded shall be recoverable by

1872

Synopsis

- | | |
|---|---|
| <ol style="list-style-type: none"> 1. Legislative changes. 2. Object and applicability of the section 3 "Upon complaint or upon information given to a police-officer or to a Magistrate" 4. "Accused of an offence." 5 "Triable by a Magistrate" 6 Magistrate by whom the case is heard. 7. "Discharges or acquits." 8 False and either frivolous or vexatious. 9 "By his order." 10 "Call upon him to show cause" | <ol style="list-style-type: none"> 11. "Shall record and consider any cause"—Sub-section (2) 12 "For reasons to be recorded" 13 Amount and nature of compensation. 14 Who can be ordered to pay compensation. 15 To whom compensation can be awarded. 16 Imprisonment in default of compensation—Sub-sections (2A) and (2B) 17. No exemption from civil or criminal liability—Sub-section (2C) 18 Abatement 19. Appeal—Sub-section (3). 20 Revision |
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NOTE to the Synopsis. See the Notes indicated for the following topics :

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| <p>Absence of complainant—Procedure See Note 10</p> <p>Acquittal owing to absence of complainant. See Note 7</p> <p>Appellate Court has no power to award compensation. See Note 6</p> <p>Case heard by two Magistrates—Magistrate deciding is to act. See Note 6</p> <p>Cases on police-report—Section inapplicable See Note 3</p> <p>Civil-dispute's Act—Complaint onler See Note 4</p> <p>Charge framed—No lar. See Note 8</p> <p>Compensation not fine, but recoverable as fine See Note 13</p> <p>Complainant—Servant or master See Note 14.</p> <p>Composition. See Note 7.</p> <p>Co-accused convicted—Still compensation awarded See Note 15</p> <p>Death of party pending revision. See Note 18</p> | <p>Dismissal of complaint—Section inapplicable See Note 7</p> <p>General, special or local Acts. See Note 4</p> <p>Guardian of a minor complainant. See Note 14</p> <p>Informant when liable and when not See Notes 3 and 14</p> <p>Magistrate without jurisdiction See Note 5</p> <p>Notice to accused—In appeal See Note 19</p> <p>Notice to accused—In revision See Note 20</p> <p>Petition under S 438—Section inapplicable See Note 4</p> <p>Security proceedings. See Note 4</p> <p>Several offences—Conviction only for some—Section inapplicable. See Note 7</p> <p>Summary cases See Notes 2 and 12</p> <p>Summons and warrant-cases See Note 2</p> <p>Village Magistrate See Note 3.</p> <p>Withdrawal. See Note 7</p> |
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1. Legislative changes.

Changes made in 1860—

- (1) Under s 270 of the Code of 1861, the compensation awarded could not exceed rupees fifty, whether there were one accused person or more¹ Act 8 [VIII] of 1870 amended the section and made rupees fifty awardable as compensation for each of the accused where there were more than one²
- (2) The words "false and frivolous" were changed into "false or frivolous"³

Changes made in 1872—

The second part of s 270 of the 1861 Code relating to the mode of recovery of compensation was omitted in s 203 of the Code of 1872, provision having been made therefor in s 307 of the latter Code

Changes made in 1882—

- (1) For the words "dismiss the complaint as frivolous or vexatious" and "by his order of dismissal," the words "acquits the accused under s 215 or s 217" and "is of opinion that the complaint was frivolous or vexatious" and "by his order of acquittal" were substituted.

Section 250—Note 1

1 (87) 8 Suth W R Cr 51 (55), *Queen v. Laloo Singh*.

(70) 2 N W P H C R 430 (431) *Queen v. Gopal*.

2. (70) 14 Suth W R Cr 75 (75), *In re Bhagoo Lall*.

3 (03) 30 Cal 123 (132) : 6 Cal W N 793 (FB), *Dent Madhub v. Kumud Kumar*.

- (2) The provisions as to recovery of the sum awarded, as if it were a fine and imprisonment if the same is not realised were introduced as paragraph 2
- (3) Paragraph 3 was added

Changes made in 1891 —

Act 4 [IV] of 1891 repealed s 250 of the Code of 1882 and in its place substituted s 560 at the end of first Code. The chief changes made were in sub s (1) —

- (1) After the word "complaint" the words "or upon information given to a police officer or to a Magistrate, a person is accused before a Magistrate of any offence triable by a Magistrate" were added.
- (2) After the word "Magistrate" the words "by whom the case is heard" were added
- (3) For the words "acquits," etc, the words "discharges or acquits" were substituted
- (4) The provisions as to the recording and considering the objections of the complainant and the recording of reasons for the orders were added.
- (5) Paragraphs 3 and 4 regarding appeals were added

Changes made in 1898 —

There was no change in the Code of 1898

Changes made by Act 18 [XVIII] of 1923 —

- (1) In sub sections (1) and (2)
- (a) For the words "frivolous or vexatious," the words false and either frivolous or vexatious were substituted
- (b) The words beginning with "if the person upon whose complaint" to the end of sub section (1) were new
- (c) The words fifty rupees were replaced by the words "one hundred rupees or if the Magistrate is a Magistrate of the third class not exceeding fifty rupees"
- (2) The proviso to old sub s (2) was incorporated in the newly added sub s (2A) and the old sub section (2) was omitted
- (3) Sub section (2B) is new
- (4) Sub section (2C) is new. The proviso is the same as sub s (5) (now repealed) of the Code of 1898
- (5) In sub s (3) for the word and figure 'sub s (1)' the word and figure "sub s (2)" were substituted and after the words "pay compensation" the words "or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees" were added
- (6) In sub section (4) the last sentence is new

2 Object and applicability of the section — The object of the section is twofold, *firstly*, to award by a summary order some compensation to the person against whom a frivolous or vexatious accusation is brought, leaving it to him to obtain further redress against the complainant, if he seeks for it by a regular civil suit or criminal prosecution,¹ and *secondly*, to deter persons from making vexatious and frivolous complaints.² The powers, however, should never be used as a punitive measure.³

Under the Code as it stood before it was amended in 1891, it was held that this section applied only to summons-cases and not to warrant cases.⁴ For the changes intro-

Mad Haskin

WN 116, *Bundesrat v Emperor*.

4. (41) 1891 All W N 151 (151), *Empress v Angu*.

can be said to be a case of summary trial. The present section is applicable to any case triable by a Magistrate. It is applicable also to cases triable summarily whether tried summarily or not.

3 'Upon complaint or upon information given to a police-officer or to a Magistrate' — In the year 1891 the corresponding section of the old Code only dealt with a case initiated upon a complaint and not to cases initiated on information. After the amendment of that section in 1891 and also under the present Code on a case initiated on information given to a police officer or to a Magistrate is within the section.

- (1) 1881 All W N 161 (114) *Empress v Jollan*
 (2) 1882 All W N 116 (116) *Jugmoan v Sleetalal*
 (3) 1883 All W N 170 (137) *Asanush v Nijju*
 (4) 1884 All W N 45 (47) *In the matter of Harbans* (The mere fact that Magistrate chooses to treat a case as a summary case does not bring it under the provisions of s 250 and compensation, if any, cannot be legally awarded.)
 (5) 1885 All W N 254 (255) *Kalla v Balu (Do)*
 (6) 1886 51 Ind H C R Cr 12 (12) *Jeys v Bimji*
 (7) 1887 51 Ind H C R Cr 12 (12) *Jeys v Gurlingaji*
 (8) 1888 51 Ind H C R Cr 12 (12) *Chidi Chokke v Phortee*
 (9) 1889 51 Ind H C R Cr 6 (7) *Aruruddee Khan v Babu Alan*
 (10) 1890 51 Ind H C R Cr 57 (57) *Queen v Gajul Sen*
 (11) 1891 51 Ind H C R Cr 60 (60) *Queen v Nijmuni*
 (12) 1892 51 Ind H C R Cr 70 (70) *Jalorran v Girdharee Lari*
 (13) 1893 51 Ind H C R Cr 1 (1) *Lateenah v J. J. Jondoe*
 (14) 1894 51 Ind H C R Cr 55 (55) *Jahil Yunishi v Faran Hossein*
 (15) 1895 51 Ind H C R Cr 11 (12) *Jharu v Jhar Ali*
 (16) 1896 51 Ind H C R Cr 12 (12) *Dhurat Doolgo v Hulke Nashyn*
 (17) 1897 51 Ind H C R Cr 40 (40) *Choo so Dham Dharbhoma v Abdul Meah*
 (18) 1898 51 Ind H C R Cr 54 (54) *Queen v Lalloo Singh*
 (19) 1899 51 Ind H C R Cr 1 (1) *Jeys v Houtalar v Asaruddin*
 (20) 1900 51 Ind H C R Cr 6 (7) *Gunamantee v Harce Dutta*
 (21) 1901 51 Ind H C R Cr 59 (59) *Jilam Khan v Durga Singh*
 (22) 1902 51 Ind H C R Cr 12 (12, 14) *Ladhamath v Wooma Churn*

(69 70) 5 Mad H C L App xl (xl)

(71) 6 Mad H C L App xlix (xlix)

[See (68) 10 Ind H C R Cr 49 (49) *Hothoor Laloog v Hindoo Singh*]

[See also (83) 6 Mad 316 (318, 319) *Sonu v Queen* (Complaint and proof in support thereof showing accused to be guilty of offences under s 323 Penal Code — Magistrate issuing summons to answer

(75) 23 Ind H C R Cr 17 (18) *Kali Churn v Shoshke Dhooshun*]

5 (44) 31 AIR 1914 Oudh 272 (272) 45 Cri L Jour 665 20 Luck 48 218 Ind Cas 415 *Mool Chand v Emperor*

(41) 28 AIR 1911 Cal 24 (24) 42 Cri L Jour 423 193 Ind Case 468 *Gokal Chand v Said Ali*

(27) 14 AIR 1927 Oudh 175 (175) 28 Cri L Jour 450 *Pangambar v Emperor*

6 (81) 11 Mad 142 (143) 2 Weir 314, *Queen Empress v Basava*

Note 3

1 (83) 6 All 96 (97) 1893 All W N 224 *Ishri v Bakhshi*

(84) 7 Mad 563 (563, 564) *Queen Empress v Polavarapu*

2 (39) 26 AIR 1930 Oudh 101 (102) *Gajadhar v Emperor*

As has been seen already in S 4 (1) (h), a *police-report* is not a complaint and compensation cannot be awarded in a case instituted on such report.³ The words "information given to a police officer" mean information given and entered in the register of cognizable cases under Section 154 of the Code,⁴ and the words "information given to a Magistrate" refer to such information as falls within S 190 (1), clause (c) of the Code.⁵ A statement by a person to a police officer in the course of a police enquiry is not an "information" given to him and a case instituted on the basis of such statement is not within the section.⁶ But where a person points out two persons to the police as those who assaulted him and the police treats this as first information, the case is one that falls under this section.⁷

The report of a Civil Court Amin to the Civil Court that he has been obstructed in the execution of the process entrusted to him is neither a complaint nor information to a police officer or to a Magistrate, and where the Civil Court directs a prosecution on the basis of such report, the Amin cannot be ordered to pay compensation under this section.⁸ Similarly, where A tells B and B tells C and C tells the police, A cannot be said to give any information to the police and no order can be made against him under this section.⁹ The High Court of Allahabad has, however, held in the undermentioned case¹⁰ that where

(26) 13 AIR 1926 All 165 (166) 27 Cr L Jour 35 *Jairaj Singh v Bansi* (Making a report to the police-officer amounts to giving information to police-officer)

(26) 13 AIR 1926 All 235 (296) 27 Cr L Jour 702, *Faridudin v Emperor*,

(10) 11 Cr L Jour 201 (201, 202) 5 Ind Cas 693 (Cal), *Jogdams Pershad v Mahadeo Kandoo* (Case instituted ultimately upon police-report but originally upon information given to the police-officer falls within S 250)

(25) 12 AIR 1925 Oudh 538 (558) 28 Cr L Jour 527, *Hafiz Khan v Emperor*

3 (40) 27 AIR 1940 Sind 134 (135) 41 Cr L Jour 789 1 L R (1940) Kar 470 (FB) *Md Hashim v. Emperor*

Jurga

v Habib

Sakar Jan Mahommed, (Case instituted upon information

(Do)

police officer acting under the

awarded—Police

(Section 250)

does not apply to case instituted at the instance of the police)

[See (41) 53 Mad L W 63 (64) 1941 Mad W N 61 *Rayudu Bayiah v Jakerayya* (In a case charged by the police after investigation, an order awarding compensation under S 250, Cr P Cod,

Cr L Jour 49, *Wali Mahomed v Emperor*

789 1 L R (1940) Kar 470 (FB), *Md Hashim*

Emperor

6 (20) 7 AIR 1920 Sind 73 (73, 74) 13 Sind L R 166 21 Cr L Jour 49, *Wali Md v. Emperor*

(16) 3 AIR 1916 Pat 211 (211) 1 Pat L R 100 1 Pat L R 100, *Emperor*

7 (20) 7 AIR 1920 Sind 41 *Emperor*

'decree'

D), Md
into a

A tells B about C with a view to securing the punishment of C and B informs the Magistrate. A can be ordered to pay compensation. It is submitted that this view is not correct. Where, however, the information is given by A to a person whose duty it is to report the same to the police or the Magistrate (as in case coming under s. 43 of the Code), the latter only acts as a channel for conveying the information given by A who can, therefore, be ordered to pay compensation."

An application under § 476 of this Code is not a complaint. It is merely an application that a complaint be made. This section has, therefore, no application to such a case.¹²

4 "Accused of an offence." — The section by its terms applies only where in pursuance of a complaint or information a person is accused before a Magistrate of an offence. It does not therefore, apply to the following cases where there is no accusation of any offence as defined in S. 4 (1) (c) of the Code.

- (1) Security proceedings under s. 107¹ and s. 110²
 (2) Application for maintenance under s. 458³
 (3) Complaints under s. 1 of the Workman's Breach of Contract Act, 19 (VIII)
 of 1859⁴
 (4) Complaint under s. 25 of the Bombay Police Conveyance Act⁵
 (5) Complaint under s. 41 of the Bombay District Police Act⁶

11 (24) 11 AIR 1924 Mad 81 (22) 21 Cr L Jour 717, *Kalyaperumal Naidu v. Datay Sahib*
 (14) 1 AIR 1914 Mad 671 (63) 32 Mad 1006 15 Cr L Jour 431, *Nachimuthu v. Muthusami*
 (17) 4 AIR 1917 Mad 660 (66) 18 Cr L Jour 11 (12, 13), *Marganahaya Chetty v. G. Nadiabba*
 (17) 4 AIR 1917 Mad 867 (96) 17 Cr L Jour 503 (503), *Thomakadarath Awalla v. Amman Mannil*
Kanniah

(15) 2 APR 1915 Mad 1070 (1070)

(12) 13 C₇₁ L Jour 22 (23, 30)

Magistrate is bound to report offence to police)

[But see (91) 25 Mad 607 (604, 603) 2 Weir 318, *King Emperor v Thammana Reddy*. (A made complaint to village Magistrate who sent a report to police who submitted charge-sheet — Accused discharged and A ordered to pay compensation — Held, village Magistrate not being Magistrate within S 250, A could not be ordered to pay compensation)]

12 (43) 30 AIR 1913 Lah 26 (27) 43 Cri L Jour 901 202 Ind Cas 721, *Abdul Hamid v. Ahmad Shah*

Note 4

1 (10) 11 Cr L Jour 446 (446) 7 Ind Cas 290 (All), *Ram Sukh Rai v Mahadeo Rai*
(14) 1 All; 1914 All 370 (370, 371) : 36 All 392. 15 Cr L Jour 578, *Bundhachal Prasad Rai v Lakshmi Bai*

ଅର୍ଥ ଚିନ୍ତା.

Answer: 11.25, 1000000

2 (93) 15 All 365 (366, 367) 1893 All W N 114, *Queen Empress v Lalhpari*.

(70) 2 N W P H C R 447 (448), *Queen v. Balkishan*

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• **Prevalence** = the proportion of a population that has a disease at a particular point in time

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1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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6 (13) 14 Cr I

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i. v. Muhammad

Mitha.

6 (13) 14 Cr L Jour 320 (320) 6 Sund L R 254 19 Ind Cas 1008, *Imperator v. Mt Khairi*.

The section applies to a complaint under s 20 of the Cattle trespass Act, as it has specifically been introduced in the Code of 1898 as an offence under the Code. Therefore, the undermentioned rulings,⁷ holding that compensation could not be awarded in such cases, are no longer law.

It was held in a decision under the Code of 1861 that the provisions of this section were inapplicable to a complaint under a special law⁸ and in another that it would be applicable⁹. Under the present section it is applicable to a case of any offence, as for example, under the Railways Act, 18 [XVIII] of 1851¹⁰.

5. "Triable by a Magistrate."—The offence must be one which is triable by a Magistrate,¹ that is, one which is shown as triable by a Magistrate in column 8 of Sch II². Thus, the section does not apply to cases where the offence is triable exclusively by the Court of Session but is enquired into by the Magistrate under Chapter XVIII of the Code³ or is even tried by him under the special powers under s 80 of the Code⁴.

7 ('96) 18 All 353 (353) 1896 All W N 98, *Meghas v Sheobhul*.

(86) 13 Cal 304 (305), *Kalachand v Gudhadhar Bismas* (9 Mad 102, followed)

(86) 9 Mad 102 (102) 2 Weir 315, *Pitch v Anhappa*

(86) 9 Mad 374 (375) 2 Weir 315, *Kottalanada v Muthaya*

Also see S 4 (1) (b) Note 11 and S 4 (1) (c), Note 5

8 (70) 14 Suth W R Cr 86 (89) *Queen v Abdul Azeez Khan* (Case under Act 7 [VII] of 1864)

9 (72) 1872 Pun Re No 1 Cr, p 1(1) *Alla Ditta v Shere Mahomed* (Case under Cattle Trespass Act)

10 (72) 4 Nag W P H C R 34 (98, 97) *Queen v Turner*

Note 5

1 (27) 14 AIR 1927 Oudh 175 (175) 28 Cr L Jour 450, *Paigambar v Emperor*

(27) 14 AIR 1927 All 744 (744) 28 Cr L Jour 983, *Bansidhar v Churni Lal* (Offence was triable by a Court of Session)

(22) 9 AIR 1922 All 188 (188) 23 Cr L Jour 319, *Sarup Sonar v Ram Sundar* (Do)

(16) 8 AIR 1916 Bom 96 (96) 18 Cr L Jour 463 *Emperor v Chhaba Dolsing* (Do)

(86) 2 Weir 315 (316), *In re Poligadu* (Do)

[See (10) 11 Cr L Jour 396 (396) 6 Ind Cas 735 (Lab) *Ramjan v Rajan* (Magistrate empowered under s 80 passing order under s 250 in a case triable by a Court of Session, as an Additional Sessions Judge—Order held wrong)]

2 (30) 17 AIR 1930 Lah 482 (483) 11 Lah 558 31 Cr L Jour 1133, *Amun Lal v Emperor*

3 (37) 1937 Mad W N 96 (96) *Shama Rao v Emperor* (Complaint under ss 395, 342 and 357, Code of Criminal Procedure, 1932)

(21) 14 AIR 1924 All 144 (144) 28 Cr L Jour 983, *Bansidhar v Churni Lal*

(31) 18 AIR 1931 All 355 (355) 53 All 461 32 Cr L Jour 670 *Shiam Lal v Nand Rao*

(98)

(16) " " " " " "

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(30) " " " " " "

(86) " " " " " "

(09) 9 Cr L Jour 502 (502) 2 Ind Cas 159 (Mad) *In re Kesara Panda*

(93 1900) 1693 1900 Low Bur Rul 443 (443) *Ma Pua Yon v Maung Po Mya* (Offence under s 366 Penal Code not triable by a Magistrate—This section is not applicable)

4 (19) 6 AIR 1919 Lah 192 (193) 1919 Inn Re No 1 Cr 20 Cr L Jour 141, *Mahomed Hayat v Dhola*

(02) 1902 Pun Re No 26 Cr, p 74 (75) 1902 Pun L R No 139 *Crown v Qudu*

(19) 6 AIR 1910 Lah 227 (227) 1910 Pun Re No 15 Cr 20 Cr L Jour 495 *Shankar Sahai v Emperor*

(23) 10 All 1923 Illeg 15 (15) 11 Low Bur Rul 151 23 Cr L Jour 284, *Ma E Dok v Maung Po Than*

(30) 17 AIR 1930 Lah 482 (483) 11 Lah 558 31 Cr L Jour 1133, *Amun Lal v Emperor*.

Also see S 30 Note 3

[But see (41) 28 AIR 1911 Lah 19 (21 22) 42 Cr L Jour 268 1897-1898 Ind Cas 1000 *Prasanna v*

When a complaint is made of offences some of which are triable by the Magistrate and some by the Sessions Court and the accused is discharged in respect of all the offences, an order for compensation can be passed under this section only in respect of the offences triable by the Magistrate and not in respect of the other offences also.⁶

In filing a complaint the complainant must, for the purposes of this section, be content to state an accusation which relates not merely the offence charged therein but also any offence which the fact in the complaint disclose in the light of any enquiry or trial. The mere fact that the complaint charges the accused with an offence which is not triable by a Magistrate does not oust the jurisdiction of the Magistrate to pass an order under this section if after enquiry the Magistrate finds that the accusation is really one in respect of an offence triable by him. But it is not incumbent upon a Magistrate to find whether a case is triable by a Court of Session or by himself and if he tries an accused for an offence *prima facie* triable by him an order under this section is not illegal even if really the facts prove the offence to be one triable by a Court of Session.⁷ The question, therefore, whether an offence is triable by a Magistrate is not to be decided solely by the complaint. The proper criterion is the form of the proceedings, i.e. whether they were conducted under Chapter VIII or Chapter XI.⁸

Where a particular Magistrate, however, has no power to try a case even though it is triable by a Magistrate, he cannot award compensation as he has not the power to try the case itself.⁹

6 Magistrate by whom the case is heard. — It is only the Magistrate by whom the case is heard that can pass an order under this section.¹ It is not the intention of the Legislature that one Magistrate should deal with the case and call upon the complainant to show cause and that another Magistrate should pass an order for compensation.² Thus,

5 (44) 31 AIR 1944 Oudh 272 (272) 43 Cr L Jour 665 20 Luel 48 213 Ind Civ 115, *Moolchand v Emperor* (AIR 1930 Lah 482 11 Lah 559 31 Cr L Jour 1133 followed)

(30) 17 AIR 1930 Lah 482 (483) 11 Lah 558 31 Cr L Jour 1133 *Amin Lal v Emperor*

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6 (30) 17 AIR 1930 Lah 482 (493) 11 Lah 558 31 Cr L Jour 1133, *Amin Lal v Emperor*

(16) 5 AIR 1918 All 126 (126) 40 All 615 19 Cr L Jour 706, *Hait Ram v Ganga Sahai*

7 (39) 26 AIR 1933 Lah 122 (123) 1LR (1939) Lah 619 40 Cr L Jour 515 *Panda v Mt Gulab Lal Alun*

(21) 8 AIR 1921 Sind 105 (106) 16 Sind L R 205 26 Cr L Jour 265 *Harmandas v Ahmad Khan*

(31) 18 AIR 1931 All 355 (356) 53 All 461 32 Cr L Jour 670 *Shyam Lal v Nand Ram*

8 (29) 9 AIR 1922 Mad 213 (223, 224) 45 Mad 29 23 Cr L Jour 232, *Venkataramay v Venkata rayar*

(30) 17 AIR 1930 All 260 (260) 31 Cr L Jour 563, *Balishen v Emperor*

9 (31) 18 AIR 1931 All 355 (356) 53 All 461 32 Cr L Jour 670, *Shyam Lal v Nand Ram*

10 (09) 9 Cr L Jour 502 (502) 2 Ind Cas 159 (Mad), *In re Kesava Panda*

Note 6

1 (40) 27 A I I 1910 Rang 278 (279) 1910 Rang L R 502 42 Cr L Jour 218 *King v Mg Ahin Maung*

.. . . . Alan Chittan

.. . . .

(26) 13 A I R 1926 Lah 427 (427) 7 Lah 152 27 Cr L Jour 570, *Notified Area, Elarar v. Karta Pam*

2 (39) 26 A I R 1939 Sind 321 (321) 41 Cr L Jour 53 1 L R (1910) Kar 110, *Emperor v. Md Alan*

(29) 16 AIR 1919 Cal 762 (765) 31 Cr L Jour 828 *Najaram Moji v Panchanan Ghosh*

(39) 1892 All W N 59 (58) *In the matter of Mahadeo Tiwari*

It was held in a decision under the Code of 1861 that the provisions of this section were inapplicable to a complaint under a special law⁸ and in another that it would be applicable.⁹ Under the present section it is applicable to a case of *any* offence, as for example, under the Railways Act, 18 [XVIII] of 1854¹⁰

5. "Triable by a Magistrate."—The offence must be one which is triable by a Magistrate,¹ that is, one which is shown as triable by a Magistrate in column 8 of sch. II.² Thus, the section does not apply to cases where the offence is triable exclusively by the Court of Session but is enquired into by the Magistrate under chapter XVIII of the Code³ or is even tried by him under the special powers under s. 30 of the Code.⁴

(86) 9 Nad 102 (102) 2 Weir 315, *Pitchi v Anlappa*

"ahomed (Case under Cattle Trespass Act)

(⁸⁰) 2 Weir 315 (316), *In re Poligadu* (Do)

[See ('10) 11 Cri L Jour 396 (398) 6 Ind Cas 735 (Lab) *Ramjan v Rajan* (Magistrate empowered under S 30 passing order under S 250 in a case triable by a Court of Session, as an Additional Sessions Judge—Order held wrong)]

3 (87) 1937 Mad W N 96 196), *Shama Rao v. Emperor* (Complaint under Ss 895, 342 and 503, Penal Code, Acc. and abet. of S. 489, I, P. O. No. 1138, Amritsar Dist. Magistrate's Court, Amritsar, 1937).

(93 1900) 1893 1900 Low Bur Bal 443 (443) *Ma Pua Yon v Maing Po Mya.* (Offence under S 366, Penal Code, not triable by a Magistrate—This section is not applicable)

4. (19) 6 AIR 1919 Lah 192 (193) : 1919 Pan Re No 1 Cr 20 Cr L Jour 141, *Mahomed Hayat v. Bhola*

Dried

Sahay v Emperor
Dok v Maung Po

(30) 17 AIR 1930 Lah 482 (483) : 11 Lah 558 : 31 Cal L Jour 1193, *Amin Lal v Emperor*.
Also see S. 30, Note 3.

[But see (41) 28 AIR 1941 Lah 19 (21-22); 42 Cr L Jour 266; 192 Ind Cas 905. *Mt Doreph v. Paras Ram*, 1937 PC 1.

(36) 23 AIR 1

passed — Mag. has authority to pass order directing payment of compensation under S 250, although offence is exclusively triable by Sessions Court.)

Where a complaint is made of offences some of which are triable by the Magistrate and some by the Sessions Court and the accused is discharged in respect of all the offences, an order for compensation can be passed under this section only in respect of the offences triable by the Magistrate⁵ and not in respect of the other offences also⁶

In filing a complaint the complainant must, for the purposes of this section, be deemed to make an accusation which includes not merely the offence charged therein but also any offence which the facts in the complaint disclose in the light of any enquiry or trial. The mere fact that the complaint charges the accused with an offence which is not triable by a Magistrate does not oust the jurisdiction of the Magistrate to pass an order under this section if after enquiry the Magistrate finds that the accusation is really one in respect of an offence triable by him.⁷ But it is not incumbent upon a Magistrate to find whether a case is triable by a Court of Session or by himself and if he *tries* an accused for an offence *prima facie* triable by him an order under this section is not illegal even if really the facts prove the offence to be one triable by a Court of Session.⁸ The question therefore whether an offence is triable by a Magistrate is not to be decided solely by the complaint. The proper criterion is the form of the proceedings, i.e., whether they were conducted under Chapter XVIII or Chapter XXI.⁹

Where a particular Magistrate however, has *no power* to try a case even though it is triable by a Magistrate he cannot award compensation as he has not the power to try the case itself.¹⁰

6 Magistrate by whom the case is heard. — It is only the Magistrate by whom the case is heard¹ that can pass an order under this section.¹ It is not the intention of the Legislature that one Magistrate should deal with the case and call upon the complainant to show cause and that another Magistrate should pass an order for compensation.² Thus,

5 (44) 31 AIR 1944 Oudh 272 (272) 45 Cri L Jour 665 20 Luc 48 218 Ind Cas 415, *Moolchand v Emperor* (AIR 1930 Lah 432 11 Lah 558 31 Cri L Jour 1133, followed)

Court of Session — On accused being discharged as to all offences order for compensation cannot be passed.]

Ahlatun

(21) 8 AIR 1921 Sind 105 (106) 16 Sind L R 203 26 Cri L Jour 265 *Hamandas v Ahmad Khan*
 (31) 18 AIR 1931 All 355 (356) 53 All 461 33 Cri L Jour 670 *Shiam Lal v Nand Ram*
 8 (22) 9 AIR 1922 Mad 223 (223, 224) 45 Mad 29 23 Cri L Jour 232, *Venkatarama v Venkata rayar*
 (30) 17 AIR 1930 All 280 (280) 31 Cri L Jour 563 *Balishen v Emperor*
 9 (31) 18 AIR 1931 All 355 (356) 53 All 461 32 Cri L Jour 670 *Shiam Lal v Nand Ram*
 10 (09) 9 Cri L Jour 502 (502) 2 Ind Cas 159 (Mad), *In re Kesava Panda*

Note 6

1 (40) 27 A I R 1940 Rang 278 (279) 1940 Rang L R 502 42 Cri L Jour 218 *King v Mg Khin Maung*
 (39) 26 AIR 1939 Sind 321 (321) 41 Cri L Jour 53 11LR (1910) Kar 119 *Emperor v Md Alan Chittan*

(26) 13 A I R 1926 Lah 427 (427) 7 Lah 152 27 Cri L Jour 570 *Notified Area, Kharar v Karla Ram*

2 (39) 26 A I R 1939 Sind 321 (321) 41 Cri L Jour 53 11LR (1910) Kar 119, *Emperor v. Md Alan*

(39) 16 AIR 1939 Cal 762 (763) 31 Cri L Jour 622 *Pajiram Majhi v Pinc man Gosh*

(42) 189 All W N 56 (56) *In the matter of Mahadeo Taware*

an Appellate Court³ cannot when reversing a conviction act under this section. Even a High Court cannot in revision pass an order for compensation although it is of opinion that such an order should be made⁴ See also Note 39 on S 423

The words the Magistrate by whom the case is heard do not however, mean that the evidence must have been heard by him but mean the Magistrate by whom the case is decided So where *part* of the evidence is heard by one Magistrate and the rest of the evidence is heard and the case is *decided* by another the latter is competent to order compensation under this section⁵ A Magistrate by whom a case is heard need not be the one before whom it was instituted⁶

7 "Discharges or acquits"—Under the Codes of 1861 and 1872 compensation could be awarded only where the complaint was *dismissed* as being frivolous or vexatious. There was a divergence of opinions as to whether it could be awarded in cases of acquittal.¹

The Code of 1882 provided for the award of compensation only in cases where the accused was *acquitted* under S 215 or S 217² An acquittal by reason of *withdrawal* of the complaint was not within the section³

After the amendment in 1891 (see Note 1) the Magistrate can act under this section when he either *discharges or acquits* an accused person⁴ The acquittal may be either one

3 (40) 27 A I R 1940 Rang 278 (279) 1940 Rang L R 502 (506) 42 Cri L Jour 218 *The King v Mg Khin Maung* (Such an order cannot be an order incidental to the order of acquittal under S 423 (1) (d) of the Code)

(06) 3 Cri L Jour 441 (449) 28 All 695 3 All L Jour 389 1906 All W N 145 *Emperor v Chittan*

(24) 11 AIR 1924 All 224 (224) 46 All 80 25 Cri L Jour 987 *Chedi v Ram Lal*

(01) 3 Bom L R 841 (842) *Hari Chand v Fakir Sadruddin*

(11) 12 Cri L Jour 529 (531 532) 12 Ind Cas 297 89 Cal 157 (15) *Mehi Singh v Mangal Khas da* (Overruling 11 Cri L Jour 46)

(26) 13 AIR 1926 Lah 427 (427) 7 Lah 150 27 Cri L Jour 570 *Notified Area Kharar v Karia Fa n*

(74) 8 Mad H C R App vi (vi)

4 (40) 27 A I R 1940 Rang 278 (279) 1940 Rang L R 502 (505 506) 42 Cri L Jour 218 *The King v Mg Khin Maung*

(39) 26 AIR 1939 S nd 821 (329) 41 Cri L Jour 53 11LR (1940) Kar 110 *Emperor v Md Ala*

(29) 15 AIR 1928 All 95 (98) 29 Cri L Jour 274 *Aminullah v Emperor*

Also see S 230 Note 8

5 (44) 31 A I R 1944 Lah 10 (11 12) 45 Cri L Jour 265 210 Ind Cas 401 *Teja Singh v Haran Singh* (Where the District Magistrate transferred a case to himself from the file of a Sub Magistrate and decided the case on the record prepared by the Sub Magistrate after hearing arguments the District Magistrate by reason of

v Mt Gulab

Note 7

v 7 1974 D 82 83 84 D v

withdrawal of complaint — Section does

not apply)

3 (85) 1888 Pun Re No 19 Cr p 35 (36 37) *Empress v Khushal Ram* (Dissenting from 1883 Pun Re No 24 Cr)

(87) 1887 Pun Re No 56 Cr p 151 (151) *Sital Das v Aiol ha*

(84) 1884 Pun Re No 14 Cr p 19 (19) *Ali Ahmed v Nathoo*

(81) 1884 Pun Re No 14(n) Cr p 19 (20) *Gulab v Santram*

[But see (83) 1883 Pun Re No 24 Cr p 57 (57) *Hammat Singh v Bull tawar* (Not approved 3 1889 Pun Re No 19 Cr)]

4 S 250 N 6-7

159 39 Cri L Jour 29 D K Nath v P E

(Do)

under S 245 or S 247 or may be one passed on the withdrawal of the complaint. But the acquittal must be one *made by the Magistrate himself*. The composition of an offence under S 245 has by itself the *effect of an acquittal* but there is no order by the Magistrate himself recording an acquittal. The section is not applicable to such cases and no compensation can be awarded.⁶

Where the accused is neither *discharged* nor *acquitted* this section does not apply and no compensation can be awarded to him.⁷ Thus where a complaint is dismissed under S 203 there is neither a discharge nor an acquittal of the accused as no process is at all issued to the accused consequently no compensation can be awarded under this section.⁷

This section speaks of the case as a whole and contemplates a trial or inquiry ending in an unqualified acquittal or discharge of the accused and the policy of the Legislature is to limit the jurisdiction of the Magistrate under this section to simple cases in which the complainant is found to be wholly in the wrong and the accused is discharged or acquitted altogether. So where an accused is charged with two offences and convicted under one and acquitted under another, this section will not apply.⁸

8 False and either frivolous or vexatious — Before the amendment of 1973 an order under this section could be passed if the case was either frivolous or vexatious.¹ It was not necessary that the charge should be false as well. But it was held in some cases that neither of the two words excluded the element of falsehood in the charge and that a charge which is false must also be vexatious and is not outside the scope of the section.²

5 (10) 11 Cr L Jour 638 (639) 8 Ind Cas 387 1910 Pun Re No 30 Cr *Emperor v Sunder*

(96) 1898 Rat 907 (957) *Queen Empress v Sangappa*

(08) 9 Cr L Jour 186 (187) 10 Bom L R 1008 *In re Harkisan Das Hari Das*

(94) 1891 Rat 700 (700) *Queen Empress v Raoji*

(97) 7 C 1 L R Cr 2 (3) *Illoji v Bhura*

(88) 1888 Pun Re No 19 Cr p 33 (36 37) *Empress v Khushali Ram*

Also see S 340 Note 18

6 (29) 18 AIR 1929 Lah 693 (624) 30 Cr L Jour 851 *Ram Lubhaya v Jagan Nath*

7 (08) 4 Cr L Jour 451 (451) 29 All 137 1906 All W N 306 *Bhagwan v Harmukh*

(97) 1897 Pun Re No 8 Cr p 19 (19 20) *Basia Singh v Kapuri Lal* (It could be gathered from the orders of the Magistrate in this case that he intended to dismiss the complaint under S 203 though there was no such clear order)

(08) 7 Cr L Jour 297 (299) 5 All L Jour 137 1908 All W N 67 *Bhagwan Das v Dikka*

(97) 1897 Pun Re No 14 Cr p 35 (35) *Asam v Mir Abdulla*

(06) 1906 Ind L R No 84 p 254 (255 256) 4 Cr L Jour 36 1906 Pun Re No 6 Cr *Harpal v Manlu*

8 (97) 24 Cal 53 (53) 1 Cal W N 17 *Mukhi Dewa v Jhotu Santra*

(18) 5 A I R 1918 All 109 (109) 40 All 610 19 Cr L Jour 670 *Md Ali Khan v Raja Ra Singh*

(18) 5 AIR 1918 Snd 24 (24) 12 Snd L R 67 20 Cr L Jour 106 *Emperor v Nadar* (Order for compensation on is not just filed merely because the complaint is frivolous as regards one of the heads of charges)

Note 8

1 (83) 2 Weir 319 (370) *In re Mumtazs Mudals*

2 (03) 30 Cal 123 (129) 6 Cal W N 799 (FB) *Bens Madhab Kurmi v Kumsud Kumar Dasgupta* (Over ruling 28 Cal 251)

(04) 1 Cr L Jour 433 (433 434) 1 All L Jour 234 1904 All W N 118 26 All 512 *Emperor v Bindeshri Prasad*

(03) 5 Bom L R 128 (128 129) *Emperor v Bai Asha* (Dissenting from 4 Bom L R 64)

(13) 14 Cr L Jour 75 (75) 37 Bom 376 16 Ind Cas 411 *In re Gopala Bhan Chan Gula v Ismail*

(18) 5 AIR 1918 Low Bur 48 (50) 19 Cr L Jour 170 *Shah Daxwood v Mohomed Ibrahim*

(14) 1 AIR 1914 Upp Bur 29 (30) 2 Upp Bur Bul 31 18 Cr L Jour 90 *Nga Mzo v Nga Kyau*

(20) 7 AIR 1908 Snd 41 (47) 14 Snd L R 168 22 Cr L Jour 120 *Fau Mahomed v Emperor*

Under the present Code the case must be *false* and either frivolous or vexatious⁴ and there must be a definite finding to that effect before an order for compensation can be pressed⁵. The fact that a Magistrate has framed a charge, does not of itself prevent him from holding, after inquiry, that the charge is false and frivolous or vexatious⁵.

As qualifying an accusation the term "frivolous" indicates that the accusation is of a trivial nature⁶ or is "trifling," "silly" or "without due foundation"⁷. The term vexatious implies that the accusation is one that ought not to have been made and is intended to 'harass'⁸ or 'annoy'⁹ the accused. For instance, where a criminal prosecution is launched

[See (69) 11 Suth W R Cr 10 (10), *Ir-ve Mothoor Ghose* (Complainant laying claim to large jammias on chur without possessing documents to prove rights—Order under S 250 — Interference in revision with order refused on ground that complaint was false and vexatious)]

(02) 29 Cal 479 (480), *Kunaharmakar v Prem Nath Dutt* (Where a case is found to be false and vexatious but is essentially one coming under S 211, Penal Code, Magistrate would not be exercising proper discretion in passing an order for compensation under S 250 instead of instituting proceedings under S 211, Penal Code)

(07) 9 Cr L Jour 268 (269) 1 Sind L R 28 (1B) *Crown v Noto* (Overruling 9 Cr L Jour 255 Where a complaint is not only false but also vexatious, Magistrate has discretion to award compensation if in his opinion public policy does not necessitate sanctioning prosecution of complainant under S 211, Penal Code)]

[See also (17) 4 AIR 1917 Pat 594 (595) 18 Cr L Jour 837, *Mangra Kharia v Ram Dhari Singh* (Serious charge cannot by itself be described as frivolous and order of compensation is not justified unless such charge is proved in fact to be false)]

[But see (12) 13 Cr L Jour 247 (248) 14 Ind Cis 599 34 All 354, *Ram Singh v Mathura*

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5 (44) 31 AIR 1944 Lah 10 (12) 45 Cr L Jour 265 210 Ind C 101 *mal v* *arnant Singh*

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(21) 8 AIR 1921 Lah 293 (294) 23 Cr L Jour 1, *Chanan Singh v Emperor*

(17) 4 AIR 1917 Sind 73 (73) 18 Cr L Jour 1005 (1005, 1006) 11 Sind L R 55 *Emperor v. Kouro*
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on mere suspicion¹⁰ or with a view to put pressure on an opponent in a civil suit,¹¹ the Magistrate is justified in acting under this section. Similarly, a false accusation of rape is vexatious to the person accused.¹²

But where the complainant's case is not an improbable one¹³ and he is merely unable to prove his case,¹⁴ or there is nothing to show that it is wilfully false or that there is any perversion or exaggeration of evidence,¹⁵ it is not proper to hold the complaint false and vexatious. Similarly, the fact that the complainant and the accused are on bad terms is not a sufficient ground for holding that the complaint is a false one.¹⁶

9. "By his order"—Before the amendment of 1923, the order to pay compensation was part of the order of discharge or acquittal, that is to say, the order of discharge or acquittal and the order directing compensation had to be made simultaneously. An order for compensation made, after such discharge or acquittal, in a separate proceeding was held to be illegal.¹ This is no longer law as after the amendment it is not necessary

10. ('32) 19 AIR 1932 Bom 177 (178) : 33 Cri L Jour 392, *In re Dandhaji Harjibhai*

11. ('33) 20 AIR 1933 Bom 233 (234) : 31 Cri L Jour 878, *Dakhyabhai v. Tangania*

(26) 13 AIR 1926 Bom 163 (164) : 27 Cri L Jour 418, *Rati Shankar v. Satai Lal* (In this case the complaint was filed in order to force the accused to give up his legal rights without defending them in a civil suit)

12. ('41) 28 AIR 1941 Lah 19 (21) : 42 Cri L Jour 266 : 192 Ind Cas 295, *Mt. Daroph v. Paras Ram*

13. ('05) 3 Cri L Jour 123 (124) : 1905 Pan Re No 57 Cr, *Emperor v. Narpal Rai*

14. ('44) 31 AIR 1944 Oudh 25 (27) : 45 Cri L Jour 137 : 209 Ind Cas 319, *Ras Ahmad v. Emperor*. (When there are cross-cases and the final order in the connected case shows that there is a clear doubt about the facts, an order under S 250, in the other case cannot be upheld. An order under S 250 should only be passed when there is no doubt about the falsity of the complaint)

(21) 8 AIR 1921 Oudh 247 (247, 248) : 24 Oudh Cas 261, *Emperor v. Chinnu*

(34) 21 AIR 1934 Sind 18 (19) : 35 Cri L Jour 1638, *Emperor v. Baloch Daryakhan*

[See ('36) 23 AIR 1936 All 363 (364) : 37 Cri L Jour 421, *Dechan Prasad v. Jhuri* (Unreliable or inconclusive evidence)]

[See also ('26) 27 Cri L Jour 633 (633) : 94 Ind Cas 409 (Lah), *Sannaliya v. Daru* (Some witnesses and zaidars report supporting the complaint without any rebuttal by the accused—Complaint cannot be said to be false and frivolous or vexatious)]

15. ('29) 16 AIR 1926 Rang 14 (14) : 30 Cri L Jour 539, *Ganguli v. Emperor*

[See ('35) 22 AIR 1935 Pesh 178 (179) : 37 Cri L Jour 298, *Gul Din v. Abdul Khalik*. (*Prima facie* case against accused—Mere discrepancy of two of complainant's witnesses does not justify conclusion that case is false)]

[See also ('41) 28 AIR 1941 Mid 681 (685) : 43 Cri L Jour 156 : 197 Ind Cas 333, *Venkayya v. Seethayya* (On a complaint under S 426 and S. 417, Penal Code, in respect of cutting of the leaves of trees, it was found that the accused were entitled to the leaves, the complaint was therefore dismissed and compensation was awarded under S 250, Cr P C—Held that the finding that the accused were entitled to the leaves did not make the complaint false and frivolous or vexatious, and the order of compensation was therefore unsustainable)]

(36) 23 AIR 1936 Lah 702 (703) : 37 Cri L Jour 935, *New Delhi Municipal Committee v. Ram Bai*. (Prosecution lodged carelessly and on inadequate ground, but not grossly careless or vindictive—No case for compensation)]

16. ('33) 25 AIR 1938 Rang 209 (207) : 39 Cri L Jour 704, *Mg Pan v. Mg Mya Din*

Note 9

that the order for compensation should be embodied in the order of discharge. The two orders are made in separate proceedings. It is only the order calling upon the complainant to show cause which is to be contained in the order of discharge or acquittal.³ The actual order for compensation is necessarily a subsequent order.³ But, where the order of compensation is made along with the order of discharge or acquittal, the provision of law is complied with if the order calling upon the complainant to show cause is also made simultaneously with the order of discharge.⁴ The order calling upon the complainant to show cause cannot either precede⁵ or be made after⁶ the order of discharge or acquittal. Although, the order to show cause is not made part of the judgment of discharge or acquittal, if it is passed and signed immediately after the judgment, so that the order can be said to be a continuation of the original proceeding, or part of it, it is not illegal.⁷

Where there are two accused, and one of them is discharged on one day and the other acquitted on a later day, the Magistrate cannot call upon the complainant, in so far as the payment of compensation to the discharged accused is concerned, to show cause on the day of the acquittal of the other accused, as the case against that person is at an end on the date of his discharge and no order to show cause can be made subsequently.⁸ But where the same accused is charged with two offences, and he is discharged on one charge first, and

[See (14) 1 AIR 1914 Cal 548 (549) 15 Cri L Jour 150, *Lalit Mohan v Kunji Behari* (Magistrate by his order of discharge declaring case to be false and vexatious and ordering complainant to pay compensation subject to any cause to be shown by him — On failure to show cause next day, order made absolute — Order held satisfied requirements of S 250)]

[But see (20) 7 AIR 1920 Bom 314 (314, 315) 21 Cri L Jour 371, *In re Nagindas Channuz* (Notice to show cause why order under S 250 should not be made, issued on the same day and practically in same proceedings as order of discharge—Final order for compensation made some days later, below the order of discharge — Held, S 250, cl (b) was sufficiently complied with)

(06) 4 Cri L Jour 423 (424, 425) 8 Bom L R 847, *Emperor v Punamchand* (Do)

(18) 5 AIR 1918 Lah 58 (59) 1917 Pun Re No 31 Cr 19 Cri L Jour 444, *Emperor v Saudagar Ram* (Do)

(14) 1 AIR 1914 Sind 25 (26) 7 Sind L R 123 15 Cri L Jour 508, *Ghanumal v Emperor* (Order for acquittal and compensation need not be pronounced in same breath but must be in same proceedings — Reserving order of compensation for hearing objections is not bad)]

In the following cases it was held that it was a mere irregularity curable by S. 537

(05) 2 Cri L Jour 523 (524) 1905 All W N 214, *Jogal Ashore v Abdul Karim* (Held, under the circumstances of the case that two orders might be recorded as correct —)

(14) 1 AIR 1914 All 86 (88) 36 All

(18) 5 AIR 1918 Cal 436 (436) 18 C

(17) 4 AIR 1917 Mad 628 (629) 17

2 (36) 23 AIR 1936 Sind 240 (242) 38 Cri L Jour 121 39 Sind L R 359, *Talib Delawar v Sajjan Saleh*

[See also (37) 21 AIR 1937 Rang 301 (302) 38 Cri L Jour 999, *Chidambaram v Chand Ali* (No opinion expressed in order of discharge that case was false and frivolous or vexatious — No reasons recorded for ordering compensation — Order is bad)]

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In case of a frivolous or vexatious case is not illegal)]

5 (29) 1929 Mad W N 277 (278, 279), *Ramaswami v Suryanarayana*

6 (33) 20 AIR 1933 Nag 296 (296 297) 13 Nag L R 15 34 Cri L Jour 1163, *Emperor v Panguath Kashi* (No reference in the order of discharge that action is to be taken under S 250 — Magistrate subsequently acting on suggestion of accused and issuing notice to complainant to show cause — Procedure held bad)

7. 1906 All 177 (1906)

acquitted of other charges at a later date, it is not illegal to pass an order to show cause on the later date⁹

10 "Call upon him to show cause" — When a Magistrate discharging or acquitting an accused intends to take action under this section, he has to call upon the complainant forthwith to show cause why he should not pay compensation to the accused or if he is not present direct the issue of a summons to him to appear and show cause¹. An order for compensation made without giving the complainant an opportunity to show cause is illegal and must be set aside². If the complainant is present, he is bound to show cause immediately. He cannot insist upon the grant of an adjournment for the purpose³.

It is only after the examination of all the evidence, which the complainant wants to adduce, that a Magistrate can come to the conclusion that the case is false and frivolous or vexatious and can award compensation to the accused. Though he can discharge the accused at any stage he is not entitled to order compensation without examining all such witnesses,⁴

9 (26) 13 AIR 1926 Bom 163 (164, 165) 27 Cri L Jour 448, *Ravishanker v Satav Lal*
Note 10

1 (38) 25 AIR 1938 Rang 161 (164) 39 Cri L Jour 642, *The King v Mg Thoungh Shwe*
(35) 25 AIR 1938 Rang 247 (248) 39 Cri L Jour 743 1938 Rang L R 163, *Ma E Myaing v The King*
(29) 16 AIR 1929 Bom 287 (288) 30 Cri L Jour 1112, *In re Vali Mahomed*
(33) 20 AIR 1933 All 814 (816) 35 Cri L Jour 175, *M H Faruqi v Municipal Board, Allahabad*
(26) 13 AIR 1926 All 241 (242) 27 Cri L Jour 128, *Kalka v Ranjit Singh*
(29) 16 AIR 1929 Cal 762 (764) 31 Cri L Jour 823, *Rajaram Majhi v Panchanan*
(33) 20 AIR 1933 Sind 226 (226) 27 Sind L R 78 34 Cri L Jour 767, *Emperor v Sarup Singh Phool Singh*

The following cases, decided before the amendment of 1923, holding that the complainant need not be called upon to show cause, are no longer good law

(23) 10 AIR 1923 All 548 (549) 45 All 474 24 Cri L Jour 719, *Pancham v Emperor*
(14) 1 AIR 1914 Cal 548 (549) 15 Cri L Jour 150, *Lalit Mohan v Kunga Behari*
(64) 1884 All W N 115 (115), *In the matter of Musahid Khan*
2 (35) 25 AIR 1938 Rang 247 (249) 39 Cri L Jour 743 1938 Rang L R 163 *Ma E Myaing v The King*
(36) 23 AIR 1936 Lah 702 (703) 37 Cri L Jour 935 *New Delhi Municipal Committee v Pam Bai*
(26) 13 AIR 1926 All 241 (242) 27 Cri L Jour 128, *Kalka v Ranjit Singh*
(19) 6 AIR 1919 All 399 (398) 20 Cri L Jour 774, *Chouthi Ahir v Emperor*
(19) 13 Cri L Jour 268 (269) 14 Ind Cas 652 (All), *Gulzari Lal v Ganga Pam*
(22) 9 AIR 1922 Bom 409 (410) 23 Cri L Jour 574 *In re Mahadev Pamkrishna*
(31) 1893 Rat 634 (634), *Govinda v Keshaw Rao*
(94) 1894 Rat 725 (726) *Queen Empress v Mamik*
(15) 2 AIR 1915 Cal 225 (225) 15 Cri L Jour 707 *Sulan Singh v Mahabir*
(06 07) 11 Cal W N 131 (131), *Selk Jonab Ali v Hiralal Pasban*
(21) 12 Cri L Jour 6 (7) 38 Ind Cas 45 *Mewa Pooni v Sateek Poo*
(23) 10 AIR 1923 Lah 408 (458) 25 Cri L Jour 1312 *Mughla v Mahomed*
(33) 20 AIR 1933 Oudh 37 (38) 34 Cri L Jour 44, *Municipal Board, Lucknow v Abdul*
(20) 7 AIR 1920 Pat 211 (211) 21 Cri L Jour 751 *Alloo Mishra v Naubat Lal*
(09) 10 Cri L Jour 220 (220) 2 Sind L R 4, *Emperor v Achar*
(09) 10 Cri L Jour 279 (230) 2 Sind L R 14 *Emperor v Jettho*
[See also (21) 8 AIR 1921 Mad 597 (597) 44 Mad 51 22 Cri L Jour 161 *Appala Narasayya v Emperor* (Order for compensation made in spite of complainant's request to examine his remaining witnesses is not illegal — But such order should not be made except in exceptional cases)]

Also see Note 11

3 (29) 16 AIR 1929 Bom 287 (288) 30 Cri L Jour 1112 *In re Vali Mahomed*
(26) 13 AIR 1926 Bom 225 (225) 27 Cri L Jour 430, *In re Ishwarlal Manelal*
(14) 1 AIR 1914 All 86 (87) 36 All 132 15 Cri L Jour 193 *Ghurben v Emperor*
(29) 16 AIR 1929 Cal 762 (763) 31 Cri L Jour 825 *Pajaram Majhi v Panchanan Ghose*
4 (25) 15 AIR 1928 Mad 169 (169) 51 Mad 337 29 Cri L Jour 114 *Parti asarat v Naubet v. Krishna Narayan Anjan*

Emperor

— it — Accused acquitted and
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except in very exceptional circumstances⁵ As to the effect of irregularities in the original hearing on the proceedings for compensation, see the undermentioned case⁶

11. "Shall record and consider any cause"—Sub-section (2).—Before making an order for compensation the Magistrate should record and consider any objection the complainant makes or any cause he may show. An order without doing so is illegal and the defect is not cured by s 537¹ Cause may be shown with reference to the evidence already recorded, why complaint should not be held frivolous or vexatious²

It is not necessary that the actual words used by the complainant in explanation should be recorded separately as in the case of an accused under s 342 It is, however, necessary that the Magistrate should at least indicate in his judgment that he asked the requisite questions and he should set out the explanation the complainant gave and say

(82) 1882 All W N 116 (116) *Jugmohan v Sheobahal*

(72) 17 Sath W R Cr 6 (6), *Ram Churan Dey v Sheikh Jannue* (Complaint dismissed for default—Case not heard—There being no judicial decision whether case is false or true compensation cannot be ordered)

(68) 10 Sath W R Cr 61 (61) 2 Beng L R (S N) 15 *Bulash v Mahroo*

(35) 22 AIR 1935 Peab 178 (179) 37 Cri L Jour 298, *Gul Din v Abdul Khalik* (Order for compensation made without going through all the evidence of the complainant though not illegal is highly

It is not necessary that the actual words used by the complainant in explanation should be recorded separately as in the case of an accused under s 342 It is, however, necessary that the Magistrate should at least indicate in his judgment that he asked the requisite questions and he should set out the explanation the complainant gave and say

5 (33) 1933 Mad W N 900 (902), *Maruthathal v Ramaswami Chetty*

(21) 8 AIR 1921 Mad 597 (597) 44 Mad 51 22 Cri L Jour 161, *Appalanarasayya v Emperor*

(23) 10 AIR 1923 Lah 194 (195) 24 Cri L Jour 251 *Deva Singh v Emperor*.

6 (34) 21 AIR 1934 Bom 157 (158) 58 Bom 298 35 Cri L Jour 841 *In re Tippanna Koutja Mannataddar* (Held that failure to record evidence in summary trial did not affect the validity of the proceedings for compensation)

Note 11

1 (1) 1913 120 2 (1) 1913 100 23 C L J 100 24 C L J 100 25 C L J 100 26 C L J 100 27 C L J 100 28 C L J 100 29 C L J 100 30 C L J 100 31 C L J 100 32 C L J 100 33 C L J 100 34 C L J 100 35 C L J 100 36 C L J 100 37 C L J 100 38 C L J 100 39 C L J 100 40 C L J 100 41 C L J 100 42 C L J 100 43 C L J 100 44 C L J 100 45 C L J 100 46 C L J 100 47 C L J 100 48 C L J 100 49 C L J 100 50 C L J 100 51 C L J 100 52 C L J 100 53 C L J 100 54 C L J 100 55 C L J 100 56 C L J 100 57 C L J 100 58 C L J 100 59 C L J 100 60 C L J 100 61 C L J 100 62 C L J 100 63 C L J 100 64 C L J 100 65 C L J 100 66 C L J 100 67 C L J 100 68 C L J 100 69 C L J 100 70 C L J 100 71 C L J 100 72 C L J 100 73 C L J 100 74 C L J 100 75 C L J 100 76 C L J 100 77 C L J 100 78 C L J 100 79 C L J 100 80 C L J 100 81 C L J 100 82 C L J 100 83 C L J 100 84 C L J 100 85 C L J 100 86 C L J 100 87 C L J 100 88 C L J 100 89 C L J 100 90 C L J 100 91 C L J 100 92 C L J 100 93 C L J 100 94 C L J 100 95 C L J 100 96 C L J 100 97 C L J 100 98 C L J 100 99 C L J 100 100 C L J 100

(38) 25 AIR 1938 Rang 247 (248) 39 Cri L Jour 713 1938 Rang L R 163, *Ma D Myaing v Ma King* (If complainant shows cause verbally, what he says should be written down in words used by him)

homed v Yacoub (This is so even in cases

(02) 2 Weir 310 (311), *Narayanasaami v Buker Reddy*

(22) 9 AIR 1922 Pat 157 (158) 23 Cri L Jour 261, *Deo Narain Mahto v Chhattoo Raut*

(06) 5 Cri L Jour 298 (298, 299, 300) 1906 Upp Bul Bul Cr P C 51, *Emperor v Nga Puc*

(14) 1 AIR 1914 Sind 69 (69) 8 Sind L R 25 15 Cri L Jour 666, *Minhomal v Emperor* (Per Hayward, J C "In this case the cause shown P")

(32) 19 AIR 19

[See (81) 3 Do "In this case, *Ramsurung Narayan v Luzman Babaj* (Complainant was not called upon to show c

(09) 10 Cri L Jour 22

(33) 20 AIR 1933 Sin

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nity of being heard)]

Also see Note 11

[But see (95) 2 Weir 711 (711) *Ramudu v Ramayya*]

2 (98) 1898 All W N 198 (199), *Queen Empress v Chiragh Ali*

(11) 1 AIR 1914 All 86 (87) 36 All 132 15 Cri L Jour 193, *Ghurbin v. Emperor* (All evidence tendered by complainant in support of allegations in complaint already taken at trial itself—He cannot be given further opportunity of producing evidence in order to show cause against order of compensation)

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whether he thought the explanation satisfactory, and if so, why. Even in the cases where the complainant says nothing more than that the evidence let in is true, the Magistrate should note in his judgment that the complainant had no explanation to offer.³

12 "For reasons to be recorded" — The Magistrate is bound to record his reasons for making an order for compensation. The record of reasons is almost a condition precedent to the proper exercise of the power.¹ This is so even in summary cases.²

The reasons must go to show why it is that the Magistrate considers the accusation against the accused to be frivolous or vexatious and why, in his opinion, it is a fit case for awarding compensation.³ While Magistrates should be on their guard against frivolous or vexatious complaints they should also at the same time be careful not to deny the protection and redress provided by law against wrong doers.⁴ The policy of the Legislature in requiring reasons to be recorded is to afford an opportunity to an appellate or revising tribunal to consider the sufficiency of the reasons.⁵ The mere statement in the order that in his opinion the evidence is highly unsatisfactory,⁶ or that he finds nothing in the explanation to justify that the complaint was not false and either frivolous or vexatious,⁷ or that no case is made out against the accused and some of the accused were added vexatiously,⁸ is not a good reason for making an order under this section. The reasons must be in addition to and apart from the finding of the Magistrate that the accusation was either frivolous or vexatious,⁹ such as that the object of the complainant was to harass the accused.¹⁰ But it

3 (42) 20 AIR 1942 Mad 241 (241) 43 Cri L Jour 336 198 Ind Cr 259 *Naraburmal Naidu v Mutlu Kalata Mudali*

Note 12

1 (36) 25 AIR 1938 Oudh 99 (99) 39 Cri L Jour 378, *Bhagaudin v Jagdal* (Order for compensation without recording reasons is illegal)

(37) 24 AIR 1937 Oudh 269 (270) 38 Cri L Jour 191 *Krishna Datt v Dharma Datt*

(37) 24 AIR 1937 Rang 801 (802) 38 Cri L Jour 999 *Chidambaram v Oland Ali* (Reasons not recorded before order directing compensation to be paid to accused — Order of compensation is void)

(25) 12 AIR 1925 Mad 1139 (1139 1140) 26 Cri L Jour 1501 *Thadiappan v Veera Perumal Thevan*

(06) 3 Cri L Jour 390 (391) 10 Cal W N 511 *Imjad Ali v Ashraf Ali*

(32) 19 AIR 1932 Sind 156 (156 157) 26 Sind L R 299 33 Cri L Jour 644 *Salih v Emperor*

(33) 20 AIR 1933 Sind 220 (226) 27 Sind L R 78 34 Cri L Jour 787 *Emperor v Sarungany Phoolsing*

(34) 21 AIR 1934 Sind 18 (19) 35 Cri L Jour 1038 *Emperor v Baloch Darya Khan*

[See (14) 1 AIR 1914 All 80 (87) 36 All 132 15 Cri L Jour 193 *Ghurbin v Emperor*

(06) 3 Cri L Jour 123 (124) 1905 Pan Re No Cr 57 *Emperor v Narpat Pat* (Reasons for awarding compensation for making frivolous complaint and the order awarding it must be contained in the order of discharge or acquittal)

4 (1892 96) 1 U P Bur Ral 200 (297) *Queen Empress v Ma Te*

5 (38) 25 AIR 1938 Oudh 99 (99 100) 39 Cri L Jour 378, *Bhagaudin v Jagdal*

(37) 24 AIR 1937 Oudh 269 (270) 38 Cri L Jour 191 *Krishna Datt v Dharma Datt*

(25) 12 AIR 1925 Mad 1139 (1139 1140) 26 Cri L Jour 1501 *Thadiappan v Veera Perumal*

[See (06) 3 Cri L Jour 390 (391) 10 Cal W N 511 *Imjad Ali v Ashraf Ali* (In this case the judgment did not contain statement of the facts nor any criticism of the incidents involved nor any reasons why the case was considered to be frivolous — Hence High Court set aside order to

has been held in some decisions¹¹ that the Magistrate is only bound to give reasons for ordering compensation and not for his finding that the accusation is false and frivolous or vexatious

13. Amount and nature of compensation.—The compensation awarded to each accused should not exceed one hundred rupees. The section does not mean that if there are a number of accused, the total amount awarded to all must not exceed one hundred rupees¹

Money ordered to be paid as compensation under this section is not a *fine*² though it is made recoverable under S 547 as if it were a *fine*³. The sum awarded as compensation is by way of amends or compensation to the accused and should not be credited to the Government⁴. As to the method of recovery of fines, see S 386

The section should not be used as a punitive measure and in awarding compensation the Magistrate should be strictly guided by the loss or inconvenience which the accused has sustained⁵. Any misconduct of the accused may also disentitle him to any compensation⁶

The powers under this section are to be exercised only in fit and proper cases and not indiscriminately in every case in which the accused is discharged⁷

14. Who can be ordered to pay compensation.—Compensation under this section can only be awarded against a person upon whose complaint or information the accusation was made, and not against a person who did not institute the proceedings but was only examined as a witness¹. Where a judicial officer makes a complaint under S 476 acting in his judicial capacity, it is not to be lightly presumed that his conduct is vexatious or frivolous and no compensation should be awarded against him under this section²

Public officers are not exempted from liability under this section when they make a complaint³. A police officer making a report in a non *cognizable* case must be taken to be only making a complaint and is not exempt from liability under the section⁴

11 (36) 23 AIR 1938 Rang 230 (232) 37 Cri L Jour 773 14 Rang 378, *Ma Sin v Mg Maung Lay*
(36) 28 AIR 1938 Sind 240 (242) 33 Cri L Jour 121 30 Sind L R 359, *Talib Delawar v Sajjan Saleh*

Note 13

1 (28) 13 AIR 1926 All 295 (290) 27 Cri L Jour 702, *Fariduddin v Emperor*
2 (703) 28 Mad 127 (129, 130) *In the matter of Byratalu Naidu*

or
250 itself provided

(01) 23 Cal 164 (166), *Lal Mahomed Shailkh v Satconari Biswas* (Do)

4 (66) 1868 Pun Re No 102 Cr, P 101 (101), *Jumna Dass v Pamlu*

v Ranganath Koshi.

6 (01) 1901 Pun L R No 22, P 65 (66) *Crown v Ishar Singh*

R Abrol v S L Sirpaul. (Awarding of

L Jour 614, *Saleh v Emperor*

Note 14

1 (93 1900) 1893 1900 Low Bur Rul 443 (443), *Ma Pua Lon v Maung Po Mya*

2 (71) 15 Suth W R Civ 506 (507)

Emperor

(02) 26 Bom 150 (157, 158) 3 Bom L R 546 (TD), *King Emperor v Sada*

The word "person" includes also a "juristic person" like a corporation. So a municipal committee may be ordered to pay compensation under this section⁵. An *obiter dictum* has been expressed in the undermentioned case⁶ to the effect that there is nothing in the section to make it non applicable to the case of even the Crown.

The question whether a servant is responsible under this section for an information lodged on behalf of his master is one of fact and depends on the question whether the servant is merely the mouth piece of the master or whether he also joins the master in the accusation. In the latter case he is liable⁷.

A guardian or next friend of a minor complainant⁸ or a person who only instigates the giving of false information but who does not *himself* make the complaint or give the information⁹ cannot be ordered to pay compensation.

15 To whom compensation can be awarded.—A complaint may be well-founded as regards some of the accused and yet vexatious and frivolous as regards others. So where a Magistrate discharges one of the accused, and convicts the other accused, he can award compensation to the accused who is discharged¹.

16. Imprisonment in default of compensation.—Sub-sections (2A) and (2B).—Before the amendment in 1923 a Magistrate had no power to order imprisonment in default of payment of compensation *alternatively* in the order for payment of compensation itself. He could order imprisonment only *after the failure* to recover the compensation¹. But now such an order can be made in the order itself.

(12) 13 Cr L Jour 752 (753) 6 Snd L R 62 17 Ind Cas 64, *Imperator v Khushal Das* (Information laid by police officer before Magistrate under S 51 Bombay District Police Act is complaint for the purposes of S 250)

5 (23) 10 AIR 1923 Lah 31 (31) 24 Cr L Jour 463, *Municipal Committee, Lahore v Rattan Chand*

be ordered to pay compensation)

[See also (86) 1886 Rat 309 (309) *Queen Empress v Dhuma* (Executive body cannot authorise a servant to prefer a wrongful complaint and so screen the complainant from legal penalty)]

8 (12) 13 Cr L Jour 136 (137) 13 Ind Cas 824 (Lah) *Ira v Panon*

9 (40) 27 AIR 1940 Sind 134 (136) 41 Cr L Jour 789 1 L R (1910) Kar 470 (TB) *2d Hashin v Emperor* (Section does not apply to punish the real complainant as against the formal complainant)

(18) 5 AIR 1918 Sind 25 (25) 12 Sind L R 76 20 Cr L Jour 100 *Emperor v Sumar*

Note 15

1 (82) 5 Mad 391 (392) 2 Weir 316 *Number v Ambu*

(77) 1877 1 un Re No 15 Cr p 31 (32), *Gohra Shaha v Amira*

Note 16

1 (70) 2 N W P H C R 130 (131) *Queen v Gopal*

(95) 18 All 96 (97) 1895 All W N 241, *Queen Empress v Punna*

(96) 19 All 73 (74) 1896 All W N 180, *Vangli v Manth Chand* (Overruled on another point in 26 All 512)

(92) 1892 Pat 611 (611) *Queen Empress v Hari*

(75) 23 Buth W R Cr 64 (65) *Bisheshwar v Bishuambar* (Compensation awarded — Complainant admitting that he has no goods—Magistrate can proceed to imprison him in civil jail — But warrant of distress cannot be issued simultaneously with order of imprisonment)

(94) 21 Cal 979 (984) *Pamjeetan Kurmi v Durga Charan*

(95) 22 Cal 586 (586) *Shib Nath Chong v Sarat Chunder Sarfar*

30 Cal 123 on another point.)

(44) 1 AIR 1914 Cal 548 (548) 15 Cr L Jour 150 *Lalit Mahan v Kunja Delara*

(18) 5 AIR 1918 Cal 436 (437) 18 Cr L Jour 1011 *Prasanna v Anil Chandra*

The Magistrate has no power to order that the sentence of imprisonment in default shall take effect after a term of civil detention which the complainant was undergoing at the time² The term of thirty days' imprisonment can be imposed in respect of each of several accused in whose favour payment of compensation has been ordered though the aggregate term of imprisonment exceeds thirty days³ Where a portion of the compensation is recovered the person ordered to pay compensation is liable to imprisonment only for a proportionate part of the period of one month mentioned in this section¹ [Sub s (2D)]

17. No exemption from civil or criminal liability—Sub section (2C) — The compensation awarded under this section does not deprive the person compensated of his right to further redress either by a regular civil suit or a criminal prosecution against the person ordered to pay compensation under this section¹

An order for payment of compensation does not debar the Magistrate from directing the prosecution of the complainant under S 476 for an offence under S 211 of the Penal Code² Nor does the starting of the prosecution of the complainant bar an order for compensation under the section³ The question whether a Magistrate is to act under this section or prosecute the complainant under S 211 Penal Code or to do both is in the discretion of the Magistrate himself and depends upon the facts of each particular case If prosecution is necessary on grounds of public policy it would be a wrong exercise of his discretion if he were to act under this section instead of instituting a prosecution If prosecution on the other hand is unnecessary on grounds of public policy an order under

And

- (14) 1 Cr L Jour 76^o (76^o) 17 C P L R 104 *Bhuwa Kurib v Rastogi*
 (20) 7 AIR 1920 Nag 108 (109) 21 Cr L Jour 2^o6 *Bakaji v Muzaid Singh*
 (20) 7 AIR 1920 Pat 211 (211) 21 Cr L Jour 751 *Alloo Misra v Nawbat Lal*
 (97-01) 1 Upp Bur Rul 71 (71) *Queen Express v Nga Mynt*
 (05) 2 Cr L Jour 724 (724 7^o5) 3 Low Bur Rul 3^o *King Emperor v Pan Aung*
 2 (25) 12 AIR 1920 Rang 202 (203) 3 Rang 93 26 Cr L Jour 821 *Emperor v Ma Kha Gji*
 ,
 v *Ma Kha Gji*

Note 17

- 1 (03) 30 Cal 123 (1^o9) 6 Cal W N 799 (FB) *Devi Madhub v Kumud Kumar*
 (70) 2 N W P H C R 58 (58 59) *Adra n v Harbilalub*
 2 (20) 12 AIR 1925 Oudh 508 (558) 26 Cr L Jour 527 *Hafiz Khan v Emperor*
 (98) 21 Mad 237 (239) 2 Weir 312 *Adulka v Alaga*
 (67) 2 Weir 311 (311)
 (70) Weir 3rd Edn 908 (908)
 (17) 4 AIR 1917 S and 19 (20) 18 Cr L Jour 414 (414 415) 10 S and L R 16^o *Alia Bta v Emperor*
 Also see S 476 Note 1
 [But see (90) 2^o Cal 586 (588) *Sitab Nath Chong v Sarat Chunder* (It was never intended that recourse should be had to the provision of S 560 Code of 1882 (corresponding to S 250 in the present Code) in a case in which the trying Magistrate is of opinion that the complainant should be prosecuted

not illegal but
 S 211 Penal

1 *Ichar v Piru Shah* (Magistrate can

this section, instead of a prosecution will not be wrong⁴ The fact that the Magistrate did not desire to act under this section cannot also preclude him from directing the prosecution of the complainant.⁵

The compensation awarded will, of course be considered in passing sentence in the event of a conviction as the result of the prosecution⁶

18. Abatement. — Where the *accused* to whom compensation has been ordered, dies just after the complainant has filed his revision in the High Court no order can be passed on the petition as no notice can be served and no proceedings can be taken against a dead person¹ But where the complainant dies after filing a revision against an order of compensation the application does not abate but can be prosecuted by his legal representative²

19. Appeal.—Sub section (3) — Before the amendment of 1901 no appeal lay against the order for compensation¹ Sub section (3) now provides for an appeal

Before the amendment of 1923, no appeal lay against an order under this section passed by a first class Magistrate² Sub section (3) now provides for such an appeal if the amount awarded exceeds rupees fifty No appeal lies against the order of a single Judge of the High Court in revision from an order under this section³ An appeal lies when the total amount ordered to be paid exceeds rupees fifty even though the amount to be paid to *each* of the accused where there are more than one does not exceed that sum⁴ Where an order for compensation is appealed against the accused should on the principle of *audi alteram partem* receive notice thereof and the Court hearing the appeal would be exercising a proper discretion to give notice to the accused in such cases⁵ See also S 422 An appellate

4 (38) 27 Mad 59 (60 61) 1 Cr L Jour 230 2 Weir 313 *In the matter of Tam, Reddi*
(See (19) 6 AIR 1919 Pat 81 (83) 20 Cr L Jour 226 *Lalji Hari v Emperor* (Order to pay compensation under S 250 passed — Subsequent order calling upon complainant to show cause why prosecution under S 211 Penal Code should not be sanctioned held not justified under the particular circumstances of the case))

5 (11) 12 Cr L Jour 521 (522) 12 Ind Cas 289 (Upp Bur) *Ma Ma v Emperor*

6 (04) 1 Cr L Jour 597 (598) 1904 Pun Re No 6 Cr *Mull v Fatteh Muhammad*

Note 18

1 (93) 1893 Rat 634 (634) *Gorinda v Keshava Rao*

2 (08) 9 Cr L Jour 103 (103 104) 1903 Pun Re No 21 Cr, *Prem Singh v Dola*

Also see S 431 Note 1 and S 439 Note 43

Note 19

Willai

(2) 12 AIR 1925 Bom 129 (129) 49 Bom 410 26 Cr L Jour 180 *Pereira v Darning Pascol*

(28) 15 AIR 1928 Lah 638 (638) 9 Lah 462 29 Cr L Jour 430 *Sarab Dial v Dir Singh*

(26) 13 AIR 1906 1st 70 (70 71) 26 Cr L Jour 1501 *Sobhat Mallah v Emperor*

(26) 13 AIR 1906 2d 70 (70 71) 26 Cr L Jour 1501 *Assanial v Di bar*

(26) 13 AIR 1906 3d 70 (70 71) 26 Cr L Jour 1501 *Kairuddin*

(26) 13 AIR 1906 4th 70 (70 71) 26 Cr L Jour 1501 *Jesa Pam*

(26) 13 AIR 1906 5th 70 (70 71) 26 Cr L Jour 1501 *ibid* (Order by appellate Court

passed without notice to accused is not bad in law — But very often notice in such case is desirable)

(03) 3 Cr L Jour 403 (459) 29 Mad 187 *Emperor v Palanappa Iyengar*

(09) 9 Cr L Jour 10 (150 151) 1 Ind Cas 79 33 Mad 89 *Nagi Peddi v Bassappa* (Notice legally not necessary — High Court will not interfere on the ground of want of notice unless there is some irregularity of the order of lower Court)

(18) 2 AIR 1915 Mad 910 (910 912) 16 Cr L Jour 123 (123 129 130) 35 Mad 1091 *Ben's arama Iygar v Krishna Arava*

(11) 8 AIR 1921 Mad 281 (281) 23 Cr L Jour 583 *Krishna Ene v Narayana Dass* (9 Cr L Jour 150 33 Mad 89 followed)

(11) 13 AIR 1926 Sind 113 (114) 20 Sind 1 1 11 27 Cr L Jour 1501 *Emperor v Ibrahim*

Court can go into all the facts of the case, in order to determine whether the case is false and vexatious⁶ But an appellate Court will not set aside an order for compensation except for very cogent reasons inasmuch as the power to award compensation is discretionary with the Magistrate⁷ As to whether additional evidence can be recorded by the appellate Court in an appeal under this section, see Note 3 on S 423

20. Revision.—The High Court has ample jurisdiction to revise and examine an order under this section, in the exercise of its ordinary revisional powers and under S 435,¹ though it will not interfere when no prejudice is caused²

The High Court can also entertain a revision petition in the first instance, though ordinarily it is the practice not to entertain it without its being presented to the Sessions Judge or the District Magistrate³

An accused person after his acquittal is not an accused within S 439 (2), and hence has no right to be heard in a revision petition against an order for compensation under this section⁴

It has been held that in cross cases while the trying Magistrate should, so far as is possible, keep the evidence produced in each case distinct in his mind, a revisional Court with both cases before it need not confine them in water tight compartments when considering whether an order under this section should or should not be upheld⁵

CHAPTER XXI

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES.

Procedure in
warrant cases **251.*** The following procedure shall be observed by
Magistrates in the trial of warrant-cases.

Synopsis

- | | | |
|--|--------------------------------|--|
| 1. "Trial," meaning of | See Notes on Section 4 (1) (k) | 4 Change of procedure subsequent to commencement of trial |
| 2. "Warrant-case" | | 5 Joint trial of offences triable as summons and warrant-cases See Note 2 on S 241 |
| 3 Effect of non-compliance with provisions | | 6 Presidency Magistrates, procedure of |

NOTE to the Synopsis See the Notes indicated for the following topics

- | | | |
|--|---------------------------------------|---|
| Issue of summons instead of warrant | See Note 2 | Splitting of warrant case into summons cases See Note 2 |
| Procedure for summons cases, warrant cases, and Sessions cases compared and contrasted | See S 251, Notes 2 and 3, Ss 241, 206 | Trial—Commencement See S 252, Note 2, S 253, Note 3 |
| | | Trial of warrant-case as a summons-case See Note 3 |

1 "Trial," meaning of — See Notes on section 4 (1) (k)

* 1882 S 251, 1872 S 213, 1861 Nd

Dharasa Now v Sudder
accused — Complainant

Khan v Emperor (In such cases Crown being the real respondent notice to accused is not necessary)
6 (32) 19 AIR 1932 Cal 120 (121) 58 Cal 1436 33 Cri L Jour 269, *Surendra Nath v Basania*
Chandra

7 (38) 25 AIR 1938 Rang 200 (201) 39 Cri L Jour 687 *L. R. Abrol v S. L. Sirpaul*
Note 20

(Order for

ver not co

nperor.

2. "Warrant-case" — For definition of warrant case, see Section 4 (1) (v)

Where the offence is one triable as a warrant case, the fact that a summons instead of a warrant was issued under S 204, does not affect the character of the offence and it cannot be tried as a summons case¹ Similarly, where an offence is triable as a warrant case, the Magistrate cannot split it up into its component parts which constitute minor offences so as to be able to try the case as a summons case.²

3. **Effect of non-compliance with provisions.** — It has been held in the undermentioned cases¹ that where a Magistrate tries a warrant case as a summons case and acquits the accused the order of acquittal operates only as an order of discharge under s. 253 and not as an order of acquittal. See also Note 19 on s. 537.

4 Change of procedure subsequent to commencement of trial —Where the offence charged at the commencement of proceedings against the accused is triable as a warrant case and the trial is commenced as a warrant case, it is not open to the Magistrate thereafter to abandon the procedure prescribed for the trial of warrant cases and adopt that of summons cases on the ground that the accused appears to have committed only an offence triable as a summons case, when such course is likely to prejudice the accused in his defence¹. Similarly a Magistrate who has commenced a trial under this chapter (chapter 21) cannot subsequently change the procedure to one under chapter 22 (summary trial)² as such a course would be prejudicial to the interests of the accused³. But where the irregularity has not in fact occasioned a failure of justice it will not invalidate the trial³.

Section 251 — Note 2

- 2 (91) 8 AIR 1911 All 232 (284) 22 Cri L Jour 146 *Ganga Saran v Emperor*

Note 3

1

- (69) 12 Suth W R Cr 63 (66) 4 Beng L R A Cr 1 *Queen v Goberdhan Bera*
[See also (93) 22 Bom 711 (713) *In re Samsudin*]

Also see S 245 Note 5 and S 403 Note 14

Note 4

- 1 (21) 8 AIR 1911 All 282 (281) 22 Cr L Jour 146 *Ganga Saran v Emperor*
 (27) 14 AIR 1927 All 270 (270) 28 Cr L Jour 227 *Gaound v Emperor*
 (87) 1897 Pan Re No 17 Cr p 34 (36) *Empress v Ghulam Hosain*
 (16) 3 AIR 1916 Mad 610 (610) 16 Cr L Jour 250 (251) *In re Appavu Padayachi*
 (28) 15 AIR 1928 Lah 294 (295) 29 Cr L Jour 23, *Devi Dayal v Mt Rattan Devi*
 (21) 22 Cr L Jour 693 (683 684) 63 Ind Cas 619 (Pat) *Munshi Teli v Emperor*
 [See also (25) 12 AIR 1915 Oudh 200 (200) 25 Cr L Jour 1271 *Rani Ratan v Ram Sagar*
 (Summons-case tried as warrant-case—Procedure not to be changed to that of summons-case)]

Also see § 226 Note 2

- [See however (84) 7 *Mad* 454 (457) 2 *Weir* 521 *Queen Express v Papadu*]

$$[R \vdash_{\text{sem}} \phi_1 \wedge \neg \exists x (\phi_2 \wedge \neg \phi_3) \wedge \forall x (\phi_4 \rightarrow \neg \phi_5) \wedge \exists x (\phi_6 \wedge \neg \phi_7) \wedge \forall x (\phi_8 \rightarrow \neg \phi_9)]$$

[See also (43) 30 AIR 1943 Pesh 89 (90) 45 Cr L Jour 167 210 Ind Cas 10 *Khurshid o Rehman v Emperor* (Charge under S 302/31 Penal Code — Magistrate thinking that there was nothing in evidence to show as to who caused the stab wound turning to summary side and convicting accused under S 323/31—*Held* such resorting to summary trial in the midst of the proceedings was undesirable)]

[But see (99) 22 Mad 430 (460) 2 Weir 251 *Queen Empress v Rangamani* (Commitment for proceedings — Magistrate finding original charges not maintainable but charge of other offence triable summarily maintainable — He can try summarily for such offence instead of discharging accused if he has acted bona fide in the interests of justice)]

- 3 (17) 4 AIR 1917 Sind 69 (70) 18 Cr L Jour 621 (621) 10 Sind L R 145 *Ado v Emperor*
(Stealing a cow and taking it to slaughter yard is not trivial offence)

5 Joint trial of offences triable as summons and warrant-cases — See Note 2 on Section 241

6 Presidency Magistrates, procedure of — The provisions of this chapter are applicable to trials before Presidency Magistrates except in so far as their applicability is otherwise specifically excluded¹

252. (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court

(2) The Magistrate shall ascertain, from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

Synopsis

- | | |
|---|---|
| 1 Legislative changes | 7 "Shall ascertain" — Sub section (2) |
| 2 Scope of the section | 8 Process fee See Notes on S 544 |
| 3 'Appears or is brought | 9 Production and inspection of documents |
| 4 "Shall proceed to hear the complainant" | 10 Cross-examination of witnesses |
| 5 'Take all such evidence as may be produced in support of the prosecution' | 11 Procedure under the section — Trial or inquiry See Section 4 (1) (k) |
| 6 Proviso to sub-section (1) | 12 Revision |

NOTE to the Synopsis See the Notes indicated for the following topics

- | | |
|---|---|
| Duty confined to ready evidence See Note 5 | Irregularity in arrest See Note 8 |
| Duty of prosecution and inference from non-examination See Note 5 | Section mandatory See Note 5 |
| Duty to summon witnesses See Note 7 | Subsequent list of witnesses See Note 5 |
| Hearing—Not examination See Note 4 | Vakil's admissions See S 200 and S 205 Note 7 |
| | Warrant to a witness See Note 7 |

1. Legislative changes

- (1) The Code of 1861 did not contain any express provision entitling the accused to cross examine the prosecution witnesses *before the framing of the charge*. The Code of 1872 contained such express provisions (Sections 218, 191, 214). The express provisions were omitted in the later Codes.
- (2) The proviso to subs (1) has been added by the Code of Criminal Procedure (Amendment) Act 18 [XIII] of 1923 (Of s 200 (aa) and s 214, proviso)

2. Scope of the section — This section requires that the trial of a warrant case must commence with the hearing of the complainant (if any) and the examination of the prosecution witnesses. The Magistrate has no power to forthwith require the accused to state his plea and on his admission of his guilt, convict him without taking any evidence as in a summons-case¹ (see ss 242 and 243)

* 1882 S 252 1872 Ss. 214, 190, 362 Para 1, 1861 Ss 249, 185, 193

Note 6

- 1 (32) 19 AIR 1932 Cal 865 (866) 33 Cr L Jour 828 *Paglabir Kalar v Emperor* (Presidency Magistrate is bound to frame charge under Section 251)
 (15) 2 AIR 1915 Bom 14 (15) 16 Cr L Jour 538 (539) *Dosabhai J Dlondy v Emperor*
 (91) 1891 Rat 539 (540) *Queen Empress v Abdul* (Offence of adultery cannot be tried summarily by a Presidency Magistrate)

Section 252 — Note 2

- 1 (00) 1 Cr L Jour 231 (231 232) 29 Mad 372, *Emperor v Chinapayan*

This section, like the other sections in this chapter, applies to variant cases generally. Hence, it applies to a case started on a police challan.²

3 "Appears or is brought." — This section empowers the Magistrate to proceed with the trial of an accused person whenever he appears or is brought before a Magistrate. The legality or otherwise of the arrest under which the accused is brought before the Magistrate does not affect the jurisdiction of the Magistrate to try the accused.¹

As to the right of the accused to appear by pleader see S 205 and Notes thereon.

4 "Shall proceed to hear the complainant." — This section only requires that the complainant should be heard. It does not require the examination of the complainant on oath.¹

The Magistrate must proceed to hear the case though the complainant wishes to withdraw his complaint.² The reason is that in variant cases the complainant is not entitled to withdraw his complaint. See S 218 and Notes thereon.

5 "Take all such evidence as may be produced in support of the prosecution" — This section casts upon the Magistrate the duty of taking all the evidence produced on behalf of the prosecution unless it is irrelevant.¹ But this duty applies only to the evidence which is ready when the case is taken up for hearing and the Magistrate is not bound to go on taking the evidence that may be offered subsequently from time to time.²

- 2 (45) 52 AIR 1945 Lah 201 (904) 921 Ind Cas 274 *Heman Parai v Emperor* (Assumed)
 (40) 27 AIR 1940 Nag 390 (391) 1 L R (1942) Nag 333 42 Cr L Jour 208 *Hansraj v Emperor*
 [See (38) 95 AIR 1938 Nag 103 (104) 39 Cr L Jour 69 *Palat Ali v Md Murad*]

Note 3

- 1 (11) 12 Cr L Jour 356 (356) 10 Ind Cas 906 35 Bom 220 (SB) *Emperor v Mayal Damodar*
 (04) 1 Cr L Jour 535 (537) 31 Cal 507 *Emperor v Madho Dhobi*
 (90) 1899 Pun re No 0 Cr p 17 (18) *Sobha v Empress*
 (98) 15 AIR 1928 Sind 161 (163 164) 29 Cr L Jour 1089 *Wiceles v Emperor*
 (03) 26 Mad 124 (125) 1 Weir 630 *Public Prosecutor v Ravalu Kesigadu* (Case under Madras Abhari Act S 34 — Power of a Circle Inspector to arrest accused in another circle)
 Also see S 46 Note 6 S 177 Note 8 S 190 Note 17 and S 537 Note 9
 [See however (25) 12 AIR 1925 Bom 131 (133 134) 49 Bom 212 26 Cr L Jour 441 *Candri Danoo v Emperor*]

Note 4

- 1 (29) 9 AIR 1922 Mad 126 (128) 23 Cr L Jour 203 *In re Kunla Kadir*
 (29) 16 AIR 1909 Cal 299 (230) 30 Cr L Jour 942 *Santiram Mandal v Emperor*
 [See (45) 32 AIR 1945 Nag 127 (129) 1 L R (1915) Nag 419 *Mohamad Khan v Emperor* (Hearing of complainant merely means granting of audience. It does not amount to examination.)]
 [See also (35) 22 AIR 1945 Cal 515 (590) 36 Cr L Jour 1354 15 Pat 69 *Kewal Pam v Emperor* (Conviction not vitiated by absence of examination of complainant.)]
 (38) 27 AIR 1938 Nag 103 (104) 39 Cr L Jour 69 *Itahat Ali v Md Murad* (Failure to examine complainant does not vitiate trial.)]
 2 (29) 16 AIR 1929 Mad 17 (8) *Asimulahu Naidu v Naina Pulla*
 (27) 14 AIR 1927 Rangoon 174 (174 175) 5 Rang 146 28 Cr L Jour 649 *Maung Thu Daw v U Po Nyun* (Public Prosecutor on the instructions from the District Magistrate may however withdraw the prosecution.)
 (83) 13 Bom 600 (603) *In re Ganesh Narayan Sathe*

Note 5

- 1 (08) 7 Cr L Jour 273 (273) (Lah) *Mt Begam Bibi v Gulam Mohamud*
 (13) 14 Cr L Jour 412 (412) 20 Ind Cas 236 (All) *Gokul Chand v Mahabir Misir* (Complaint dismissed on exhibition of one out of several prosecution witnesses — Proceeds illegal.)
 (09) 1869 Rd 1 (21 22) *Jeg v Daya Kesur*
 (35) 2 AIR 1915 Mad 83, (895) 16 Cr L Jour 156 (157) *Venkatappayya v Venkataramanayya* (Magistrates should always be chary of taking upon themselves the duties of deciding on behalf of the parties which witnesses should be examined.)
 [See (33) 20 AIR 1933 No 374 (377) 30 Nag 1 R 76 30 Cr L Jour 404 *Tulindas v Chandras* (Whether witness is necessary or not should be determined by complainant and not by Magistrate.)]
 2 (38) 27 AIR 1938 Nag 103 (104) 39 Cr L Jour 62, *Rahat Ali v Md Murad*

When a Magistrate, for sufficient reasons refuses to issue a commission, or to move the District Magistrate for issue of a commission, for the examination of a witness, he cannot be deemed to have refused, or omitted to take the evidence produced in support of the prosecution³

When witnesses are common to a number of cases before the Court, the evidence in each case should be taken separately. It is not proper to take the depositions in one case and have them copied and used in another case⁴

As to the right of the prosecution to lead evidence after the accused has entered on his defence, see S 256 and Notes thereon

On general principles the duty of the prosecution is not to work for a conviction, but to see that justice is done and it is bound to produce all witnesses who are acquainted with the facts of the case although they may not favour the prosecution, unless their evidence is unnecessary or there is reasonable ground for believing that they will not speak the truth⁵. Where a material witness is withheld by the prosecution without any sufficient cause, the Court can draw an inference that his evidence if produced will be against the prosecution. See Evidence Act, S 114, Illustration (g)⁶. See also Notes on sections 208, 214 and 256

But it is open to the prosecution to examine its witnesses in any order it chooses. No inference adverse to the prosecution should be drawn from the mere fact that a particular witness was examined last especially when it is not suggested that the accused has suffered any prejudice by such late production of the witness⁷

6 Proviso to sub-section (1). — For cases where the complaint of a Court is necessary for taking cognizance of an offence, see S 195.

7. "Shall ascertain" — Sub-section (2). — The Magistrate is bound under this section to ascertain from the complainant or otherwise the names of any persons who are likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and he may summon to give evidence before himself such of them as he thinks necessary¹. In discharge of this obligation the Magistrate must specifically question

(14) 1 AIR 1914 All 430 (431) 15 Cr L Jour 363 *Govind Saha v Emperor* (Case under S 110-Cr P C—Twenty witnesses named by the police at the beginning were examined—Further, thirty one witnesses were also examined—Transfer ordered)

(26) 13 AIR 1926 Mad 989 (990) 49 Mad 973 27 Cr L Jour 1123, *K C Menon v Krishna Nayar*

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Nath

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Also see S 244 Note 3 and Notes on S 356

group is to be regarded as an accomplice prosecution need not produce and examine him)

(23) 15 AIR 1928 Pat 46 (48) 28 Cr L Jour 869, *Prabhu Dasadh v Emperor* (Unnecessary witnesses need not be produced)

Also see S 203 Note 7 and S 286 Note 6

the complainant as to whether he knows of any witnesses who will have to be summoned. The Magistrate is not bound or expected to exercise this duty of ascertaining more than once, and the proper time for such ascertainment is when the evidence already 'produced' in support of the prosecution has been taken.² Further, where before the charge is framed, all the witnesses mentioned in the list of witnesses for prosecution supplied by the police have been examined and the complainant or the officer in charge of the prosecution makes a statement that he closes his case and has no further witnesses to examine, the Magistrate may treat such statement as tantamount to a statement that there are no other persons acquainted with the facts of the case who may be able to give evidence for the prosecution, and he need not specifically question the complainant or the officer in charge of the prosecution on the matter.³

The Magistrate is not bound to summon *every* one of the witnesses named by the complainant; he must only summon such of the witnesses as he *thinks necessary*.⁴ But he cannot arbitrarily refuse to summon any witness; he should issue summons to all witnesses named by the complainant, who he considers are likely to give useful evidence.⁵ This power of summoning witnesses named by the complainant may be exercised from time to time as the occasion requires.⁶

The section only authorizes the issue of a *summons* to a witness, and a warrant for his arrest can be issued only if the conditions laid down in s 90 are satisfied.⁷ See also

- (43) 30 AIR 1943 All 9 (9) 44 Cri L Jour 196 1LR (1943) All 31 204 Ind Cas 268 *Chiranjy Lal v Ram Swarup*
 (41) 28 AIR 1941 Sind 199 (201, 202) 43 Cri L Jour 73 1 L R (1941) Kar 345 198 Ind Cas 755 *Mahomed Ibrahim v T C H Naughton*
 (40) 27 AIR 1940 Pat 355 (358) 19 Pat 413 41 Cri L Jour 931 *Musahru v Emperor*
 (36) 23 AIR 1936 Nag 192 (197) 1LR (1936) Nag 205 39 Cri L Jour 307 *Thakur Das v Narayan*
 (26) 13 AIR 1928 Mad 989 (990) 49 Mad 978 27 Cri L Jour 1123 *Menon v Krishna Nayar*

failed to produce a necessary witness)

- 2 (26) 13 AIR 1928 Mad 989 (990 991) 49 Mad 978 27 Cri L Jour 1123 A C Menon v P Krishna Nayar [See also (45) 32 AIR 1945 Lab 201 (204) 221 Ind Cas 274 (F B) *Heman Ram v Emperor* (Duty cast by the sub section should be performed before charge is framed)]
 3 (45) 32 AIR 1945 Lab 201 (204) 221 Ind Cas 274 (F B), *Heman Ram v Emperor*
 4 (40) 27 AIR 1940 Pat 355 (358) 19 Pat 413 41 Cri L Jour 931, *Musahru v Emperor*
 (38) 25 AIR 1938 Nag 103 (105) 39 Cri L Jour 69 *Rahat Ali v Md Murad* (It is only where a list is unduly long and appears to have been filed vexatiously that the Magistrates should avail them selves of the power to scrutinize the list to prevent harassment of the accused and an unwarranted prolongation of the trial)
 (39) 25 AIR 1938 Lab 444 (445) 39 Cri L Jour 624 *Ghulam Mohiyuddin v Sardara* (Magistrate is bound to summon at Government expense such of complainant's witnesses as he considers necessary — Mere fact that same case was investigated by police and no challan was put up is no ground for refusal)
 (14) 1 AIR 1914 All 526 (526) 14 Cri L Jour 682 (682) *Sital Singh v Dalganyan Singh* (Where a fresh list of witnesses is put in by the complainant after the first hearing it is irregular on the part of the Court to accept the list without scrutiny)
 (26) 13 AIR 1926 Mad 989 (990) 49 Mad 978 27 Cri L Jour 1123, A C Menon v P Krishna Nayar
 (14) 1 AIR 1914 All 430 (431) 15 Cri L Jour 363 *Gowind Sahai v Emperor*
 (75) 23 Suth W R Cr 9 (9) *Jeldhari Singh v Shunkur Doyal*
 5 (26) 13 AIR 1926 Mad 989 (991) 49 Mad 978 27 Cri L Jour 1123 E C Menon v P Krishna Nayar [See also (36) 23 AIR 1936 Nag 192 (197) 1 L R (1936) Nag 205 39 Cri L Jour 307 *Thakur Das v Narayan* (Magistrate refusing to summon witness cited by complainant even before prosecution has begun — It amounts to grave error)]
 6 (40) 27 AIR 1940 Nag 390 (391) 1 L R (1940) Nag 333 49 Cri L Jour 207 *Hansraj v Emperor*
 7 (07) 6 Cri L Jour 275 (75) (Lab) *Kala Singh v Emperor* (In a case under s 494 Penal Code there is no legal sanction for the Magistrate to issue warrant for compelling the complainant's wife to attend as a witness without first requiring her to attend by a summons as laid down under s 254 Criminal Procedure Code)

the undementioned case⁸

It is open to a Magistrate, under this subsection, to take such evidence as he considers necessary in order to find whether an offence has really been committed or not even if the complainant states that he does not wish to proceed with the complaint⁹

8 Process-fee — See Notes on S 544

9 Production and inspection of documents — Where during the examination of the complainant several documents are produced as evidence against the accused, and are admitted by the Magistrate and marked as exhibits, the accused is entitled to the inspection of all documents filed as exhibits in the case and such inspection should not be refused with the direction that he may apply for and obtain certified copies¹

10 Cross-examination of witnesses — This section does not expressly refer to the right of the accused to cross examine the prosecution witnesses. But on general principles and under S 138 of the Evidence Act, the liability to cross examination by the adverse party is part of the conception of legal evidence² and under sections, like S 214 which also do not expressly confer a right of cross examination, it has been held that such a right undoubtedly exists³. But S 256 provides that after the charge is framed the accused must be required to state if he desires to cross-examine any of the prosecution witnesses and if he says he wishes to do so, the witnesses named by him should be re-called and he should be allowed to cross examine them. The question has arisen as to what is the effect of this provision. Does it impliedly negative the right of the accused to cross examine at an earlier stage, viz., before the charge is framed, or does it confer on the accused an additional right to cross examine the prosecution witnesses a second time after the charge is framed? On this question there is a conflict of decisions. On the one hand, it has been held by the High Courts of Madras⁴ and Patna⁵ the Chief Court of Lower Burma⁶ the Judicial Commissioners Courts of Upper Burma⁷ and Nagpur⁸ that the accused is entitled as of right to cross examine prosecution witnesses before the charge is framed as well as afterwards. But it has been held by the Allahabad⁹ and Calcutta¹⁰ High Courts that the accused is not entitled as of right to cross examine prosecution

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1 (99) 1 Bom L R 433 (433) *In re Francis Domingo Fernandes*

(82) 10 Cal L Rep 51 (55) *In the matter of Abdul Guffoor*

Note 10

1 (30) 19 AIR 1932 Oudh 298 (299) 34 Cri L Jour 58 8 Luck 135 *Mohammed Hossein v Mirza Fakhruddin Beg* (Per Srivastava J)

2 See Notes on S 244

3 (20) 7 AIR 1920 Mad 201 (203) 43 Mad 411 21 Cri L Jour 297 B *H Lockley v Emperor*

(23) 10 AIR 1923 Mad 609 (610) 46 Mad 449 24 Cri L Jour 547 (FB) *Varisai Rowther v Emperor*

(20) 11 AIR 1923 Cal 325 (327) 25 Cal 188 (190)

on v P Krishna Nayar

vs Singh v Emperor

v Emperor

vision prohibiting the

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Muhammad Rahim v

8 (35) 22 AIR 1915 Nag 8 (9 to 11) 31 Nag L R 276 30 Cri L Jour 578, *Gurudatta v Emperor*

(Conflicting case law discussed)

Varas v Emperor

vs the

Code of 1861 which

Anta Chatterjee v

witnesses before the charge is framed, but is only entitled to do so afterwards under s 256. At the same time the Allahabad¹¹ and Calcutta¹² High Courts have held that s 256 does not prohibit cross-examination by the accused before the charge is framed and the Magistrate can, as a matter of discretion, allow, and indeed will be well advised to allow, the accused to cross-examine prosecution witnesses even before the charge is framed. The Punjab Chief Court also seems to hold the same view.¹³ The question came up for decision before a Bench of the Oudh Chief Court, but the Judges constituting the Bench differed in their opinion, one of them expressing his concurrence with the Madras and Patna view and the other agreeing with the Allahabad and Calcutta view.¹⁴

An accused is entitled to decline to exercise his right of cross-examination (assuming that it is held that he has such a right).¹⁵

The object of cross-examination is to test the truth of the evidence given in chief.¹⁶ But the fact that certain evidence has not been tested by cross-examination does not affect its admissibility but only its probative value.¹⁷

11 Procedure under the section—Trial or inquiry. — See Section 4 (1) (k).

12. Revision — The section leaves it to the discretion of the Magistrate as to what witnesses named by the prosecution should be summoned to give evidence before himself and a Court of revision will not interfere with this discretion unless there are strong and exceptional reasons for doing so.¹

253. (1) If, upon taking all the evidence referred to in section 252,

Discharge of accused. and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the

* Code of 1882 S 253 — Same

Code of 1872 S 215 para 1 and Expt III

215. When the evidence of the complainant and of the witnesses for the prosecution and such examination of the accused person as the Magistrate considers necessary have been taken the Magistrate, if he finds that no offence has been proved against the accused person shall discharge him

Explanation III — An order of discharge cannot be passed until the evidence of the witnesses named for the prosecution has been taken

* Emperor

(24) 21 Cal 642 (663), *Empress v Sagat Samba Sajad*]

13 (16) 3 AIR 1916 Lah 445 (445) 17 Cri L Jour 278 (279) *Sher Singh v Emperor*

14 (32) 19 AIR 1932 Oudh 298 (299 305) 31 Cri L Jour 59 9 Luck 133 *Mahomed Hussain v Fakhrullah Beg*

15 (23) 10 AIR 1923 Cal 727 (728) 50 Cal 939 25 Cri L Jour 27 *Dibulata Chatterjee v Gour Gopal Mukherjee*

(73) 19 South W R Cr 53 (53 54) 3 Beag L R App 151 *Shanto Teoria v Mrs Duhias*

16 (43) 30 AIR 1913 Pat 446 (452) 22 Pat 611 45 Cri L Jour 537 212 Ind Cas 197 (DB) *Amir Prasad Singh v Emperor* (A Court would require cogent grounds to enable it simply to reject all admissions favourable to the accused made in cross-examination by the witnesses for the prosecution.)

17. (25) 12 AIR 1915 Mad 497 (537) 48 Mad 1 *Maharaja of Kolhapur v Sundaram Iyer*

(29) 16 AIR 1919 Lah 840 (842) 30 Cri L Jour 951 *Mangal Sen v Emperor*

(13) 14 Cri L Jour 70 (71) 18 Ind Cas 406 (Cal) *Ibrahim v Emperor*

(03) 1903 Pun Re No 5 Cr p 15 (16) *Gunga Ram v Emperor*

(10) 11 Cri L Jour 145 (145) 51 Ind Cas 512 (Mad) *Rosa v Yadala Pillamma*

(Testimony of witnesses not a legal evidence unless subjected to cross-examination.)

Note 12

1 (29) 15 AIR 1929 All 681 (685) 30 Cri L Jour 631, *Indrajit Hussain v Emperor*

behalf of the prosecution before he discharges the accused¹ unless he finds that the charge against the accused is groundless in which case he can discharge the accused even before he has taken all the prosecution evidence (See Note 6) It has been held that the Magistrate can discharge an accused on the basis of the evidence of a witness called at the instance of accused under S 510, though this section refers only to the evidence for the prosecution²

3. Examination of accused (if any) as he thinks necessary. — This section enables the Magistrate in a warrant case to examine the accused *before* the charge is framed¹ But such an examination is entirely discretionary with the Magistrate and he is not bound to examine the accused before the charge is framed²

As to whether the examination of an accused before the charge is framed dispenses with the examination of the accused under S 312 after the charge is framed and the prosecution evidence is closed and before the accused is called on to enter upon his defence, see Section 312, Note 9.

As to the scope and effect of an examination of the accused in criminal cases, see Notes on Section 312.

4. "The Magistrate shall discharge him." — This section contemplates an order *discharging* the accused. An order *dismissing a complaint* is not the proper order to be passed under the section¹ A *formal* and *express* order of discharge is, however, not necessary. It may be implied and presumed from the circumstances of a case² Thus, where a person is accused of a major offence but the Magistrate frames only a charge for a minor offence there is an implied discharge in respect of the major offence³ To deter-

(74) 22 Suth W R Cr 25 (26), *Queen v Japit Ahir*

(75) 24 Suth W R Cr 9 (10), *Meer Azem Ali v Hurnam Dass*

(1971) 13 AIR 1997 14 (1972) 13 AIR 551 22 Cr L J 299 S. 253 N 2-4 (The ...)

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1 (30) 17 AIR 1930 Cal 515 (517) 31 Cr L Jour 1055 53 Cal 340, *Faizur Rahman v. Emperor*.

(37) 1937 Mid W N 991 (992), *Shivakatacham Pillai v. Emperor* (Though the complainant, after examining some of the witnesses, does not want to proceed further)

(29) 16 AIR 1929 Cal 479 (480) 31 Cr L Jour 129, *Mukunda Patre v Purushottam Shah* (Complainant not examined — Discharge order is irregular)

(13) 14 Cr L Jour 412 (412, 413) 20 Ind Cas 236 (All), *Gokul Ghand v Mahabir Misir*

(20) 7 AIR 1920 Mad 131 (131) 21 Cr L Jour 478, *In re Packianathan*

(08) 7 Cr L Jour 272 (273) (Lah), *Mt Begam Bibi v Ghulam Muhammad*

2. (33) 20 AIR 1933 Lah 561 (566, 567) 34 Cr L Jour 735, *Duan Singh v Emperor*

Note 3

1 (33 1900) 1893 1900 Low Bur Bol 642 (615), *Pat Tha U v Queen Empress*

(1971) 13 AIR 1997 14 (1972) 13 AIR 551 22 Cr L J 299 S. 253 N 2-4 (The ...)

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1 (13) 14 Cr L Jour 412 (412) 20 Ind Cas 236 (All), *Gokulchand v Mahabir Misir*

(31) 21 AIR 1931 Pat 548 (549, 550) 36 Cr L Jour 285, *Jotindra Nath v Radhakrishna* (Dismissal of complaint after issue of process not legal — When process has once been issued, an accused person

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Emperor.
may
carry that

[But see (20) 13 AIR 1926 Outh 191 (193) 27 Cr L Jour 417 *Padar v Emperor*]

mine whether a particular order is one of discharge the substance of the order and not its form should be taken into consideration. Thus, where no charge has been drawn up and the prisoner has not been asked to make his defence and the Magistrate finds that no case has been made out against the accused, his order is only one of discharge though he styles it as an order of acquittal⁴. Similarly, if the defence of the accused is taken and witnesses are examined in support thereof, the order of the Magistrate where he finds the accused not guilty is one of acquittal though he styles it as one of discharge⁵.

As to whether a Court is bound to hear arguments before discharging an accused, see Section 310 Note 7.

5 Grounds of discharge — Under sub s (1) of this section a Magistrate can discharge an accused when upon considering the evidence for the prosecution he comes to the conclusion that no case has been made out against the accused, which if unrebutted, would warrant his conviction¹. But where the Magistrate has not come to such a conclusion he has no power to discharge the accused under this section. Thus an accused person cannot be discharged under this sub section merely because a civil suit touching the same dispute is pending between the parties² or the complaint is vague³ or because it is desirable to try the accused along with another co accused whose attendance before the Court it has not so far been possible to procure⁴. Similarly except in cases falling under s 259 the absence of the complainant at the hearing is no ground for discharging an accused (see Notes on s 259). But in such a case the accused may be discharged for want of evidence against him⁵. It is not sufficient to enable a Magistrate to discharge an accused person under this section that there can be no conviction for the particular offence which was

4 (66) 6 South W R Cr 13 (14) *Queen v Robert Sheriff*

(67) 8 South W R Cr 45 (46) *Queen v Dipro Doss*

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Also see S 253 " " " " " "

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(Recruitment of trial under s 350 does not cancel a charge framed and the Magistrate must acquit)

(Order of release on

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Note 5

1 (25) 12 AIR 192, All 298 (299) 26 Cri L Jour 736 *Daya Nand v Emperor*

(27) 11 AIR 1927 All 804 (805) 19 All 879 28 Cri L Jour 601, *Alam v Emperor* (If prosecution does not choose to put the correct version of facts before the Court and itself attempts to spoil a true case by adducing false and perjured evidence a Magistrate cannot but discharge the accused)

(08) 10 Cri L Jour 14 (16) 1908 Upp Bar Hal 15 *Nga Mauna Gyn v Nga Lu Gale*

(34) 11 AIR 1934 Oudh 321 (323) 35 Cri L Jour 939 10 Luck 80 *Emperor v Chandewa Pasi* (If Magistrate considers that no case has been made out against the accused the proper procedure is to discharge the accused under s 253)

2 (25) 12 AIR 192, All 298 (299)

This subsection unlike subs (2) does not require a Magistrate to record any reasons for the order of discharge. An order merely discharging the accused without giving any reasons will operate as a final order and the discharge will take effect from the date of such order.⁹

6. ('67) 8 Suth W R Cr 82 (82, 83) *Dequmbar v Kally Das*

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Note 6

(11) 12 Cri L Jour 105 (106) 9 Ind Cas 606 (Mad) *Narasimha v Venkatarayudu*

Mahomed Ibrahim v T C H Naughton (Order of discharge after examination of complainant but without examining any witnesses named in the complaint)

(30) 17 AIR 1930 Cal 515 (517, 518) 58 Cal 346 31 Cri L Jour 1035, *Fazlar Rahman v. Emperor*,
(39) 26 AIR 1939 Cal 329 (330) 1LR (1939) 1 Cal 474 40 Cri L Jour 652 *Sundar Das v. Fardun*
Ru tom (Order of discharge after hearing parties and examining documents, without taking pro-secu-
tion evidence is legal.)

(30) 17 AIR 1930 Lah 159 (159) 31 Cr L Jour 239 *Halim Singh v Lal Singh* (Order of discharge during the course of prosecution evidence being taken)

(26) 13 AIR 1926 All 461 (461-462) 27 Cr L Jour 541, *Kunj Dehari v Emperor* (Order of discharge before any prosecution evidence was taken)

(11) 12 Cr L Jour 105 (106) 9 1st Cas 606 (Ma), *Narasimma v Venkatarayadu* (Order of discharge before examining all the prosecution witnesses.)

(34) 21 AIR 1934 All 51 (32) 56 All 285 35 Cri L Jour 418 *Elagawandas v Emperor* (Complaint

4. (25) 12 AIR 1925 Pat 151 (155) 25 Cr L Jour 696 R J Watson v P H Mc Calfe

5 (05) 2 Cr L Jour 524 (530) 9 Cal W N 810 32 Cal 763 *Ajab Lal v Emperor*

7. (13) 14 Cr L Jour 559 (561) 21 Inl Cas 159 36 Md 315 *In re Muthia Mooran*.

8. See (1901) 1 Cri L Jour 200 (98), 201; 1 All L Jour 609, *Dhaku Bari v. Emperor*.

⁹ An accused amounts to an order of discharge, see the undermentioned case⁹ See also Notes on Section 201.

Under this sub section, the Magistrate can discharge the accused before he has taken the evidence for the prosecution if he finds that the charge against the accused is *groundless*. A finding that the charge is *groundless* is not the same as a finding under sub s (1) that no case has been made out against the accused¹⁰ In the undermentioned case¹¹ it has been observed that a charge may be said to be groundless when there are no good grounds for the charge

7. "For reasons to be recorded"—Sub section (2) requires the Magistrate to record his reasons for holding that the charge is groundless. No hard and fast rule can be laid down as to when a Magistrate will be justified in holding a charge to be groundless. The Magistrate should arrive at his conclusion judicially and not capriciously¹ If, acting judicially, a Magistrate has come to the conclusion on grounds to be recorded, that the charge must fail either because the allegations are false or because they disclose a dispute of a civil nature which is distorted into a criminal case or for any other reason, he can discharge the accused without taking the evidence for the prosecution² In arriving at his conclusion the Magistrate can take into account a police report³ or a civil Court's judgment⁴ touching the dispute. Where the story related by the prosecutor himself is of such a nature that it does not disclose a criminal offence, the Magistrate will be justified in discharging the accused under this sub section without taking the evidence for the prosecution⁵ Similarly where from the complaint and the complainant's evidence the Magistrate arrives at a conclusion that the defects in the complainant's case could not be made good even if all his witnesses said everything in his favour, the Magistrate would be justified in discharging the accused

9 (45) 32 AIR 1915 Sind 51 (51) 11LR (1914) Kar 411 221 Ind Cas 136 (DB) *Amarial v Emperor* (Complaint under Ss 193 and 199 read with S 120 B, Penal Code — Magistrate issuing process to accused — Application under S 203 (2) to discharge accused and to take cognizance of offence under Ss 193 and 199 read with S 109 — Magistrate cancelling process under S 120 B and issuing fresh process under S 109 — Such order may be construed as discharge of accused under S 253 and taking cognizance of offence under Ss 193 and 199 read with S 109)

10 (28) 15 AIR 1928 Mad 120 (129) 51 Mad 185 28 Cri L Jour 995, *Mahomed Sheriff v Abdul Karim*

(30) 17 AIR 1930 Lah 461 (462) 31 Cri L Jour 491 *Mehrab v Nathu*

(35) 22 AIR 1935 Pesh 23 (21) 36 Cri L Jour 632 *Saran Singh v Kirpal Singh* (Distinction between the two sub-sections pointed out)

11 (41) 28 AIR 1941 Sind 198 (201) 43 Cri L Jour 73 11LR (1941) Kar 345 196 Ind Cas 755 *Muhammad Ibrahim v T C H Naughton*

Note 7

1 (41) 28 AIR 1941 Sind 198 (201) 43 Cri L Jour 73 1 L R (1941) Kar 345 196 Ind Cas 755 *Muhammad Ibrahim v T C H Naughton* (The amount of evidence which would enable a Magistrate to say that a particular charge was groundless entirely depends on circumstances. No general rule or direction except that he is required to arrive at his conclusion judicially and not capriciously is likely to be of any use AIR 1926 Mad 989 49 Mad 978 27 Cri L Jour 1123 followed)

2 (29) 16 AIR 1919 Mad 754 (753) 32 Mad 987 31 Cri L Jour 275 *Kasinatha Pillai v Shanmugham Pillai*

3 (26) 13 AIR 1926 All 461 (461) 27 Cri L Jour 511 *Kunj Dikhar v Emperor*

(30) 17 AIR 1930 Cal 515 (518) 58 Cal 346 31 Cri L Jour 1055 *Fazlar Rahman v Emperor*.

4 (16) 3 AIR 1916 Bom 163 (163 164) 17 Cri L Jour 153 (154) 41 Bom 1 *In re Marlur*

5 (40) 27 AIR 1910 Lah 40 (42) 41 Cri L Jour 354, *Sita Datta v D K Sood* (Examination of complainant under S 202 of the Code not disclosing criminal offence — Magistrate may discharge accused without taking the rest of complainant's evidence)

(1900) 1900 Pan L R Cr p 69 (69) *Ram Chand v Emperor*

without examining the witnesses named by him in the complaint⁶

But where the complaint discloses *prima facie* a case against the accused the Magistrate cannot discharge the accused unless he knows what is the sort of evidence that is going to be adduced in support of the charge and unless he considers that even if such evidence were taken into consideration the charge would be groundless⁷ Where a Magistrate discharges an accused without applying his mind to the evidence already before him on the mere ground that the whereabouts of the accused are not known and it is useless to drag on the case indefinitely the order of discharge is illegal⁸

The mere fact that the matter is one of rendition of accounts does not justify a Magistrate in holding a charge of criminal breach of trust to be groundless⁹ In such a case the question of trust must be fully inquired into and for this purpose it is necessary that the whole of the prosecution evidence should be recorded An order of discharge after examination of some of the prosecution witnesses on the ground that the case is of a civil nature is premature¹⁰ Similarly it would not be a proper exercise of the discretion of the Magistrate under this sub section to discharge an accused merely on a statement of a prosecution witness that the complainant had previously admitted that the case was a false one¹¹

A Magistrate should give his reasons at the time he pronounces the order of discharge and if it is the final order in the case he is bound to give his reasons because the moment he pronounces the final order he becomes *functus officio* But where several accused are being tried before him and he discharges some of them without giving any reasons in the order of discharge it is competent for him to give his reasons in regard to the order of discharge at any time until the charge against the remaining accused is disposed of by a final order¹²

254.* If, when such evidence and examination have been taken

Charge to be framed and made, or at any previous stage of the case, the
when offence appears Magistrate is of opinion that there is ground for pre-
proved assuming that the accused has committed an offence triable
under this Chapter, which such Magistrate is competent to try, and which,
in his opinion could be adequately punished by him, he shall frame in
writing a charge against the accused

Synopsis

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|---|--|
| 1 Legislative changes | 6 Which in his opinion could be adequately punished by him |
| 2 When such evidence and examination have been taken and made | 7 Magistrate shall frame a charge |
| 3 Or at any previous stage | 8 Charge — What it should contain See Sects 251 to 253 |
| 4 Ground for presuming | 9 Effect of the framing of the charge |
| 5 Offence triable under this Chapter | |

* 1882 S 254 1872 S 216 1861 S 250

6 (41) 95 AIR 1941 S 1198 (201 202) 43 Cr L Jour 43 I L R (1911) Kar 34 196 Ind Cas 750
Muhammad Ibrahim v T C H Naughton

7 (98) 15 AIR 1928 Mad 19 (1929) 51 Mad 165 28 Cr L Jour 990 Muhammad Sheriff v Abdul Karim

(30) 17 AIR 1930 Lah 461 (167) 31 Cr L Jour 481 Mehtab v Asafu

8 (40) 29 AIR 1912 Cal 478 (479) 43 Cr L Jour 491 199 Ind Cas 430 (DB) Waleh Ezz v Asafu

9 (30) 17 AIR 1930 Lah 461 (167) 31 Cr L Jour 481 Mehtab v Asafu

10 (39) 26 AIR 1939 Kan 374 (375) 41 Cr L Jour 20 Chan El sam v L H Waleh

11 (29) 16 AIR 1919 Lah 63 (674) 30 Cr L Jour 454 Ram Lubhaya v Jagirani

12 (34) 95 AIR 1938 Mad 376 (394) 33 Cr L Jour 335 In re C and a

NOTE to the Synopsis See the Notes indicated for the following topics

<p>Basis of charge—Evidence and not complaint See Note 5</p> <p>Charge—When not to be framed See Note 1</p> <p>Charge—When to be framed See Notes 6 and 7</p> <p>Cross examination before charge See S 252 Note 10</p> <p>Duty to summon witnesses See S 252 Note 7</p> <p>Enquiry under S 117 See S 255, Note 2</p> <p>Failure to frame charges See S 255, Note 4</p>	<p>Framing charge—Acquittal without further evidence See Note 4</p> <p>Scope of the section See Notes 2 and 7</p> <p>Splitting up offences into summons-cases See S 251, Note 2</p> <p>Summons and warrant-cases—Charges See Note 5</p> <p>Summons and warrant-cases compared See Note 9</p> <p>Whole prosecution evidence need not be taken See Note 3</p>
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1 Legislative changes

Difference between the Codes of 1861 & 1872 and the later Codes —

- (1) The Codes of 1861 (S 200) and 1872 (S 216) contained the words 'if the Magistrate finds that an offence is apparently proved against the accused person' instead of the words 'if the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence' which occurred in the later Codes
- (2) The words 'liable under this Chapter qualifying the word 'offence' did not occur in the Codes of 1861 and 1872 but were inserted in the later Codes
- (3) The Code of 1872 S 216 contained two explanations the provisions of which have now been transferred to S 254

Changes made in 1898 —

The words 'or at any previous stage of the case' were first inserted in the Code of 1898

2 "When such evidence and examination have been taken and made" — The section contemplates that in warrant cases the Magistrate should take the evidence for the prosecution before framing a charge. In this respect the procedure is different from that adopted in summons cases where at the very commencement of the proceedings the particulars of the offence are explained to the accused and he is required to state his plea. This section authorizes the Magistrate to take into consideration the statement of the accused person himself in framing a charge against him. Hence, in a proper case, the Magistrate will be within his powers in framing a charge on the mere statement of the accused himself²

See also Notes on Section 253

3 "Or at any previous stage" — Under this section the Magistrate is not bound in every case to take the whole of the evidence for the prosecution before framing a charge. He is entitled to frame a charge even before the evidence for the prosecution has been completely recorded, at any moment he is satisfied that a *prima facie* case has been made out against the accused¹. It may be noted in this connexion that the procedure

Section 254 — Note 2

- 1 (21) 11 AIR 1921 Cal 63 (64) 25 Cr L Jour 1270 *Natabar Khan v Emperor*
 2 (16) 3 AIR 1916 All 298 (299) 17 Cr L Jour 70 (71) *Jann Dhar v Emperor* (Case under Criminal Tribes Act 3 of 1911)

Note 3

- 1 (44) 31 AIR 1911 Mad 169 (170) 15 Cr L Jour 401 I L R. (1914) Mad 759 211 Ind Cas 411 *Croton Prosecutor Madras v Ramanujulu Naidu* (Section 254 does not say that the Magistrate can frame a charge at a previous stage only if he is of opinion that it is not necessary to examine further witness before framing a charge—The section gives complete freedom to the Magistrate to frame a charge whenever he pleases and one cannot presume that because a Magistrate has framed a charge that all the prosecution evidence has been taken)
- (40) 27 AIR 1910 Nag 293 (293) 41 Cr L Jour 545 189 Ind Cas 413 (414) *Dhanwar Singh v Sukram Singh* (Framing of charge after prosecution evidence but before examination of accused is not irregular)
- (36) 23 AIR 1936 Pesh 211 (211) 39 Cr L Jour 323 *Hassan v Emperor* (Charge can be framed even after hearing the first witness)

in this respect is different in inquiries before commitment to sessions, in that it is obligatory in such inquiries for the Magistrate in every case to take the entire evidence produced on either side before framing a charge² See S 208 and Notes thereon, see also S 210

4. "Ground for presuming" — The section does not require the Magistrate to give reasons for holding that there are good grounds for framing a charge¹ In forming his opinion as to whether there is sufficient ground for presuming that the accused has committed an offence, it is open to the Magistrate to disbelieve the evidence given by the prosecution witnesses. Merely because the prosecution examines a number of witnesses who depose to the guilt of the accused, it is not obligatory on the Magistrate, if he disbelieves them, to frame a charge² When the evidence recorded does not lead to a presumption that the accused has committed an offence but merely raises a doubt, the Magistrate should give the benefit of doubt to the accused and discharge him³ Although the section contemplates the framing of a charge only when a *prima facie* case has been made out against the accused by the prosecution, it is up to the Magistrate to consider the whole of the evidence and the probabilities of the case at the time of proceeding to judgment and he may acquit an accused against whom he has framed a charge though the accused has failed to adduce any satisfactory evidence to rebut the evidence for the prosecution⁴ The discretion of the Magistrate in framing a charge under this section should not be lightly interfered with in revision⁵

5. "Offence triable under this Chapter" — Where a Magistrate commences a case as a warrant case, he can convict the accused of an offence triable as a summons case when he finds that only such an offence has been committed¹ As seen in Note 4 on S 251, in such a case it is not open to the Magistrate to abandon the procedure prescribed for the trial of warrant cases and adopt that of summons cases. It is necessary for the Magistrate to frame a charge even in such cases² The contrary view taken in the under-mentioned cases cannot be supported³ It has been seen in Notes on S 241 that in a

(1900) 2 Bom L R 543 (514), *Queen Empress v Nasarwanji Fdolji*

(1900) 1900 Pan L R Cr, p 63 (65) *Ullam Chand v Empress*

(11) 12 Cr L Jour 471 (472) 11 Ind Cas 1007 (All), *Mulwa v Sheoraj Singh*

(1900) 27 Cal 370 (372) 4 Cal W N 469, *Zamania v Ram Tahal*

See ('37) 24 AIR 1937 All 189 (190) 33 Cr L Jour 394, *Raghunir Sahai v Wali Husain Khan*

See also ('27) 14 AIR 1927 All 660 (661, 662) 50 All 71 28 Cr L Jour 792, *Tirlok v Emperor*,

(Ss 254 and 255 apply to proceedings under S 110)

(66) 3 Mad H C R App II (iii) (Case under Code of 1861)]

2 (12) 13 Cr L Jour 443 (445) 15 Ind Cas 75 (All), *Durga Datt v Emperor*

Note 4

1 (35) 23 AIR 1935 Sind 223 (223) 37 Cr L Jour 152 29 Sind L R 339, *Dagomal v Emperor*

2 ('30) 17 AIR 1930 Lah 543 (543) 32 Cr L Jour 302, *Mt Mubarak Jan v Mt, Rahat Jan*
nd, (Where the evidence
a case finally)]

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4 (96) 1896 Rat 854 (851), *Queen-Empress v Chanbasapa Madiapa*

(26) 13 AIR 1926 No. 115 (116) 23 Nag L R 99 26 Cr L Jour 1349, *Damodar v Jujhar Singh*,

Also see S 256 Note 10 and S 253 Note 3

5 ('37) 23 AIR 1937 Rang 292 (293) 36 Cr L Jour 1293 *U Ayo Sein v Emperor*

Also see S 439 Note 26

Note 5

1 (1900) 2 Bom L R 543 (514), *Queen Empress v Nasarwanji Fdolji*
1901 Fountea (Initial charge under S 500,
See S 352 only not bad)

2 ('30) 17 AIR 1930 Lah 543 (543) 32 Cr L Jour 302, *Mt Mubarak Jan v Mt, Rahat Jan*

(87) 1887 Pan Re No 17 Cr p 84 (35 36) *Empress v Gulam Hussain*

(1900) 2 Bom L R 543 (514), *Queen Empress v Nasarwanji Fdolji*

(1900) 2 Bom L R 543 (514), *Queen Empress v Nasarwanji Fdolji*
1901 Fountea (Initial charge under S 500,
See S 352 only not bad)

(1900) 2 Bom L R 543 (514), *Queen Empress v Nasarwanji Fdolji*
1901 Fountea (Initial charge under S 500,
See S 352 only not bad)

(1900) 2 Bom L R 543 (514), *Queen Empress v Nasarwanji Fdolji*
1901 Fountea (Initial charge under S 500,
See S 352 only not bad)

(1900) 2 Bom L R 543 (514), *Queen Empress v Nasarwanji Fdolji*
1901 Fountea (Initial charge under S 500,
See S 352 only not bad)

joint trial of two offences one of which is triable as a warrant case and the other as a summons case, the procedure prescribed in respect of the graver charge should be followed in regard to both the offences. Hence, in such a case the charge should be framed even in respect of the offence triable as a summons case⁴.

The section does not restrict the power of the Magistrate to frame a charge to cases where the offence disclosed on the evidence is the same as the one mentioned in the complaint or police report on which cognizance was taken. A Magistrate can and ought to frame a charge for the offence made out on the evidence though it may be different from the one alleged in the complaint or police report provided that the other conditions mentioned in the section are present⁵.

As to the procedure to be followed where the offence disclosed is exclusively triable by a Court of Session or is one which in the opinion of the Magistrate ought to be tried by such Court, see S 347 and Notes thereon.

6 "Which, in his opinion could be adequately punished by him." — The section contemplates that a charge should be framed under it only when the offence is one for which, in the opinion of the Magistrate, he can award an *adequate punishment*. If, in his opinion, he cannot do so, he cannot frame a charge and try the case¹. In such a case he must follow the procedure laid down in S 346 or S 347. It has, however, been held in the undermentioned Burma cases² that the provisions of this section are subject to those of S 349 and that under that section it is competent to a Magistrate of the second or third class to frame a charge against the accused in a case which he has jurisdiction to try even though at the time of framing the charge he is of the opinion that he cannot award adequate punishment for the offence and intends, if the accused is proved to be guilty, to submit the proceedings under that section to the District or Sub divisional Magistrate to pass sentence.

As to whether this section precludes the Magistrate from committing a case to the Court of Session when he is not of the opinion that he cannot adequately punish the offence, see Note 4 on S 347.

- 4 (01) 3 Cri L Jour 350 (350) 3 Low Bur Rul 113, *Emperor v Maung Gale*
 (15) 2 AIR 1915 Mad 1200 (1200) 16 Cri L Jour 540 (540) 39 Mad 503, *In re Sobhanadri*.
 (02) 29 Cal 481 (482) 6 Cal W N 599, *Hossein Sardar v Kalu Sardar*
 (18) 5 AIR 1918 Pat 626 (630) 19 Cri L Jour 202, *Bhow Nath Singh v Emperor*. (Charge under S 379, Penal Code, and under S 24 of the Cattle-trespass Act)
 Also see S 221, Note 7.
 5 (1900-1902) 1 Low Bur Rul 286 (237), *Mohun Maistry v Valoo Maistry*

(24) 11 AIR 1924 Lah 718 (718) : 26 Cri L Jour 420, *Gokal v Phuman Singh* (If a Magistrate finds that a girl is over sixteen years and was enticed away, he should find out if some other cognate offence could have been charged and should not throw out the case because girl is not minor)
 Also see S 210, Note 6

Note 5

(A Magistrate's discretion on the question of adequacy of punishment is subject to examination by the High Court in revision)

Also see S. 349, Note 9

7 Magistrate shall frame a charge — Unlike in summons cases (see S 242) in warrant cases it is obligatory on the Magistrate to draw up a formal charge¹ in every case where he holds that a *prima facie* case has been made out by the prosecution and the other conditions laid down in the section are fulfilled. The duty is cast on the Magistrate to frame a charge and he must be careful to see that the charge while it alleges all that is necessary to constitute the offence charged does not contain any unnecessary allegation. Further, the charge ought not to allege positively anything of which the allegation in a positive form is not justified by the materials before the Court. The prosecution is entitled to insist that the charge be so framed by the Court as not to cast on it any unnecessary burden.² In framing a charge the Magistrate must be solely guided by the offence disclosed on the evidence and should not be influenced by any other considerations.³ As to the consequences of a failure to frame a formal charge see S 535 and Notes thereon.

Where in a joint trial of several accused charged with several offences the Magistrate after taking the prosecution evidence considers that a *prima facie* case has been made out against all the accused but is faced with the difficulty that misjoinder of charges would result if charges are framed against all the accused he can in the exercise of his inherent powers order a *de novo* trial with regard to some of the accused.⁴

As to the procedure to be followed where the offence disclosed is exclusively triable by the Court of Session or for other reason the Magistrate considers the case to be a fit one for commitment to the Court of Session see S 317 and Notes thereon.

As to whether a charge need be drawn up in a warrant case tried summarily see Ss 203 and 204 and Notes thereon.

As to the power of the Magistrate to discharge the accused where the complainant fails to appear on the date of hearing see S 259 and Notes thereon.

As to the effect of committing to the sessions a case which the Magistrate himself ought to try after framing a charge under this section see S 317 Note 4.

8 Charge—What it should contain — See Sections 201 to 203.

9, Effect of the framing of the charge — As to whether the fact that a charge is framed in respect of a less serious offence amounts to a discharge of the accused in respect of a more serious offence alleged against the accused see Note 4 on S 203.

255.† (1) The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make.

(2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon.

* 1882 S 255 1872 Ss 217, 324 1861 S 251

Note 7

1 (38) 25 AIR 1939 Cal 205 (203) 39 Cri L Jour 438 *Sufat Gola v Emperor*
(26) 13 AIR 1926 Cal 537 (535) 27 Cri L Jour 406 *Mahomed Rafique v Emperor* (Case under S 46

Kabir Kaljar v Emperor (Section on 254 is

2 (89) 1939 Pau Re No 76 Cr p 65 (89 90) (FB) *Sant Singh v Empress*

3 (01) 1901 Lun Re No 5 Cr p 11 (16) 1901 Pau L R No 51 *Mukerji v Empress*.
Also see S 210 Note 6

4 (38) 25 AIR 1939 Cal 258 (61) ILR (1939) I Cal 583 39 Cri L Jour 536 *Abdul Basid v Emperor*

Synopsis

- | | |
|---|--|
| 1 Legislative changes
2 Applicability of the section to security cases
3 "Read and explained"
4 "Shall be asked"
5 Plea of guilty, what is. | 6 Plea of guilty — Value to be attached to
7 Admission by pleader
8 Plea of guilty by one of several to accused—Effect of such admission
9 Shall be recorded.
10 "May in his discretion convict"
11 Effect of non-compliance with the section |
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NOTE to the Synopsis See the Notes indicated for the following topics :

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| Admission of facts but not of offence See Note 10
Aggravating circumstances to be explained to accused See Note 3
Confession to be taken as a whole See Note 9 | Conviction without evidence or charge on admission See Note 4
Effect of plea on S 30, Evidence Act See Note 6
Plea of guilty by pleader of record See Note 7 |
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1. **Legislative changes** — The words "and explained" were first inserted in Section 217 of the Code of 1872

2. **Applicability of the section to security cases.** — This section applies only to an inquiry under S 117 where security proceedings are taken for good behaviour except in so far as the framing of a charge and the reading of the same to the accused is concerned. In such an inquiry, therefore, the Magistrate may ask the accused if he pleads guilty.¹

3. **"Read and explained"** — The charge must be read and explained by the Magistrate himself and not by his clerk or *Amlah*.¹ The accused is entitled to know with certainty and accuracy the charge brought against him.² It should, therefore, be so explained as to make the accused clearly understand the nature of the charge.³

The aggravating circumstances of the offence, if any, must also be made known to the accused.⁴

4. **"Shall be asked."** — The accused cannot be called upon to plead until a charge is framed upon the evidence recorded and the charge has been read and explained to him.

Where a Magistrate convicts the accused on his own admission without recording evidence and without framing a charge, the conviction is liable to be set aside.¹

5. **Plea of guilty, what is.** — A plea of guilty is an admission of all the facts on which the charge is founded, as well as an admission of guilt in respect of them.¹ &

Section 255 — Note 2

- 1 (27) 14 AIR 1927 All 660 (661, 662) 50 All 71 28 Cri L Jour 792 *Tirul v Emperor*
 [See also (25) 15 AIR 1928 All 270 (271, 272) 30 Cri L Jour 6 50 All 599 *Emperor v Krishan Narain* (Section 107, Cr P C)]

Note 3

- 1 (71) 16 Sath W R Cr 43(43) *Queen v Jehangeer Dulsh Khan* (This was, however, a summons-case)
 2 (16) 3 AIR 1916 Cal 188 (192) 16 Cri L Jour 497 (501) 42 Cal 937, *Amritlal v Emperor*
 (Defective charge under S 4 (b), Explosive Substances Act 1908)
 (23) 10 AIR 1923 Rang 141 (142) 21 Cri L Jour 871, *Ah Lim v Emperor* (Section 12 Borneo Gambling Act)
 [See also (93) 1900 1893 1900 Low Bur Rul 323 (328) *Nga Aye v Emperor*]
 Also see 9 221 Note 1 S 223 Note 1 S 256, Note 4 and S 535, Note 3
 3 (80) 5 Cal 826 (827), *Empress v Vasubdee* (Charge of murder not fully explained to the accused through the interpreter)
 (23) 10 AIR 1923 All 285 (286) 23 Cri L Jour 592, *Jodha Singh v Emperor*
 Also see S 271, Note 4
 4 (71) 1871 Rat 55 (56), *Peg v Mukta Manka*

Note 4

- 1 (1) 4 Cal L Jour 471 (475) 3 Low Bur Rul 209 (17), *Abbas Ali v Emperor*

See also S 271, Note 7.

7 Admission by pleader. — A plea of guilty must ordinarily be made by the accused himself and not by his pleader¹ except where the accused is permitted under s 205

(20) 7 AIR 1920 All 203 (204) 21 Cal L Jour 665, *Danwant Lal v Emperor* (admitted travelling without railway ticket, but pleaded no time to purchase one)

v. Emperor
aside)

Note 6

Note 7

(04) 1 Cr L Jour 939 (339) 61 om L R 861 *Le Royer v. Sur*, 14 Vau. 17235

to appear by his pleader.² See also S 271, Note 10 and S 310, Note 9

A plea of self-defence is not inconsistent with a plea of not guilty and consequently where the accused pleads not guilty and in the course of the argument his pleader advances the plea of self-defence, it is the duty of the Court to admit the plea and say upon the facts of the case what offence, if any, has been committed.³ In the undermentioned case⁴ it was held that, though the Court could not at the trial convict an accused merely upon the admission of his pleader, yet, in an appeal, the appellate Court could act upon an admission of fact made in the appeal by his pleader, especially where it does not cause prejudice to the accused.

8. Plea of guilty by one of several co-accused — Effect of such admission. — A plea of guilty by one of several co-accused may be taken into consideration against the other accused only where the latter are "tried jointly" with the former within the meaning of S 30 of the Evidence Act. In a variant case, it is only after the prosecution evidence is over that a charge is framed and the accused pleads guilty. In such a case, all the accused may be said to be tried jointly and the plea of one accused may be considered against the others also.¹ The case is, however, different in the session-trial where the accused's plea of guilty is recorded at the outset of the trial. An accused who then pleads guilty and is convicted on his plea cannot be held to be "tried jointly" with the others against whom the case proceeds under S 272.² Where some of the accused jointly tried plead guilty and are convicted and sentenced on their plea, they can be examined as witnesses against the other accused and it is not for the latter to object that the plea of guilty of the former should not have been accepted.³ See also S 271, Note 15

The above sums up the position on the case-law, as to whether an accused person who pleads guilty can be said to be "tried jointly" with the other accused within the meaning of S 30 of the Evidence Act. But another question arises in regard to this matter, viz, can a plea of guilty be taken to be a confession "proved" within the meaning of S 30 of the Evidence Act? Section 312, Note 27 may be referred to in this connection.

9. Shall be recorded — The proceedings must show that the plea of the accused has been recorded. A conviction based upon a plea not so recorded is bad.¹

A plea of guilty must be so recorded as to avoid any misapprehension or mistake. As far as possible the very words used by the accused must be employed. Where there is an exculpatory statement before the charge, the exact words of a plea of guilty should be recorded by question and answer.² The whole and not part of the accused's statement accompanying the plea should be recorded.³ Where the plea of the accused is interpreted

board, Lucknow v *Meer*

v *Mt. Jamal Katun*

— 1900 AC 410, *Dorab Shah v Emperor*

(Summons-case)

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1. (14) 1 AIR 1914 Mad 45 (46) 38 Mad 302 15 Cri L Jour 13, *In re Bai Reddy* (22 Mad 491, dissented from)

2. See (14) 1 AIR 1914 Mad 45 (46) 38 Mad 302 15 Cri L Jour 13, *In re Bai Reddy*

3. (35) 22 AIR 1935 Cal 530 (535) 36 Cri L Jour 1322 (SI), *Pran Krishna Chakravarty v Emperor*.

Note 9

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(Plea of guilty cannot be

ed v *Emperor*.)

to the Court, the language in which the plea should be recorded is the language in which it is conveyed to the Court by the interpreter⁴

10 "May in his discretion convict." — Under this section, the Magistrate may convict the accused on his plea of guilty without calling upon him to enter upon his defence. But he is not bound to do so¹ In an ordinary criminal case, however (to which possibly a charge of murder is the only exception) the Court should, as a general rule accept the plea of guilty and act upon it. It would be a waste of public time to hold an elaborate inquiry in such cases² But the plea of guilty must be clear and unambiguous and embrace all the elements of the offence charged. Where the accused admits some or all the facts alleged by the prosecution but pleads "not guilty," the proper course for the Court is to proceed with the trial³

Where the offence is not proved upon the evidence, the accused cannot be convicted even though he does not deny the offence⁴

Where an accused pleads guilty but the act complained of does not amount to an offence, the so called plea of guilty is no more than an admission on the part of the accused that he had committed the act which is alleged to be an offence. But the question whether the act complained of does or does not constitute an offence according to law is obvious; one for the Court to decide and hence the accused cannot be convicted merely on his plea of guilty⁵

11 Effect of non compliance with the section — The record must show that the procedure laid down in the section was followed. Where the record does not show that the charge was read and explained to the accused¹ or that the accused was asked to plead² the conviction is liable to be set aside on the ground of prejudice to the accused

255A. In a case where a previous conviction is charged under the

Procedures in case of provisions of section 221, sub-section (7), and the accused previous convictions does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused under section 255, sub-section (2), or section 258, take evidence in respect of the alleged previous conviction, and shall record a finding thereon

4 (80) 5 Cal 826 (809) *Vasimbalee v Empress*.

Note 10

- 1 (07) 5 Cr L Jour 416 (416) 3 Low Bur Rul 279 *Emperor v Taw Pyy*
- (33) 20 AIR 1933 Oudh 86 (89) 8 Luck 286 34 Cr L Jour 124 *Kunwar Sen v Emperor*
- (21) 8 AIR 1901 Cal 260 (260) 23 Cr L Jour 574 *Emperor v Rish Behari Ghose*
- (15) 2 AIR 1915 All 921 (924) 37 All 247 16 Cr L Jour 327 *Emperor v Dip Narain* (Plea of guilty by one co accused not accepted)
- (78) 3 Cal 756 (756) 2 Cal L R 317 *In the matter of Chumman Shah*
- 2 (28) 15 AIR 1908 All 270 (270) 50 All 599 30 Cr L Jour 6 *Emperor v Kishan Narain* (P. Walsb J)
- (31) 21 AIR 1934 Lah 89 (90) 35 Cr L Jour 1453 *Martin Private, Surrey Regiment Lahore v Emperor* (Conviction can be sustained solely on confession — But Court expects some corroboration as act of prudence)
- 3 (07) 6 Cr L Jour 424 (425) 9 Bom L R 1316 *Emperor v Somabhai Nathabhai*
- 4 (33) 20 AIR 1933 All 612 (613 614) 55 All 657 34 Cr L Jour 1053 *R N Basu v Emperor*
- 5 (41) 29 AIR 1941 Lah 301 (303) 1 L R (1941) Lah 796 42 Cr L Jour 765 195 Ind Cas 674 *Haj Court Bar Association v Emperor* (Sending of letter to District Magistrate intimating that accused intended to offer satyagraha by shouting anti war slogans — Charge under Rules 38 and 121 Defence of India Rules — Ika of guilty — Accused cannot be convicted on such plea as act complained of is not offence)

Note 11

- 1 (81) 7 Cal 96 (97) 8 Cal L R 471 *Empress v Gopal Dhanul*
- (86) 9 Mad 61 (63) 2 Wair 337 *Hyatt v Queen-Empress* (Charge not explained)
- Also see S 271 Note 4
- 2 (15) 2 AIR 1915 Bom 14 (15) 16 Cr L Jour 532 *Dasabhai J Dhand v Emperor* (Other irregularities also.)

1. Scope of the section. — This section is new and was introduced into the Code by the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923. It provides that evidence of a previous conviction for the purpose of affecting the punishment to be awarded can be taken only *after* the Magistrate has convicted the accused¹. It gives effect to the undermentioned decisions² which held that it was illegal to take such evidence *before* the conviction. The undermentioned decision³ which took a contrary view is now obsolete.

This section read with S 221 (7) shows that for the purpose of *framing a charge* in respect of a previous conviction, no evidence need be taken about the previous conviction.⁴ The necessity for taking such evidence will arise only subsequently, and that only where the accused has been convicted on the substantive charge and does not admit the previous conviction⁵.

2 Admission of previous conviction by accused. — The combined effect of S 221 (7) and this section is that the accused is to be charged with the substantive offence and at the same time, in anticipation, with the previous convictions. If the previous convictions are set forth in the charge and if the charge has been read over and explained to the accused and he pleads guilty to it without any reservation, he is admitting the previous convictions within the meaning of the section¹. In such a case, evidence of the previous conviction need not be taken. The mere admission by the accused that he had been in jail once is *not* sufficient to show that he pleaded guilty to a previous conviction for an offence rendering him liable to enhanced punishment².

3 May, after conviction — See Note 1

4 Evidence of previous conviction — Whenever it is required to prove a previous conviction against an accused for the purpose of enhancement of punishment such previous conviction must be proved strictly and in accordance with law.¹ The accused must

Section 255A — Note 1

1. Ind Cas 89 (DD), late procedure and then, if convicted, liable to enhanced punishment. The purpose of S 255 A is to approximate a trial in a case of previous convictions in a manner which is more direct and less tedious than the old procedure. rather than the old procedure. following it)

Shakar Chuharmal v. Emperor. (Mere conviction slip may be enough — But for committing to sessions on charge of previous conviction, under S 75, I P C, *prima facie* legal evidence of such conviction is necessary and mere conviction slip is not enough)

5 (44) 31 AIR 1911 Lah 25 (26) 1 L R (1913) Lah 477 45 Cri L Jour 361 211 Ind Cas 293 (FB). *Emperor v. Dalip Singh* (Per Division Bench In Order of Reference)

Note 2

1 (44) 31 AIR 1911 Lah 25 (25) 1 L R (1913) Lah 477 45 Cri L Jour 361 211 Ind Cas 293 (FB). *Emperor v. Dalip Singh*

2 (02) 4 Bom L R 177 (177) *King Emperor v. Gound Salharam*

Note 4

1 (16) 3 AIR 1910 Cal 311 (315) 17 Cri L Jour 185 (186) 43 Cal 112a, *Emperor v. Si Abdul* (Per Jency Magistrate must also take strict proof of previous convictions)

also be called upon to *plead* to the charge of previous conviction² See also ss 311 and 511 and Notes thereon

As to whether a Magistrate can under S 31^o question the accused with regard to his previous convictions see Note 14 on S 31^o

256.* (1) If the accused refuses to plead, or does not plead, or *Defence* claims to be tried, he shall be required to state, at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence

(2) If the accused puts in any written statement, the Magistrate shall file it with the record

Synopsis

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| <ul style="list-style-type: none"> 1 Legislative changes 2 Scope and applicability of the section 3 'Refuses to plead, or does not plead or claims to be tried' 4 The accused shall be required to state 5 'At the commencement of the next hearing 6 Right of accused to cross-examine the prosecution witnesses 7 Waiver of the right under this section 8 Recall and discharge of the witnesses | <ul style="list-style-type: none"> 9 Examination of the remaining witnesses 9a Production of documents by prosecution during cross examination of prosecution witnesses 10 The accused shall then be called upon to enter upon his defence and produce his evidence 11 Expenses of witnesses See Notes on S 501 12 Written statement of accused 13 Effect of non-compliance with this section See Note 20 on S 537 |
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* Code of 1882 S 256

256 If the accused refuses to plead or does not plead or claims to be tried he shall be called *Defence* upon to enter upon his defence and to produce his evidence, and shall at any time while he is making his defence be allowed to recall and cross examine any witness for the prosecution present in the Court or its precincts

If the accused puts in any written statement the Magistrate shall file it with the record

Code of 1872 S 218

218 If the accused person have any defence to make to the charge he shall be called upon to *Defence* enter upon the same and to produce his witnesses if in attendance and shall be allowed to recall and cross-examine the witnesses for the prosecution.

If the accused person puts in any written statement the Magistrate may file it with the record but shall not be bound to do so

Code of 1861 S 252 — Same as the first part only of S 218 of 1872 Code

NOTE to the Synopsis See the notes indicated for the following topics :

Accused unrepresented See Note 5	Joint trial of summons and warrant cases See Note 2
Adjournment for accused's evidence See Note 10	Reservation of cross examination See Note 2
Adjournment for cross-examination See Notes 5 and 6	Several accused — Right of each See Note 6
Adjournment for prosecution witnesses See Note 9	Summary cases — Further cross examination See Note 2
Commencement of trial See Note 3	Waiver by accused's counsel See Note 7
Cross-examination after defence evidence See Note 7	Warrant-case — Subsequent conversion into summons case See Note 2
Defence by cross-examination See Note 10	Written statement and examination of accused See Note 12
Fresh prosecution witnesses See Note 9	
Inapplicability to disciplinary jurisdiction under Letters Patent See Note 12	

1. Legislative changes.

Difference between the Codes of 1861 and 1872 —

In 1872 a sub clause was added by which the accused's written statement, if any, might be received and filed with the record

Differences between the Codes of 1872 and 1882 —

- (1) Instead of the clause "if the accused person . . . to enter upon the *sine*" the clause "if the accused refuses to plead . . . to enter upon his defence" was inserted. The decision bearing on the interpretation of the former expression¹ is only of academic interest now.
- (2) For the words "to produce his witnesses if in attendance"² the words "to produce his evidence" were substituted in 1882.
- (3) The clause "and shall, at any time while he is making his defence, be allowed to recall and cross-examine the witnesses for the prosecution, present in Court or its precincts" was substituted for the clause "and shall be allowed to recall and cross examine the witnesses for the prosecution" occurring in the Code of 1872.
- (4) In the clause regarding the filing of the written statement of the accused the word "shall" was substituted for the word "may" and the words "but shall not be bound to do so" were omitted.

Differences between the Codes of 1882 and 1898 —

In the 1898 Code after the words "if the accused refuses to plead, or does not plead, or claims to be tried" the words "he shall be required to state . . . they shall also be charged" were added. At the same time, the provision in the Code of 1882 by which the accused was given the right to "recall and cross examine prosecution witnesses at any time while making his defence" was repealed and it was provided that the accused should be called upon to enter upon his defence after the examination, cross examination, and re-examination of the prosecution witnesses.

Changes made by Act 18 [XVIII] of 1923 —

After the words "he shall be required to state" the words "at the commencement of the next hearing of the case . . . forthwith" were added, thereby requiring the Magistrate to ask the accused if he wished to cross examine the prosecution witnesses already examined, not on the day on which a charge is framed, but at the next hearing only, unless for reasons to be recorded in writing the Magistrate thinks fit to put the question on the same day as he frames the charge.

2. Scope and applicability of the section —Section 255 provides that when the accused pleads guilty in a warrant-case the Magistrate may convict him upon such plea.

Section 256 — Note 1

1. (73) 19 South W R Cr 53 (53 51), *Ex'ltos v Queen*

2. (69) 11 South W R Cr 15 (15), *Queen v Totaram* (Witnesses not in attendance — Failure to ask accused to produce evidence not a flaw)

This section provides for the procedure to be followed when the accused does not plead guilty. It provides *inter alia* that the accused should be asked to state whether he wishes to cross examine any of the prosecution witnesses whose evidence has been taken and if he so wishes the witnesses named by him should be recalled and he should be allowed to cross examine them. It has been seen in the Notes on S 232 that in variant cases the accused can be allowed to cross examine the prosecution witnesses even before the charge is framed. The present section confers on the accused an opportunity of cross examining the prosecution witnesses a *second time* after the charge is framed. The reason for this provision is that in variant cases the accused is in a position to know the exact case he has to meet only after the charge is framed.¹ As to whether the accused is entitled *as of right* to cross examine the prosecution witnesses before the charge is framed, see Notes on S 252.

A second opportunity to cross-examine prosecution witnesses is vouchsafed to the accused only in warrant cases. The accused has no such right in summons cases. But where a case is commenced as a warrant case but subsequently it appears that only an offence triable as a summons case has been committed, it is not open to the Magistrate to suddenly revert to the procedure of summons cases. He is bound to allow the accused further opportunity of cross-examining the prosecution witnesses if he so desires² (See Notes on S 201). Similarly, as has been seen in the Notes on S 411 where a summons case and a warrant case are tried together the procedure prescribed for warrant cases should be followed. In such a case also if the Magistrate finds that the charge in respect of the warrant case is unsustainable and decides to proceed with the other offence alone, it is not open to him to deny to the accused the opportunity of further cross-examination of the prosecution witnesses provided for by this section³.

Section 206 provides that in warrant cases tried summarily the procedure prescribed for the trial of warrant cases should be followed. Section 203 provides that in summary trials in cases in which no appeal lies a formal charge need not be drawn up. The question has arisen whether this section (S 206) applies to warrant cases tried summarily in which a charge is not framed. On this question there is a conflict of decisions. On the one hand it has been held by the High Courts of Calcutta⁴, Madras⁵, Nagpur⁶ and Patna⁷ and the

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Note 2

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Also see Section Note 4

8 (30) 17 AIR 1930 Snd 146 (147) 24 Snd L R 336 31 Cr L Jour C 3 *Si Ju v Emperor*

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NOTE to the SynopsiS See the Notes indicated for the following topics :

Accused unrepresented See Note 5	Joint trial of summons and warrant cases. See Note 2
Adjournment for accused's evidence See Note 10	Reservation of cross-examination See Note 2
Adjournment for cross-examination See Notes 5 and 6	Several accused — Right of each See Note 6
Adjournment for prosecution witnesses See Note 9	Summary cases — Further cross examination See Note 2
Commencement of trial See Note 3	Waiver by accused's counsel See Note 7
Cross-examination after defence evidence See Note 7	Warrant case — Subsequent conversion into summons case See Note 2
Defence by cross-examination See Note 10	Written statement and examination of accused See Note 12
Fresh prosecution witnesses See Note 9	
Inapplicability to disciplinary jurisdiction under Letters Patent See Note 12	

1. Legislative changes.

Difference between the Codes of 1861 and 1872 —

In 1872 a sub clause was added by which the accused's written statement, if any, might be received and filed with the record

Differences between the Codes of 1872 and 1882 —

- (1) Instead of the clause "if the accused person to enter upon the same" the clause "if the accused refuses to plead . . . to enter upon his defence" was inserted. The decision bearing on the interpretation of the former expression is only of academic interest now.
- (2) For the words "to produce his witnesses if in attendance" the words "to produce his evidence" were substituted in 1882.
- (3) The clause "and shall, at any time while he is making his defence, be allowed to recall and cross examine the witnesses for the prosecution, present in Court or its precincts" was substituted for the clause "and shall be allowed to recall and cross examine the witnesses for the prosecution" occurring in the Code of 1872.
- (4) In the clause regarding the filing of the written statement of the accused the word "shall" was substituted for the word "may" and the words "but shall not be bound to do so" were omitted.

Differences between the Codes of 1882 and 1898 —

In the 1898 Code after the words "if the accused refuses to plead, or does not plead, or claims to be tried" the words "he shall be required to state . . . they shall also be discharged" were added. At the same time, the provision in the Code of 1882 by which the accused was given the right to "recall and cross examine prosecution witnesses at any time while making his defence" was repealed and it was provided that the accused should be called upon to enter upon his defence after the examination, cross examination, and re-examination of the prosecution witnesses.

Changes made by Act 18 [XVIII] of 1923 —

After the words "he shall be required to state" the words "at the commencement of the next hearing of the case . . . forthwith" were added, thereby requiring the Magistrate to ask the accused if he wished to cross examine the prosecution witnesses already examined, not on the day on which a charge is framed, but at the next hearing only, unless for reasons to be recorded in writing the Magistrate thinks fit to put the question on the same day as he frames the charge.

2. Scope and applicability of the section.—Section 255 provides that when the accused pleads guilty in a warrant case the Magistrate may convict him upon such plea.

Section 256 — Note 1

as v. Queen

r. Totaram (Witness not in attendance — failure to ask

This section provides for the procedure to be followed when the accused does not plead guilty. It provides *inter alia* that the accused should be asked to state whether he wishes to cross examine any of the prosecution witnesses whose evidence has been taken and if he so wishes, the witnesses named by him should be recalled and he should be allowed to cross examine them. It has been seen in the Notes on S 252 that in warrant cases the accused can be allowed to cross examine the prosecution witnesses even before the charge is framed. The present section confers on the accused an opportunity of cross examining the prosecution witnesses a second time after the charge is framed. The reason for this provision is that in warrant cases the accused is in a position to know the exact case he has to meet only after the charge is framed.¹ As to whether the accused is entitled *as of right* to cross examine the prosecution witnesses before the charge is framed, see Notes on S 252.

A second opportunity to cross examine prosecution witnesses is vouchsafed to the accused only in warrant cases. The accused has no such right in summons cases. But where a case is commenced as a warrant case but subsequently it appears that only an offence triable as a summons case has been committed, it is not open to the Magistrate to suddenly revert to the procedure of summons cases, he is bound to allow the accused further opportunity of cross examining the prosecution witnesses if he so desires.² (See Notes on S 231.) Similarly, as has been seen in the Notes on S 211, where a summons case and a warrant case are tried together, the procedure prescribed for warrant cases should be followed. In such a case also if the Magistrate finds that the charge in respect of the warrant case is unsustainable and decides to proceed with the other offence alone, it is not open to him to deny to the accused the opportunity of further cross examination of the prosecution witnesses provided for by this section.³

Section 262 provides that in warrant cases tried summarily the procedure prescribed for the trial of warrant cases should be followed. Section 263 provides that in summary trials, in cases in which no appeal lies, a formal charge need not be drawn up. The question has arisen whether this section (S 256) applies to warrant cases tried summarily in which a charge is not framed. On this question there is a conflict of decisions. On the one hand it has been held by the High Courts of Calcutta,⁴ Madras,⁵ Nagpur⁶ and Patna⁷ and the Judicial Commissioner's Court of Sind⁸ relying on the general provisions of s 262, that the section applies to such cases notwithstanding the absence of a formal charge. But, on the other hand, it has been held by the High Court of Bombay⁹ and the Chief Court of Oudh¹⁰

Note 2

1. (74) 6 N W P H C R 284 (287), *Queen v Lall Mahomed*,
(16) 3 AIR 1916 Lah 295 (296); 17 Cr L Jour 84 (85); 1916 Pan Re No 1 Cr, *Ahmad Balsh v. Emperor*.

Emperor.

Also see S 251, Note 4

3. (15) 2 AIR 1915 Mad 1200 (1200); 16 Cr L Jour 510 (540) 39 Mad 503, *In re SothanaJiri* (Failure to follow S. 256 — Absence of prejudice must be proved by prosecution)

4. (20) 7 AIR 1920 Cal 769 (770); 23 Cr L Jour 271, *Nepal Bagdi v. Emperor*.

5. (42) 29 AIR 1912 Mad 672 (673) 44 Cr L Jour 10 293 Ind Cas 321, *Subbiah v. Venkatasubramma*
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8. (30) 17 AIR 1930 Sind 146 (147); 24 Sind L R 336; 31 Cr L Jour 623, *Shida v Emperor*.

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v. Emperor.

NOTE to the Synopsis See the Notes indicated for the following topics

Accused unrepresented See Note 5	Joint trial of summons and warrant cases. See Note 2
Adjournment for accused's evidence See Note 10	Reservation of cross-examination. See Note 2
Adjournment for cross-examination See Notes 5 and 6	Several accused — Right of each See Note 6
Adjournment for prosecution witnesses See Note 9	Summary cases — Further cross examination. See Note 2
Commencement of trial See Note 3	Waiver by accused's counsel See Note 7
Cross-examination after defence evidence See Note 7	Warrant case — Subsequent conversion into summons case See Note 2
Defence by cross-examination See Note 10	Written statement and examination of accused See Note 1 ^a
Fresh prosecution witnesses See Note 9	
Inapplicability to disciplinary jurisdiction under Letters Patent See Note 12	

1 Legislative changes

Difference between the Codes of 1861 and 1872 —

In 1872 a sub clause was added by which the accused's written statement if any might be received and filed with the record

Differences between the Codes of 1872 and 1882 —

- (1) Instead of the clause 'if the accused person to enter upon the same the clause if the accused refuses to plead to enter upon his defence was inserted. The decision bearing on the interpretation of the former expression¹ is only of academic interest now
- (2) For the words 'to produce his witnesses if in attendance' the words 'to produce his evidence' were substituted in 1882
- (3) The clause 'and shall at any time while he is making his defence be allowed to recall and cross examine the witnesses for the prosecution present in Court or its precincts' was substituted for the clause 'and shall be allowed to recall and cross examine the witnesses for the prosecution' occurring in the Code of 1872
- (4) In the clause regarding the filing of the written statement of the accused the word 'shall' was substituted for the word 'may' and the words 'but shall not be bound to do so' were omitted

Differences between the Codes of 1882 and 1898 —

In the 1898 Code after the words 'if the accused refuses to plead or does not plead or claims to be tried' the words 'he shall be required to state they shall also be charged' were added. At the same time the provision in the Code of 1882 by which the accused was given the right to 'recall and cross examine prosecution witnesses at any time while making his defence' was repealed and it was provided that the accused should be called upon to enter upon his defence after the examination cross examination and examination of the prosecution witnesses

Changes made by Act 18 [XVIII] of 1923 —

After the words 'he shall be required to state' the words 'at the commencement of the next hearing of the case forthwith' were added, thereby requiring the Magistrate to ask the accused if he wished to cross-examine the prosecution witnesses already examined not on the day on which a charge is framed but at the next hearing only, unless for reasons to be recorded in writing the Magistrate thinks fit to put the question on the same day as he frames the charge

2 Scope and applicability of the section —Section 256 provides that when the accused pleads guilty in a warrant case the Magistrate may convict him upon such plea

Section 256 — Note 1

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This section provides for the procedure to be followed when the accused does not plead guilty. It provides *inter alia* that the accused should be asked to state whether he wishes to cross examine any of the prosecution witnesses whose evidence has been taken and if he so wishes the witnesses named by him should be recalled and he should be allowed to cross examine them. It has been seen in the Notes on S 252 that in warrant cases the accused can be allowed to cross examine the prosecution witnesses even before the charge is framed. The present section confers on the accused an opportunity of cross examining the prosecution witnesses a *second time* after the charge is framed. The reason for this provision is that in warrant cases the accused is in a position to know the exact case he has to meet only after the charge is framed.¹ As to whether the accused is entitled *as of right* to cross examine the prosecution witnesses before the charge is framed see Notes on S 252.

A second opportunity to cross examine prosecution witnesses is provided to the accused only in warrant cases. The accused has no such right in summons cases. But where a case is commenced as a warrant case but subsequently it appears that only an offence triable as a summons case has been committed it is not open to the Magistrate to suddenly revert to the procedure of summons cases. He is bound to allow the accused further opportunity of cross examining the prosecution witnesses if he so desires.² (See Notes on S 251.) Similarly as has been seen in the Notes on S 211 where a summons case and a warrant case are tried together the procedure prescribed for warrant cases should be followed. In such a case also if the Magistrate finds that the charge in respect of the warrant case is unsustainable and decides to proceed with the other offence alone it is not open to him to deny to the accused the opportunity of further cross examination of the prosecution witnesses provided for by this section.³

Section 262 provides that in warrant cases tried summarily the procedure prescribed for the trial of warrant cases should be followed. Section 263 provides that in summary trials in cases in which no appeal lies a formal charge need not be drawn up. The question has arisen whether this section (S 256) applies to warrant cases tried summarily in which a charge is not framed. On this question there is a conflict of decisions. On the one hand it has been held by the High Courts of Calcutta⁴ Madras⁵ Nagpur⁶ and Patna⁷ and the Judicial Commissioners' Court of Sind⁸ relying on the general provisions of S 262 that the section applies to such cases notwithstanding the absence of a formal charge. But on the other hand it has been held by the High Court of Bombay⁹ and the Chief Court of Oudh¹⁰

Note 2

1 (14) 6 C W P H C R 234 (187) *Qureshi v. Lall Mahomed*

(16) 3 AIR 1916 Lah 290 (206) 17 Cri L Jour 84 (83) 1916 Pun Re No 1 Cr *Ahmad Dalsh v. Emperor*

(14) 1 AIR 1914 Lah 556 (137) 1914 Pun Re No 11 Cr 16 Cri L Jour 146 *Moola v. Emperor*

(11) 22 Cri L Jour 683 (684) 63 Ind Crs 619 (Pat) *Muhammad Teli v. Emperor*

Also see S 251 Note 4

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8 (30) 17 AIR 1930 Sind 146 (147) 24 Sind L R 336 31 Cri L Jour 6-3 *Shida v. Emperor*.
(Accused is entitled to have further time for producing his evidence)

9 (26) 13 AIR 1916 Bom 206 (206) 27 Cri L Jour 431 *Umapati Kishorji v. Emperor*

10 (3) 19 AIR 193 Oudh 212 (213) 71 Ind Crs 699 33 Cri L Jour 506, Go' - *Emperor*

that the section does not apply to such cases as it only contemplates cases where a charge is framed.

As a general rule, the cross examination of a witness should be made immediately after his examination in chief is over and the cross examination cannot be reserved till the other witnesses have been examined unless the Court, in its discretion, permits the cross-examination to be reserved. This section provides an exception to this general rule because it entitles an accused person in a warrant case to defer the cross-examination of the prosecution witnesses till the witnesses have been examined and a charge is framed.¹¹

The section applies not only to cases where the charge is framed before the prosecution has completed its evidence, but also to cases where the charge is framed *after* all the prosecution witnesses have been examined in chief.¹²

As to the applicability of the section to proceedings for the taking of security for good behaviour, see Section 117, Note 4

As to the applicability of the section to proceedings under § 145, see Notes on that section.

As to whether the accused is entitled to cross examine prosecution witnesses a second time after the charge is framed in preliminary inquiries before commitment to sessions, see Section 213, Note 7

3 "Refuses to plead, or does not plead, or claims to be tried"—If the accused "refuses to plead, or does not plead, or claims to be tried," the procedure laid down in this section should be followed. The expression "claims to be tried" includes cases where the accused pleads not guilty. Where the accused denies the charge and pleads not guilty, he is entitled to be dealt with under this section although he may admit all or any of the allegations of the prosecution¹. The procedure provided in the section should be followed not only when the accused pleads not guilty or claims to be tried but also where he refuses to plead at all or does not plead². The effect of this provision is that an accused is not bound to answer at all any question put to him and can, if he likes, decline to plead. Hence, by declining to plead he does not commit any offence under Section 179 of the Penal Code³.

Does the expression 'claims to be tried' in this section show that in warrant cases the 'trial' does not begin till the charge is framed and the accused claims to be tried? For a discussion on this question, see Notes on Section 4 (1) (k).

4. The accused shall be required to state. — This provision, requiring the Magistrate to ask the accused if he wishes to cross examine the prosecution witnesses examined before charge, was introduced for the first time in the Code of 1893. In two old decisions, one of the High Court of Calcutta decided in the year 1876¹ and the other of the High Court of Allahabad decided in 1871,² it was laid down that the Magistrate before discharging the prosecution witnesses should ask the accused if he required them for his further cross-examination. That was suggested only as a rule of convenience. Now, the

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12 (100) 10 Ail. 1932 Mad 603 (503) 35 Cri L Jour 739, *Muthiah Pillai v. Emecor*

(But see (25) 12 AIR 1925 Nag 147 (151) 25 Cr L Jour 1152, *Gangadhar v Dhangi Sa* (Submitted not correct))

Note 3

3 (07) 6 Cr¹ v v - - - - -

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Note 4

1 (76) 25 South W R Cr 43 (19) Queen v Pankras, 121 N.H. 101 (1976).

2 (74) C A W P H C R 2-1 (7-2) Quisenberry La La Mahomeds

Magistrate is bound to question the accused on that point it has been made a statutory duty on the part of the Magistrate. It is of vital importance that the accused should in all cases be asked at the appropriate time if he wishes to cross examine the prosecution witnesses.³ But as to whether such an omission is a material irregularity or not see Note 20 on Section 537.

The Code does not explicitly require the Magistrate to record the fact that he has observed the provisions of this section. But it is a safe and sound rule that when the law requires anything to be done, the fact that this has been done should be recorded.⁴ Hence, it is important that the record must show that the Magistrate has complied with the provisions of the section by questioning the accused in the manner laid down therein.⁵

5 "At the commencement of the next hearing" — There was no provision in the section as it stood originally in the Code of 1898 as to the particular time at which the accused was to be asked to state whether he wishes to cross examine any and if so which of the prosecution witnesses.¹ Under these circumstances it was held in the undermentioned case² that the re cross examination of the prosecution witnesses must be made immediately after the charge was framed. Under the section as amended in 1923, it has been provided that the accused should be required to state at the next hearing whether he wished to cross examine any witnesses unless the Magistrate, for reasons to be recorded by him thinks fit to require him to do so immediately. The object of the provision is to give the accused sufficient time to consider whether he should cross examine the prosecution witnesses.³

A Magistrate can adjourn the case to a later date solely for the purpose of asking the accused whether he wishes to cross examine the prosecution witnesses, and, if he does so it cannot be said that the proceedings on the adjourned date are not a 'hearing' merely because no other action is to be taken on that date.⁴

If the Magistrate requires the accused to state on the same date on which the charge is framed, whether he wishes to cross examine any of the prosecution witnesses, he should record his reasons for doing so.⁵ But it is not so much the recording of reasons as

3 (14) 1 AIR 1914 Lah 556 (556, 557) 1914 Pan Re No 11 Cr 16 Cri L Jour 146 *Moola v Emperor* (Provisions of this section are imperative)

4 (1900 02) 1 Low Bur Rul 238 (240) *Chit Tun v Crown*

5 (37) 24 AIR 1937 All 127 (128) 38 Cri L Jour 361, *Har Kishan v Emperor* (A Magistrate is bound to record the question whether the accused desires to cross-examine witnesses and also the accused's answer thereto)

(11) 12 Cri L Jour 89 (89) 9 Ind Cas 468 (LJ) *Emperor v Lansha*

(10) 14 C.R. 127 (127) 14 Ind Cas 127 (127) 14 Ind Cas 127 (127)

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Note 5

1 (10) 11 Cri L Jour 128 (128) 5 Ind Cas 409 37 Cal 236 *Infer Pat v Emperor*

2 (10) 11 C.R. 128 (128) 11 Ind Cas 128 (128) 11 Ind Cas 128 (128)

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5 (39) 26 AIR 1939 Pat 172 (173 174) 40 Cri L Jour 419 *Asrar Ahmad v Emperor* (A Magistrate who does so irregularly and does not vitiate trial if accused is not prejudiced)

(37) 24 AIR 1937 All 127 (128) 38 Cri L Jour 361, *Har Kishan v Emperor* (A Magistrate who records reasons is irregularly)

the adequacy thereof which should count in the determination of the question whether the provisions of the section have been complied with. If no good reasons are forthcoming the mere fact they have been recorded by the Magistrate in writing will not save the trial from the taint of irregularity. As a general rule, sufficient time must be allowed to the accused to consider and decide whether he should cross examine any of the prosecution witnesses and it is only in special cases that the Magistrate can require him to state forthwith if he wishes to do so.⁵

Good adequate and cogent reasons should be given for requiring the accused to state his intention on the same day.⁷ That it is the usual practice of the Magistrate to ask the accused to state his intention on the same day is not a sufficient reason.⁸ That the Magistrate had to go out for urgent work or that the prosecution witnesses had to leave the place of trial immediately is not a good reason for requiring the accused to state forthwith if he wishes to cross examine any of the prosecution witnesses.⁹ But the fact that the prosecution witnesses come from a Native State and it would take a long time to secure their attendance again was held to be a sufficient reason.¹⁰ The convenience of the Magistrate and the witnesses alone should not be considered. In a Madras case¹¹ where the Magistrate required the accused to state his intention on the same day and recorded the reason the accused is undefended Pandaraj J. held that the reason was good and sufficient and observed that the Magistrate might have considered that as the accused had not engaged a pleader nor appeared desirous of doing so it would simply be a waste of time to defer the question till the next hearing. But it is submitted that this reasoning is not sound as the fact that the accused is not represented by a lawyer is rather a reason for allowing him time for considering whether he should cross examine any of the prosecution witnesses than for denying him such time.¹²

It has been held in the undermentioned case¹³ that it would make no difference to the accused if the question is put to him on the date when the charge is framed and not on the next date when the witnesses for the prosecution are present and are in fact cross-examined.

As to the consequence of the failure to record reasons see Note 20 on § 53²

Though under this section the accused is entitled to an adjournment to decide what witnesses if any he should cross-examine it is open to his counsel to waive the right to such adjournment and where he does so the failure to adjourn the case cannot be objected to later on.¹⁴

6 Right of accused to cross examine the prosecution witnesses --

In warrant cases an accused has three opportunities to cross examine the prosecution witnesses: (a) before the charge is framed under s 95 (b) after charge under this section

(*) 11 AIR 1927 All 217 (218) 49 All 316 29 Cr L Jour 293 Chhajju v Emperor (Failure to record reasons is more irregularly)

(9) 16 All 1929 Lom 309 (310 312) 51 Lom 578 31 Cri I Jour 709 Emperor v. Lalshman Ram
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(30) 17 AII 1710 Wn 1 077 0781 96 C F I o
superior (Whether reasons)

(30) 2 Emperor (Omission to

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31 Cri Le Jour 309 *Imperator* & *Lal's man*

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and (c) after the accused enters on his defence under S 257¹

As regards (a) it has been seen in the Notes on S 252 that there is a conflict of decisions as to whether the accused is entitled as of right to cross examine prosecution witnesses before the charge is framed. See Notes on S 232

But as regards the right of cross examination granted under this section it is an absolute right and the Magistrate has no power to disallow such cross examination² The accused is not bound to show that he has reasonable grounds for exercising his right under the section³ The fact that the witnesses have been already cross examined by him before the charge does not deprive him of his right to cross examine them again under this section⁴ It has been held that even if the previous cross examination was on the distinct understanding that the accused would not require the witnesses to be recalled for further cross examination after the charge he cannot be deprived of his rights under this section if he wishes to exercise them⁵ If there are more than one accused each of them should be given an opportunity to cross examine the witnesses⁶ The accused should be given a full and reasonable opportunity to exercise his right under the section and he should be allowed sufficient time to engage a pleader to cross examine the witnesses⁷

Note 6

- 1 (20) 7 AIR 1920 Mad 201 (203) 43 Mad 411 21 Cr L Jour 297, *W H Lockley v Emperor*
 (23) 10 AIR 1923 Mad 609 (613) 46 Mad 449 24 Cr L Jour 547 (FB) *Varisai Rowther v Emperor*
 2 (20) 7 AIR 1920 Mad 201 (203) 43 Mad 411 21 Cr L Jour 297, *W H Lockley v Emperor*
 (24) 11 AIR 1924 Nag 114 (114) 25 Cr L Jour 912 *Radhakison v Pama Krishna*
 (29) 16 AIR 1929 Bom 309 (311) 53 Bom 578 31 Cr L Jour 309, *Emperor v Lakshman*
 (55) 1895 All W N 40 (41), *Empress v Rani Charan Lal*
 [See also (39) 1939 Nag L Jour 201 (201) *Emperor v Narpatsingh* (Complainant refusing to pay process fees for re summoning witnesses for cross examination by accused — Magistrate should not proceed to take defence evidence as accused would be deprived of his right of cross examination — Complainant should be given another chance to pay process fees)
 (36) 23 AIR 1936 Cal 356 (358) 37 Cr L Jour 758 1 L R (1937) 1 Cal 711 (TB) *Harihar Sinha v Emperor* (Witness giving evidence against accused withdrawn from witness-box and made accused — No cross examination — Conviction of accused should be set aside)
 (09) 9 Cr L Jour 146 (147) 1 Ind Cas 54 32 Mad 218 *Palaniandi Goundan v Emperor*
 (10) 11 Cr L Jour 570 (520) 7 Ind Cas 712 (Mad) *In re Krishnaswamy Udayan*]

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 (26) 13 AIR 1926 Pat 214 (215) 5 Pat 110 27 Cr L Jour 499, *Ramendra Modia v Emperor*
 (Cross-examination by accused's pleader before charge — Statement by him at that time that he did not any longer require the attendance of the prosecution witnesses not sufficient to deprive accused of his right under this section)

(10) 7 AIR 1920 Mad 201 (202) 43 Mad 411 21 Cr L Jour 297 *W H Lockley v Emperor*
 Also see Note 7

(07) 11 Cal W N exl (xii) *Lala Rasi Thakur v Emperor*

(25) 12 AIR 1925 All 285 (286) 47 All 147 26 Cr L Jour 570 *Paul v Emperor*

(16) 3 AIR 1916 Lah 443 (445) 17 Cr L Jour 278 (279) *Sher Singh v Emperor*

(11) 12 Cr L Jour 548 (549) 12 Ind Cas 524 (Mad) *Arumugam Pillai v Emperor*

(16) 3 AIR 1916 Mad 933 (531) 16 Cr L Jour 786 *Rangaswamy v E*

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This section does not prescribe the order in which the accused should cross-examine the prosecution witnesses. In these circumstances under S 135, Evidence Act, the matter is left to the discretion of the Magistrate and in a proper case he may allow the accused to cross examine the witnesses in any order he chooses⁶

Where a witness for the prosecution is examined on commission under the provisions of Chapter XL of this Code it is open to an accused person to refrain from putting in any interrogatories when the commission is first issued, and to apply, after the charge has been framed against him, for the issue of the commission together with his cross interrogatories for the purpose of the cross examination of the witness⁷

As to the point of time up to which the accused can exercise his right to have prosecution witnesses re called for cross examination under this section see Note 7

Below are given some decisions bearing on the extent to which cross examination may be allowed¹⁰

7. Waiver of the right under this section — Under the Codes of 1871 and 1861 there was a conflict of decisions as to whether the right to cross examine was exercisable at any time. One set of cases¹ holding that the accused could claim the right at

[See also (49) 29 AIR 1912 Mad 672 (673) 44 Cri L Jour 10 203 Ind Cas 321 *Subbiah v Venkatesa Subbamma* (Omission to give facilities to accused for further cross-examination is grave error)]

Also see S 340 Note 4

8 (33) 20 AIR 1933 Cal 189 (190) 34 Cri L Jour 347 *Abdul Shaloor v Emperor*

9 (34) 21 AIR 1934 Cal 698 (698, 699) 61 Cal 824 36 Cri L Jour 239, *Dombrain v Someswar*

Also see S 505 Note 1

10 (37) 24 AIR 1937 All 171 (173) 38 Cri L Jour 416 167 Ind Cas 515 *Salag Ram v Emperor* (Too much interruption and undue interference in cross-examination must be avoided by presiding Judge)

discretion as to the mode of conducting the defence and the cross examination and Court should avoid unnecessary interference with it)

(19) 6 AIR 1919 Pat 515 (518) 90 Cri L Jour 566, *Mohomed Iftan v Emperor* (Court has no discretion to forbid even scandalous or indecent questions if they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed)

(11) 12 Cri L Jour 277 (279) 10 Ind Cas 917 (LB) *Mahomed Ally v Emperor* (The cross-examination

(Court is not to prevent cross-examination)

(87) 1897 Rat 344 (346 347), *Empress v Sajad Sarfuddin* (Court should prevent gross abuse and

explanation) is not to cross examine the witnesses as to such statements and seek their

Note 7

1 (74) 6 N W P H C R 270 (279) *Queen v Lall Singh*

(81) 1 Mad 130 (131) 2 Weir 321 *Talluri Venkayya v Queen*

any time before the trial closed or after the close of the examination of his own witnesses, unless he had previously expressly abandoned it and another set of cases² holding that the right should be exercised at the time when the charge framed was read and explained to the accused and that if not exercised at that time it could not afterwards be insisted on, though the Magistrate had a discretion to permit such cross examination. But the Code of 1882 specifically laid down that the accused shall at any time while he is making his defence be allowed to re call and cross examine any witness for the prosecution.

The present section has altered this procedure. It makes it quite clear that the accused is not entitled after he has entered upon his defence to insist upon re calling and cross examining any of the prosecution witnesses examined before the charge.³ If he does not exercise his right at the proper time and begins to adduce his own evidence he will be deemed to have waived his right and cannot thereafter claim to exercise it.⁴ But as the right accrues only after the charge is framed it cannot be deemed to be waived by a statement by the accused or his pleader before the charge that he would not require any witnesses to be re called for further cross examination after the charge is framed.⁵

8 Recall and discharge of the witnesses — Under the Code of 1882 the accused was given the right to re call and cross examine the prosecution witnesses *present in Court or its precincts*.¹ But these words have been deleted in the Code of 1898. The question has arisen under this Code whether the right of cross examination of the prosecution witnesses examined before the charge conferred by this section applies only to witnesses who have not been discharged or applies also to witnesses who have been discharged. On this question there is a conflict of decisions. On the one hand it has been held by the High Courts of Madras² and Allahabad³ that this section applies only to cases where the prosecution witnesses required for cross examination have not been discharged and that where they have been discharged the accused is not entitled to have them re summoned under this section but they can only be re summoned in the discretion of the Magistrate under s 257. But on the other hand it has been held by the Calcutta High Court⁴ that

2 (81) 7 Cal 28 (30) 8 Cal L Rep 320 *Fazl Ali v Koro Ali*

5 I C 408 37 Cal

4 (29) 16 AIR 1909 Mad 201 (202 203) 52 Mad 355 30 Cri L Jour 908 *Public Prosecutor Madras v Cheekalinga* (Failure to cross-examine witness present in Court and beginning to examine defence witnesses—Held there was waiver)

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5 (26) 13 AIR 1906 Pat 214 (215) 5 Pat 110 27 Cri L Jour 499 *Ramchandra v Emperor*
(02) 6 Cal W N 404 (425) *Kohil Glose v Kassimuddi*
(20) 7 AIR 1920 Mad 901 (902) 43 Mad 411 21 Cri L Jour 297 *Lockley v Emperor*
Also see Note G

Note 8

1 (95) 1890 All W N 40 (51) *Empress v Pamcharan*
2 (20) 7 AIR 1900 Mad 201 (203 204) 43 Mad 411 21 Cri L Jour 297, *W H Lockley v Emperor*,
3 (11) 12 Cri L Jour 471 (472) 11 Ind Cas 1007 (All) *Mulua v Sheoraj Singh*
(30) 17 AIR 1930 All 495 (496) 31 Cri L Jour 761 *Baqirude v Emperor*

[See also (1874) 6 N W P H C R 281 (288) *Empress v Lall Mohammed* (Magistrate not to discharge prosecution witnesses before cross-examination without consent of accused. Where he has been discharged he is not entitled to have him re-

ar *Kishan v Emperor* ("Decided" process to ensure their attendance

the right of the accused under this section applies also to prosecution witnesses who have been discharged. It is submitted that the Calcutta view seems to be the better view as it is more consistent with the repeal of the words "present in Court or its precincts" which occurred in the previous Code as there is no reason to restrict the meaning of the word "recalled" so as to exclude the sense of "re summoning" as suggested by the Allahabad and Madras rulings cited above. See also the undermentioned case⁵

The stage at which the prosecution witnesses can be recalled follows and not precedes the statement of the accused pleading guilty or not guilty. This stage is not reached until the statement of the accused has actually been recorded. Hence, it is not open to a Magistrate to direct a complainant to bring his witnesses for cross examination before the statement of the accused pleading guilty or not guilty has been recorded.⁶

9. Examination of the remaining witnesses. — The words "remaining witnesses" do not necessarily refer only to those witnesses who have been named by the complainant as required by s 252, sub s (2) and summoned by the Magistrate before the framing of the charge, these words include any witness who according to the prosecution is able to support its case, though he has not been summoned or named by the prosecution before the framing of the charge¹ But the High Court of Allahabad has taken a contrary view in the undermentioned case² The High Courts of Lahore and Nagpur have also followed the Allahabad High Court in the cases cited below³ The mere fact that certain witnesses are not present in Court does not prevent them from being included in the words "remaining witnesses" within the meaning of this section But the prosecution is not entitled to get an adjournment of the case as of right in order to secure the attendance of such witnesses⁴

There is no obligation on the prosecution to tender witnesses, who were cited but who were not called to give evidence, for cross examination of the defence⁵ (see also § 252, Note 5)

5 (39) 1939 Nag L Jour 201 (201), *Emperor v Nirpat Singh* (The ideal procedure under this sect on would be to examine all prosecution witnesses on one day or perhaps on two consecutive days, so that all would be present and ready to be cross-examined if the accused exercised his rights under S 256)

6 (43) 30 AIR 1943 Oudh 157 (158, 159) 44 Cri L Jour 174 301 Ind Cas 262, Emperor v Part Charan (The Magistrate acquitted the accused for want of evidence — Held, this was wrong)

Note 9

1 (44) 81 AIR 1944 Mad 169 (170) 45 Cri L Jour 401 I L R (1944) Mad 759 211 Ind Cas 471
Crown, Prosecutor v Ramanujulu Naidu (Prosecution giving up some witnesses from charge sheet—
On transfer of Magistrate, trial de novo claimed—Prosecution can examine given up witnesses)

(42) 29 AIR 1942 Bom 214 (215). 43 Cr L Jour 761. I L R. (1942) Bom 540. 201 Ind Cas 503 (D P). *Einperer v Nagindas Narottamdas* (If the accused desires time to enable him to cross examine witnesses whose names had not been disclosed it is open to the Magistrate to give time just as it is open to the Magistrate to give time to the prosecution to enable them to ascertain the antecedents of the witnesses produced by the accused at the trial).

(9) 10 Cr L Jour 530 (531) 4 Ind Cas 268 (Bom), *Emperor v P H Burn* (Provided that he is not sprung upon the defence all of a sudden and sufficient opportunity is given to the defence to prepare for his cross-examination)

(40) 27 AIR 1940 Nag 390 (392) 1940 Nag L Jour 449 (451) ILR (1942) Nag 333 42 Cri L Jour 208
Hansraj v Emperor

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

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9a Production of documents by prosecution during cross-examination of prosecution witnesses.—This section as well as § 252 does not *prohibit* the admission of relevant and admissible evidence at any stage of the trial. Hence it is not illegal for a Magistrate to allow documents to be produced by the prosecution while the prosecution witnesses are being cross-examined by the accused.¹

10 "The accused shall then be called upon to enter upon his defence and produce his evidence"—The accused can be called upon to enter upon his defence and produce his evidence only *after* the charge has been framed. It is asked for and after the examination in chief cross examination and re-examination of all the prosecution witnesses including the re-examination of such of them as were examined before the charge.¹ After the accused *enters on his defence* no further evidence can be admitted against him except under the provisions of s 540.² See Notes on s 540.

The section only require the Magistrate to call upon the accused to enter upon his defence and to produce his evidence it does not require him to ask the accused if he means to call witnesses or not³ It is a right of the accused to be called upon to enter upon his defence and produce his evidence and an omission to ask him to do so is a flaw in

Note 9a

- 1 (34) 25 AIR 1935 All 677 (638) 1 L F 11939 All 968 40 Cr I Jour 115 *Lala v. J. M. M. M.*

Note 10

- (27) 14 All 1927 All 475 (475) 49 All 501 29 Cr L Jour 399 *Sudaman v Emperor*
(40) 27 AIR 1940 1e h 9 (9) 41 Cr L Jour 590 *Abdul Ghafur v Emperor* (Court ordering further cross examination of prosecution witness and production of defence evidence on same day — Order is illegal)
(40) 27 AIR 1940 Pat 29 (197) 41 Cr L Jour 267 (269) *Feroze Khan v Emperor* (Accused asked to summon their witnesses before prosecution case was closed — Trial is vitiated)
(39) 20 AIR 1939 All 235 (239) 40 Cr L Jour 549 *Bhajja v Emperor* (Defence witnesses should not be asked to be summoned before ascertaining whether further cross examination of prosecution witnesses is necessary)
(37) 24 AIR 1937 Pat 131 (133 134) 38 Cr L Jour 484 *Ishar Singh v Shama Dussadh* (It is irregular to call upon the accused to submit his list of witnesses before the cross examination of all the prosecution witnesses is finished)
(24) 11 AIR 1924 All 320 (320) 25 Cr L Jour 1003 *Kesab Das v Emperor* (Order to accused to be ready with defence before prosecution evidence is over is improper)
(23) 10 AIR 1923 Cal 657 (657) 50 Cal 659 24 Cr L Jour 649 *Malibud Hussain v J L Allen*
(24) 11 AIR 1924 Lah 84 (85) 4 Lah 61 25 Cr L Jour 601 *Dyane v Emperor*
(31) 18 AIR 1931 Mad 210 (240) 32 Cr L Jour 779 *In re Ramreddi* (Accused must wait for his defence till he is charged)
(12) 13 Cr L Jour 554 (555) 8 Nab F R 63 15 Ind Cas 370 *Birdhi Chand v Laxman Chand*
(29) 9 All 1922 Pat 158 (159 160) 61 Cal L Jour 644 22 Cr L Jour 637 *Mitaraj Singh v Emperor*
(26) 13 AIR 1926 Rang 10 (13) 27 Cr L Jour 415 *Emperor v Mg San Nyein* (It is irregular to call upon the accused after charge framed to have his witnesses summoned before he has been to forward his list of recalling prosecution witnesses for cross examination — Overruled in another point in AIR 1936 Rang 164 (TL))
(17) 4 AIR 1917 Low Bur 68 (89) 15 Cr L Jour 1006 *Orisal v Kalia* (A litigant accused to name his witnesses before framing charge is unwarranted)
(See also (44) 1844 Pun 1e No 25 Cr p 49 (49) *Govind v Empress* (Accused can be called on to enter upon his defence only after charge — Case under old Code)
(35) 1895 Rest 768 (763) *Queen Empress v Kuru* (D))
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(23) 10 All 1923 All 321 (323) 45 All 323 25 Cr L Jour 303 *Mahadeo v Emperor*
(11) 12 Cr L Jour 7 (2) 9 Ind Cas 46 (Call) *Lalla Madhab Rao v Emperor*
(25) 15 All 1925 1st 103 (933) 29 Cr L Jour 644 *Karam Choud v Emperor*
(71) J N W 11 C L 71 (22) *Queen v Choudhury*
[See also (81) 8 Cal 154 (156) 10 Cal 1 51 *Empress v Akbar Khan*]
Also see 244 N 1e 3 and 509 N 1 2
- 3 (97) 1897 1st 938 (938) *Queen Empress v B E L Porey*

the trial.⁴ The Magistrate should give every reasonable opportunity to the accused produce his evidence.⁵ See also Note 27 on S 537. The nature of the defence is gathered not only from the statement of the accused himself but also from the trend of cross examination of the prosecution witnesses and from the arguments of the accused pleader at the close of the trial.⁶

But the accused is not bound to produce any evidence in his defence merely because a charge has been framed against him, and he cannot be convicted on the mere ground that he has failed to produce any evidence.⁷ Similarly, where the prosecution has established a *prima facie* case against the accused, the failure of the accused to produce any evidence in his defence cannot give rise to any adverse inference against him.⁸ Where the evidence for the prosecution established a *prima facie* case against the accused, the fact that he has not produced any evidence of rebuttal enhances the weight of prosecution evidence.⁹

Where defence evidence is rejected by the Court, the situation simply is as if evidence had never existed. If the defence evidence is believed, it would rebut the prosecution. But, if it is not believed, the prosecution is left just where it was before the defence witnesses were called.¹⁰

The accused is entitled to raise any defence technical or otherwise and the Court bound to pronounce judgment on it.¹¹ An accused can raise inconsistent defences as alternative and such defences, though they make the accused's case weaker,¹² cannot

4 (1965) 10 Suth W R Cr 7 (7), *Bhugwan v Doyal Gope*.

[See also (43) 50 AIR 1943 Pat 309 (360) 45 Cr L Jour 233 210 Ind Cas 570, *Emperor v Datta* (An omission actually to call upon the accused to enter upon his defence will not vitiate the trial provided that the accused was not denied an opportunity of stating what his defence was and of examining witnesses in support of it)]

Also see S 259, Note 11

5 521 Lal Singh v Emperor (Necessary adjunction)

6 503 Bhagwan Das v Saddiq Ahmed

(197) 1 Cal W N 313 (314) *Sheikh Emtiaz Ali v Jagat Chandra* (Accused entitled to adjourn to produce his evidence)

(99) 1 Bom L R 636 (336) *Queen Empress v Vasudev Hari*, (Magistrate is bound to afford to accused and his friends every opportunity of making defence and he should not interpose in any way between them)

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8 (37) 24 AIR 1937 Mad 969 (969) 39 Cr L Jour 144 *Ramaswami v Pangaswami* (A conviction should not be based upon the failure of the accused to make good their defence)]

Also see S 254 Note 4 and S 258, Note 3

9 (194) 6 Bom L R 461 (489) 1 Cr L Jour 563, *Emperor v Baji Krishna*

10 (37) 24 AIR 1937 Mad 975 (975) 39 Cr L Jour 147, *In re Ramalinga Goundan*.

11. (11) 1 AIR 1914 Cal 456 (459) 41 Cal 350 15 Cr L Jour 305, *Ramesh Chandra v Er* (Ordinarily, when a new defence is raised at a late stage that circumstance goes to some extent to the new defence)

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disallowed by the Court¹³ The burden of proving the guilt of the accused is on the prosecution and it cannot succeed merely because of the weakness¹⁴ or falseness¹⁵ of the case for the defence

Though the onus of proving that the case of the accused falls within one of the general exceptions in the Penal Code is on him, it is not necessary that he should specifically raise such plea Thus, a Court is bound to consider the plea of private defence as appearing from the prosecution evidence even though it is not specifically pleaded by the accused¹⁶

The right of the accused to produce evidence in his defence under this section is one that can be waived and if the accused when asked to produce his evidence has said that he has no witnesses to examine, he will not afterwards be entitled to let in any evidence¹⁷

It is not obligatory on the accused to submit a list of witnesses at the stage of the trial reached under S 256 If he wishes the Court to summon the witnesses, necessarily he must give their names But if he can produce them in Court without the assistance of the

- 13 (20) 7 AIR 1920 Pat 843 (844) 5 Pat L Jour 61 21 Cri L Jour 793, *Fauzi Keot v Emperor*. (Right of private defence can be pleaded specifically or in alternative)
- (27) 14 AIR 1927 Lah 710 (712) 29 Cri L Jour 117, *Santa Singh v Emperor*
- (24) 11 AIR 1924 Lah 733 (731) 25 Cri L Jour 1005, *Kakar Singh v Emperor*. (Accused is not bound to speak truth and he cannot be pinned down to any statement that he may have made)
- (19) 6 AIR 1919 Cal 439 (441) 20 Cri L Jour 661, *Afruddi Chakdar v Emperor*. (Alternative defence such as no assault was made and if made it was in self-defence can be taken)
- (23) 10 AIR 1923 Cal 717 (718) 25 Cri L Jour 190, *Nagendra Chandra v Emperor*.
- (18) 5 AIR 1918 All 189 (190) 19 Cri L Jour 371 40 All 284, *Yusuf Husain v Emperor*. (Accused can plead alibi as well as right of private defence)
- (15) 2 AIR 1915 Cal 786 (787) 16 Cri L Jour 76, *Kals Prasad v Emperor* (An accused is not bound by any statement denying any fact against him if he desires subsequently to take a defence inconsistent with the denial)
- [See (36) 23 A I R 1936 Rang 1 (2) 37 Cri L Jour 293, *Nga Ba Sein v Emperor* (Plea of the accused can take a different line of defence from that taken by the accused)]
- 14, (46) 33 AIR 1946 All 191 (195) 1945 All W R (HC) 287 (290) (DB), *Ramkala v Emperor*
- (43) 30 AIR 1943 Pat 361 (363) 22 Pat 423 45 Cri L Jour 801 211 Ind Cas 115 (DB), *Gadai Sahu v Emperor*
- (36) 23 AIR 1936 Cal 75 (84) 63 Cal 929 37 Cri L Jour 301, *Benoyendra Chandra v Emperor*. (But where accused is involved by evidence in state of considerable suspicion, he must for his own safety prove facts reconciling suspicious circumstances with his innocence)
- (23) 12 AIR 1925 Oudh 78 (89) 27 Oudh Cas 189 26 Cri L Jour 225, *Hira Lal v Emperor*
- (18) 5 AIR 1918 Oudh 71 (75) 19 Cri L Jour 689, *Emperor v Sahab Din*
- 15 (40) 27 AIR 1940 Lah 54 (57) 41 Cri L Jour 417, *Bhag Singh v Emperor*
- (40) 27 AIR 1940 Pat 365 (370) 41 Cri L Jour 114 (120), *Rambrichh Singh v Emperor* (Defence story untrue—Prosecution must still establish truth of their story)
- (37) 24 AIR 1937 Mad 969 (969) 39 Cri L Jour 144, *Ramaswami v Rangaswami*
- (23) 10 AIR 1923 Mad 365 (367) 24 Cri L Jour 426, *Ramudu Iyer v Emperor*
- (66) 1866 Pun Re No 57 Cr p 64 (64) *Azeem v Crown* (Resort to false alibi is no sufficient evidence of guilt, though it may add probability to suspicion of guilt)
- (67) 1867 Pun Re No 37 Cr, p 61 (64) *Crown v Shah Mahomed*

(No inference of guilt can be

- 16 (36) 23 AIR 1936 Rang 1 (2) 37 Cri L Jour 293 *Nga Ba Sein v Emperor*
- (40) 27 AIR 1940 Lah 54 (57) 41 Cri L Jour 417, *Bhag Singh v Emperor*
- (27) 14 AIR 1927 Mad 97 (97) 27 Cri L Jour 119, *In re Joyaji Bhawjo*
- (15) 2 AIR 1915 Mad 532 (533) 15 Cri L Jour 710 *In re Pancha Gunden*
17. (24) 11 AIR 1924 All 673 (674), *Mustaq Hussain v Emperor*

Court, he is entitled to do so¹⁸

The Magistrate should, as far as possible, allow the accused to select the order in which the defence witnesses are to appear¹⁹

See also the undermentioned case,²⁰ S 290, Note 1 and S 312, Note 29

11 Expenses of witnesses — See Notes on Section 544

12. Written statement of accused — This is the only section in the Code which provides for the filing of a written statement by the accused¹ There is no provision in the Code for the filing of a written statement in sessions trials (see S. 290, Note 6) or in preliminary inquiries before commitment to sessions² or in summons cases

Under this section the Court is bound to receive and file the written statement submitted by the accused³ Though great weight is to be attached to the written statement filed by the accused,⁴ it is not like a pleading in a civil suit and does not preclude the raising of any defence not mentioned in the written statement⁵

It has been held by the Madras High Court⁶ that the right to file a written statement under this section carries with it the right to file any documents to which the accused was a party and that as the accused cannot give evidence on oath the Court is bound to consider such documents, though not proved in the regular way

The section does not specify the point of time at which the written statement is to be filed under this section It has been said that the written statement is to be filed at the time of recording the accused's plea to the charge⁷

There is a conflict of decisions as to whether the filing of a written statement by the accused under this section dispenses with his oral examination after the close of the prosecution evidence under S 312 (See Note 18 on S 312) But the fact that a written statement has been filed may be taken into consideration in determining whether the accused was prejudiced by the failure to comply with the provisions of Section 312⁸

It has been held in the undermentioned case⁹ that a written statement put in by the accused under this section can be used to fill up gaps in the prosecution case

18 (42) 29 AIR 1942 Bom 214 (215) 43 Cr L Jour 761 1LR (1942) Bom 540 201 Ind Cas 503 (DB), *Emperor v Nagindas Narattamdas* (If the prosecution ask for an adjournment in order to

1. (1900) 2 Weir 255 (257), *Chinnasami Naidu v Veeriah Naidu*

2. (1900) 2 Weir 255 (257), *Chinnasami Naidu v Veeriah Naidu*

3. (28) 15 AIR 1928 Mad 1135 (1136) 29 Cr L Jour 1011 *Mad Salia Bowther v Emperor*
(But see (17) 4 AIR 1917 Cal 687 (692) 17 Cr L Jour 9 (14, 15) *Deputy Legal Remembrancer*,

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not relieve prosecution from proving publication)

(See also (30) 17 AIR 1930 Cal 442 (442, 443) 31 Cr L Jour 1203, *Kuti v Emperor* (Defence of accused is to be gathered not only from his statement but also from the trend of cross-examination of prosecution witnesses, the arguments of accused's pleader etc.))

6 (28) 15 AIR 1928 Mad 1135 (1136) 29 Cr L Jour 1011, *Mad Salia v Emperor*
Also see S 244, Note 7.

7. (25) 29 Cal W N cxviii (cxviii)

8. (25) 29 Cal W N cxviii (cxviii)

9. (25) 29 Cal W N cxviii (cxviii)

This section does not apply to disciplinary proceedings against legal practitioners under the Letters Patent and the legal practitioner is not entitled to file any written statement in such proceedings.¹⁰

See also Note 18 on Section 312

13 Effect of non-compliance with this section — See Note 20 on Section 537

257.* (1) If the accused, after he has entered upon his defence,

Process for compelling production of evidence at instance of accused applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing.

Provided that, when the accused has cross examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

Synopsis

- 1 Scope and applicability of the section
- 2 "After he has entered upon his defence"
- 2a Right of prosecution to lead evidence after accused has entered on his defence
- 3 Right of accused to apply for process for compelling attendance of witnesses
- 4 Reasons for refusal to issue process
- 5 Production of documentary evidence by accused
- 6 Right of accused to cross-examine prosecution witnesses
- 7 Proviso to sub-section (1)
- 7a Examination of witness present in Court though not summoned
- 8 Power to require deposit of expenses of witnesses before summoning them

NOTE to the Synopsis See the Notes indicated for the following topics

Absence of defence evidence See Note 1	Delay in application for summon See Notes 2 and 4
Accused summoning prosecution witness and right of cross-examination See Note 6	Duty of Magistrate to issue process and his discretion See Note 3
Accused's witnesses to rebut other evidence See Note 2	Duty to record reasons. See Note 4
Adjournment—Right of accused See Note 2	Duty to secure attendance of witnesses. See Note 3
Application to summon witnesses — Each case to be specifically dealt with See Note 4	Inspection by Court before rejecting document See Note 5
Citing trying Magistrate as witness. See Note 3	Power to restrict defence witnesses See Note 4
Cross-examination of co-accused's witness See Note 6	Written statement — Legal value See Section 133 Note 19
	Wrong refusal—Illegality See Note 3

1 Scope and applicability of the section. — In criminal cases the prosecution must succeed on its own merits and an accused cannot be convicted *merely* by reason of his failure to produce any evidence in his defence¹ But, where the prosecution has established a *prima facie* case against the accused, he is liable to be convicted unless he rebuts the presumption raised by the prosecution evidence² He is entitled to a sufficient opportunity to defend himself and to prove his innocence³ The Court is bound to take the evidence which he offers in his defence,⁴ subject to the provisions of the Evidence Act. He is further entitled to call upon the Court to assist him in the production of evidence material for his defence This section deals with the last mentioned right of the accused in warrant cases and lays down under what circumstances he is entitled to apply to the Court for process to compel the production of evidence on his behalf The section applies also to warrant cases tried summarily⁵ It has been held that the principle of the section applies to summons cases⁶

See also the undermentioned cases⁷

Section 257 — Note 1

1 (66) 1866 Rat 5 (5), *Reg v Jenkoo*

2 (28) 15 AIR 1928 Cal 27 (39) 29 Cri L Jour 49, *Hari Narayan v Emperor*. (If *prima facie* case is made out against accused, he should rebut it by some tangible evidence other than by mere criticism and suggestions or untested and uncorroborated statements from the dock)

(18) 5 AIR 1918 Cal 314 (315) 19 Cri L Jour 81, *Ashraf Ali v Emperor* (Non production of evidence will raise adverse presumption)

(See (28) 15 AIR 1928 Pat 100 (101) 6 Pat 637 29 Cri L Jour 239, *Ghanshyam Singh v Emperor*

(It will not avail the accused merely to rely upon a discrepancy here and a discrepancy there or upon the absence of motive or upon exaggerations in the prosecution story — He must lead evidence))

(See also (71) 16 Suth W R Cr 59 (59), *Junga Khan v Hur Chunder Rai*)

Emperor (accused)

4 (04) 4 Bom L R 461 (463) *Emperor v Nagar Purshottam* (It is not open to a Magistrate to

juries which witnesses should be examined)

dictate to the accused terms upon which witness shall be examined)

7. (96) 1896 Rat 851 (854), *Queen-Empress v Chanbasappa Madappa* (A Magistrate being subordinate to a Sessions Court must treat its judgments with respect and be guided by them on such matters of procedure as arise in S 257)

(97) 1897 Rat 938 (938), *Queen Empress v Sadashiv* (Accused's pleader stating that he would examine witnesses but actually summoning no witnesses — Prosecutor has no right to reply)

nation of defence
the examination-

2 "After he has entered upon his defence." — This section comes into play only after the accused has entered on his defence¹ The accused is entitled to a reasonable interval for considering what evidence he should produce² It is open to a Magistrate even after a case has been closed, at any time before judgment is pronounced, to allow the accused to let in evidence, it depends on the circumstances of each case whether a belated application for the production of evidence should be granted or not³

Where, after the close of the evidence for the defence, the Magistrate examines witnesses on the side of the prosecution, the accused is entitled to an opportunity to rebut the new evidence⁴

2a Right of prosecution to lead evidence after accused has entered on his defence — Where the accused leads evidence of good character by way of defence, the Code does not entitle the prosecution to lead rebutting evidence as a matter of right But the Magistrate may, in his discretion, allow such evidence to be given¹

3 Right of accused to apply for process for compelling attendance of witnesses — This section makes it obligatory on the part of the Magistrate except in the cases specified therein, to issue process at the instance of the accused to compel the attendance of the witnesses named by him¹ A non compliance with the section in this

(19) 6 AIR 1919 Oudh 79 (80) 21 Cri L Jour 60 *Rohan v Emperor* (Mere fact that some of accused's witnesses are his caste fellows is not by itself a sufficient reason for discrediting their testimony)

(19) 6 AIR 1919 Oudh 310 (311) 22 Oudh Cas 375 20 Cri L Jour 748 *Rameshwar Tewari v Emperor* (Do)

(25) 12 AIR 1925 Oudh 501 (501) 27 Oudh Cas 327 26 Cri L Jour 530 *Bahadur v Emperor* (Where number of respectable persons have given evidence in favour of accused their evidence should not be rejected)

Note 2

1 (40) 27 AIR 1940 Pesh 9 (9) 41 Cri L Jour 590 *Abdul Gafur v Emperor* (Court ordering cross examination after charge and production of defence evidence on same day—Defence cannot be struck out for failure to summon witnesses for that date — Opportunity should be given to accused to produce his witnesses)

(14) 1 AIR 1914 Sind 135 (135) 8 Sind L R 267 16 Cri L Jour 245 *Tahilaram Lilarani v Pitamberdas Valabdas* (Accused not entitled to inspection of complainant's documents before charge is framed)

(25) 12 AIR 1925 Nag 41 (47) 20 Nag L R 174 26 Cri L Jour 971 (TB) *Local Government v Maria* (Prosecution case does not close until all the prosecution witnesses are discharged and their discharge does not take place till they have been cross-examined after the charge if the accused so desires)

(84) 1891 Pun Re No 28 Cr, p 48 (49) *Gohar v Empress* (Accused is entitled to have an opportunity given to him after he had been charged of producing his witnesses or causing them to be produced with aid of the Court notwithstanding an order passed previously asking him to be ready with his witnesses on a particular date)

{See also (41) 11 AIR 1924 All 320 (320) 25 Cri L Jour 1003 *Keshabdeo v Emperor* (Order to accused to be ready with defence before prosecution evidence is over is improper)}

2 (20) 7 AIR 1920 Pat 25 (28) 21 Cri L Jour 321 *Pamashwar Dussadi v Emperor* (Demand of two days' time for this purpose is not unreasonable)

3 (11) 12 Cri L Jour 150 (150) 9 Ind Cr 897 (Mad) *In re Vyasa Rao*

4 (25) 12 AIR 1925 Lah 551 (532) 26 Cri L Jour 1035 *Shugan Chand v Emperor*

(70) 13 Suth W R Cr 15 (15) *Queen v Assanoolah*

(81) 6 Cal 711 (715) 8 Cal L Rep 70 *In re Deela Malton* (Fact that accused had declined to examine a witness previously is no ground for refusing to summon such witness when required to meet fresh evidence taken by Magistrate after close of defence arguments)

Also see S 250 Note 2 and S 540 Note 10

Note 2a

1 (30) 17 AIR 1930 Mad 448 (448) 31 Cri L Jour 119 *Pimashwar Mudaliar v Ramalingadurai*

Note 3

1 (40) 27 AIR 1940 Lah 351 (356) 41 Cri L Jour 915 190 Ind Cas 561 *Mirza Jaffar Beg v Emperor* (The Magistrate was directed as far as possible to allow the accused to select the order in which the witnesses were examined)

respect is not a mere irregularity curable by the application of S 537 of the Code³ It is *prima facie* an illegality which will cause serious prejudice to the accused and hence the conviction will be set aside in such cases⁵ But the section does not compel the Magistrate to ask the accused if he means to call witnesses, it is his right to apply for process and if he fails to do so, he cannot afterwards complain that he was not given an opportunity to adduce evidence⁴

The duty of the Magistrate under the section is not exhausted with his issuing a summons for the attendance of a witness in the first instance It is his duty to secure the attendance of the witness unless the accused decides that he does not want to examine him⁶ If the process first issued fails, the accused is entitled to call upon the Court to

- (70) 13 Suth W R Cr 56 (58) *Queen v Siddhoo*
 (04) 1 Cri L Jour 1003 (1002) 2 Low Bur Rul 270, *Shiva Bawa v. Emperor*.
 (75) 24 Suth W R Cr 60 (60) *In re Hara Pershad*
 (31) 18 AIR 1931 Lah 56 (56) 32 Cri L Jour 620, *Emperor v Nand Lal*
 (94) 1894 Rat 723 (723), *Queen Empress v Purushotam*
 (02) 26 Bom 418 (421) 4 Bom L R 38, *Emperor v Purushotam Kara*
 (66) 5 Suth W R Cr 65 (65), *Queen v Kalee Thakgoor*
 (1865) 3 Suth W R Cr 35 (36) *Queen v Abdool Setar*

Baksha v Emperor
Chandra

(70) 5 Mad H C R App xxiii

- Batcha v Emperor

- (61) 6 Cal 714 (715) 8 Cal L Rep 70 *In re Deela Mahlon*
 (23) 12 AIR 1925 Cal 80 (80) 25 Cri L Jour 310, *Abdul Jabbar v Emperor*.
 (29) 16 AIR 1929 All 914 (915) 30 Cri L Jour 1155 *Pardhu v Emperor*.
 (31) 18 AIR 1931 Oudh 286 (287) 32 Cri L Jour 1176 *Bhunschwart Pershad v. Emperor*.
 (26) 28 Cri L Jour 167 (168) 99 Ind Cas 599 (Lab) *Hara Singh v Emperor* (Trial Magistrate must make all attempts to secure the evidence of defence witnesses either by procuring their attendance or

(Inability or even refusal

to pay costs of witnesses is no excuse)

- (05) 9 Cal W N eeliv (ecliv), *Ashtosh Mallik v Emperor*
 (84) 1884 Pun Re No 28 Cr, p 49 (49) *Gohar v Empress* (Accused entitled to aid of Court in producing witnesses notwithstanding order of Court passed prior to the charge that he should be ready with his witnesses on a particular date)
 (21) 22 Cri L Jour 683 (684) 63 Ind Cas 619 (620) (Pat), *Munshi Tela v. Emperor*
 [See also (24) 11 AIR 1924 All 320 (320) 25 Cri L Jour 1003, *Keshab Deo v Emperor* (Order to the accused that he must be ready with his witnesses on a certain date is improper)]

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- (09) 10 Cri L Jour 207 (207) 2 Sind L R 5 *Emperor v Dabud* (Conviction arrived at in violation of

Emperor
v Kuppri Tejan

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As 250 *Panchu Swain v.*

issue further processes to compel the attendance of the witness⁶ But in exceptional cases the Magistrate can reconsider his decision to issue process and may refuse to compel the attendance of a witness if he finds that the application for process against him is made for purpose of vexation or delay⁷ A Court should not order the accused to pay adjournment costs on the absence of a witness summoned on his behalf⁸ See also the undermentioned case⁹

- 6 (38) 42 Cal W N 843 (844), *Ramdhan Mondal v Girdhar Mondal* (Failure to pass an order on application for issue of fresh process vitiates the trial)
- (09) 9 Cri L Jour 72 (73) 35 Cal 1093 *Rohimuddin Howaladar v Emperor*
- (1865) 9 Suth W R Cr 21 (21) *Queen v Nobo Coomar Banerjee*
- (05) 9 Cal W N cccxix (cccix) *Kedarnath Das v Bhaba Sanwar Bhattacharjee*
- (06) 10 Cal W N vii (vii) *Jassem Sheikh v Emperor*
- (32) 1932 Mad W N 1349 (1350) *Ramasamy Mudaliar v Ramalinga Odayan*
- (22) 9 AIR 1922 Lah 71 (71) 22 Cri L Jour 497, *Muhammad Din v Emperor* (Refusal to resummon witness is material irregularity and cannot be cured by S 537)
- (22) 9 AIR 1922 Lah 143 (144) 22 Cri L Jour 501, *Sohara v Emperor* (Do)
- (24) 11 AIR 1924 Cal 196 (197) 25 Cri L Jour 293, *Ponthiram Joab v Emperor*
- (26) 13 AIR 1926 Cal 1038 (1038) 27 Cri L Jour 811, *Upendranath v Jogendranath*
- (20) 7 AIR 1920 All 59 (60) 21 Cri L Jour 340, *Jhaboo v Emperor*
- (02) 6 Cal W N 548 (550) *Bhomar Munshi v Digambar Das*
- (97) 1892 Rat 594 (595), *Queen v Shamsherka*
- (76) 3 Cal 573 (593) 1 Cal L Rep 332, *Empress v Rajcoomar Singh*
- (81) 4 All 53 (54) 1881 All W N 102, *Empress of India v Ruku ud din*
- (84) 10 Cal 931 (931, 932) *Queen v Dhanajoy Choudhury*
- (20) 7 AIR 1920 Pat 714 (714) 21 Cri L Jour 336, *Imrat Mander v Emperor*
- (18) 5 AIR 1918 Pat 272 (272) 19 Cri L Jour 902 3 Pat L Jour 632, *Mahomed Zamiruddin v. Emperor*
- (31) 18 AIR 1931 Pat 207 (208) 32 Cri L Jour 613 *Duaraha Singh v Emperor*
- (26) 18 AIR 1926 Pat 139 (140) 26 Cri L Jour 1627, *Ramsakal Ras v Emperor*
- (21) 8 AIR 1921 All 142 (142) 23 Cri L Jour 124 *Bissay v Emperor* (It is the business of the Court to see that its summonses and warrants are duly executed)
- (24) 11 A I R 1924 Cal 534 (534) 24 Cri L Jour 370, *Mukar Lal Roy v Emperor* (When accused informs the Court that witness summoned by him was ill and asks for adjournment to produce him, the application should not be refused on the ground that it was not accompanied by medical certificate)
- (See also (25) 12 A I R 1925 Pat 55 (56) 3 Pat 591 25 Cri L Jour 1255, *Jamuna Singh v Emperor* (If witness is unable to attend Court owing to illness the Court should ascertain whether it will be possible for the witness to attend within a reasonable time, if not then his evidence should be taken on commission)
- (34) 21 AIR 1931 Nag 39 (42) 35 Cri L Jour 411 *Samuel v Emperor* (District Magistrate cited as witness before a subordinate Magistrate, the former issuing a memo to the latter to consider with reference to S 257, whether it is not a case of causing vexation or annoyance and the Magistrate thereupon cancelling his previous order, the accused applied for transfer on the ground that he was apprehensive of not having a fair trial—Held that the procedure adopted by the District Magistrate was irregular and that it was a proper case for transfer)
- [But compare (26) 13 AIR 1926 All 298 (298) 27 Cri L Jour 333 *Puran v Emperor* (Where the application for summonses was made late and granted on the understanding that no adjournment would be allowed if the witness did not appear the accused cannot in L.T. on adjournment)]
- 7 (30) 17 AIR 1930 Mad 632 (632) 31 Cri L Jour 720 *Sadayan Chetty v Emperor* (Section confers a large discretion and by the mere fact that a Magistrate has once subpoenaed witnesses under the section he is not bound to compel their attendance if he is satisfied that it is unnecessary for the purposes of justice)
- (26) 13 AIR 1926 Pat 139 (140) 26 Cri L Jour 1627, *Ramsakal Ras v Emperor* (As a general proposition it should be considered that once a Magistrate has given orders that a certain witness should be called he should take such steps as may be necessary and possible to enforce his attendance but it cannot be suggested that in no case it is possible for the Magistrate if he comes to the conclusion that the attendance of the witness is not really necessary to dispense with that person's attendance)
- (25) 15 AIR 1928 Mad 652 (652) 29 Cri L Jour 725 *Saminathan v Kuppusamy*
- (31) 18 AIR 1931 Pat 207 (208) 32 Cri L Jour 613 *Duaraha Singh v Emperor*

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Under this section the accused is entitled to compel the appearance as a witness even of the trying Magistrate himself and to enable the accused to do so, the case should be transferred to some other Court if he applies for such transfer¹⁰

That Magistrate can issue a process who is seized of the case and not any other Magistrate¹¹

Where an application is made under this section for summoning witness the Magistrate must deal with the application and pass an order either granting or refusing it merely keeping it on the file is not proper¹²

4. Reasons for refusal to issue process—The right of the accused to claim the issue of process under this section to compel the production of evidence on his behalf is not an absolute one. The Magistrate can refuse to issue process at his instance if he considers that the application for process has been made for the purpose of vexation or delay or for defeating the ends of justice¹. But the Magistrate must consider the case of each witness *individually* before deciding that the application with reference to him has been made for any of the purposes specified in the section². Further, the section requires that the Magistrate must *record* his reasons for refusing to issue process in compliance with the accused's application³. But it has been held that the Magistrate's order need not expressly state that the application for process has been made for the purpose of vexation or delay and that it is sufficient if it states facts which lead to the conclusion that the application has been made for such a purpose⁴.

An application for process under this section can be refused only on the ground of its having been made for the purpose of vexation or delay or for defeating the ends of

in having acquitted the accused on ground of the absence of the statement of the principal witness for the defence but he should have pronounced judgment upon the evidence on the record.)

10 (14) 1 Cr L Jour 838 (339) 26 All 536 1901 All W N 94 *Emperor v Abdul Latif*
[See also (70) 13 Suth W R Cr 60 (67) 4 Beng L R App Cr 15 *Queen v Mookta Singh*]

11 (14) 1 AIR 1914 All 197 (199) 36 All 13 15 Cr L Jour 164 *Mangal v Emperor*

12 (38) 42 Cal W N 843 (844) *Ramdhan Mondal v Girdhar Mondal* (Failure to pass an order on an application for issue of fresh process on the failure of the first process vitiates the trial)

(35) 22 AIR 1935 Sind 69 (70) 29 Sind L R 64 36 Cr L Jour 889 *Kundanlal v Emperor*

Note 4

1 (41) 28 AIR 1911 Oudh 33 (36) 42 Cr L Jour 40 190 Ind Cas 887, *Vishambhar Dajal Tripathi v Emperor*

(40) 27 AIR 1940 Sind 193 (194) 42 Cr L Jour 80 1 I L R (1940) Kar 198 191 Ind Cas 127 (DB) *Sukhrum Das Hiranand v Emperor*

(14) 1 AIR 1914 All 382 (386) 36 All 39 15 Cr L Jour 212 *Juggan v Emperor* (Twenty witnesses

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(33) 20 AIR 1933 Rang 29 (30) 34 Cr L Jour 468 *Zamin v Emperor*

[See also (71) 18 Suth W R Cr 28 (30 31) 7 Beng L R 564 *Queen-Empress v Bholanath Mukherjee*]
2 (41) 28 AIR 1911 Sind 177 (178) 43 Cr L Jour 76, 1 I R (1911) Kar 66 197 Ind Cas 781 (DB) *Jumo Lal Baksh v Emperor*

12 a. If a record reasons is illegal)

(107) 20 Bom 418 (421) 4 Bom L R 38 *Emperor v Purusottam*

(68) 10 Cr L Jour 267 (207) 2 Snd L R 5 *Emperor v Dabud*

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(Omission to record reasons)

justice. The mere fact that the Magistrate thinks that the evidence of the proposed witness will not be *material* is not sufficient for refusing the application for process⁵. Similarly, the fact that a particular witness is an Amil of certain place or he does not live in the District in which the accused lives or he is a Member of the Legislative Assembly or a Minister who cannot be having any relevant evidence to give is not a sufficient ground for refusal to summon him⁶. Nor can the Magistrate take upon himself the responsibility of selecting the witnesses for the defence⁷. His duty is to issue process for the attendance of all the witnesses named by the accused unless the application for process is vitiated for the reasons mentioned in the section. But where an unduly large number of witnesses are asked to be summoned, it is open to the Magistrate to conclude in the circumstances of a case, that the application for process is made for purposes of delay⁸. But where in spite of the largeness of the number of witnesses asked to be summoned the Magistrate does not think that the application for process is made for the purpose of delay or vexation he has no option but to accede to the prayer for process⁹. Nor can he, in such a case, arbitrarily restrict the number of witnesses to be summoned¹⁰.

Under this section what is the decisive ground for refusing an accused's application to call witnesses is not the fact that the case would be delayed but that a witness is *called for that purpose*¹¹.

5 (42) 29 AIR 1942 Sind 122 (129) 44 Cri L Jour 367 1LR (1942) Kar 252 205 Ind Cas 309 (DB) *Emperor v Rasulbuz* (Weston J.—The probable irrelevancy of evidence is not of itself enough to justify the conclusion that the purpose of the accused seeking to adduce it is vexation or delay or the defeat of justice. But such purpose must necessarily be inferred from circumstances. The number of witnesses cited, the difficulty and delay involved in securing their attendance and the materiality of their evidence are all circumstances which may be considered.)

(37) 24 AIR 1937 Rang 528 (530) 39 Cri L Jour 211, *Suppaya Chettyar v Karuppaya Pillay* (Mere fact that the accused is not able to satisfy Magistrate that witnesses named by him would give material evidence is not a sufficient reason.)

Pallas v Emperor (Application refuse application merely because

Emperor

(71) 15 Suth W R Cr 15 (15 16) *In re Mohima Chunder Shah*

[See also (32) 19 AIR 1932 All 125 (126) 33 Cri L Jour 578 54 All 331 *Pallrishna Sharina v Emperor* (Under rules of the Allahabad High Court the Magistrate can ask for certificate from pleader of accused that witness is material)]

[But see (25) 12 AIR 1925 Mad 106 (110) 30 Cri L Jour 401 *In re Narayana Menon* (Holding that evidence is not going to be of any use is tantamount to holding that the application is vexatious)]

6 (42) 29 AIR 1942 Sind 122 (126) 44 Cri L Jour 367 1LR (1942) Kar 252 205 Ind Cas 309 (DB) *Emperor v Rasul Buz*

7 (28) 15 AIR 1928 Lah 129 (131) 15 Lah 407 29 Cri L Jour 217 *Taj Md v Emperor*

[See also (83) 1893 All W N 189 (190) *Empress v Harpat* (It is no part of the Judge's duty to examine the prisoner's witness when his pleader has refused to do so)]

8 (32) 19 AIR 1932 All 125 (126) 54 All 331 33 Cri L Jour 578 *Pallrishna v Emperor* (193 witnesses)

(09) 7 Cri L Jour 146 (153) 7 C L J 177 12 C W N 299 35 Cal 243 *Chunoman Singh v Emperor* (Demand to examine about 1000 witnesses was held to be vexatious)

9 (41) 28 AIR 1941 Sind 177 (177) 43 Cri L Jour 265 1LR (1941) Kar 66 197 Ind Cas 751 (DB) *Jumo Lal Bishal v Emperor*

(32) 19 AIR 1932 All 125 (126) 54 All 331 33 Cri L Jour 578 *Pallrishna v Emperor*

10 (41) 28 AIR 1941 Sind 177 (178) 43 Cri L Jour 265 1LR (1941) Kar 66 197 Ind Cas 751 (DB) *Jumo Lal Bishal v Emperor* (To reject an application to call witnesses on behalf of an accused merely because enough witnesses have been examined is not in itself a sufficient compliance with section 257)

(26) 13 AIR 1916 Lah 431 (434) 27 Cri L Jour 543 *Musafir v Emperor*

(19) 6 AIR 1919 Cal 69 (69) 20 Cri L Jour 201 *Murad v Emperor*

(07) 17 Mad L Jour (NRC) 67 (67)

11 (41) 28 AIR 1941 Sind 177 (177) 43 Cri L Jour 265 1LR (1941) Kar 66 197 Ind Cas 751 (DB) *Jumo Lal Bishal v Emperor*

The mere fact that an application for process is made at a late stage of the proceeding is not by itself a ground for refusing it.¹² But an unduly belated application for process is liable to be construed as made for the purpose of delay or vexation.¹³

Where an application for process is first made in respect of some witnesses and then in respect of others, that by itself is no ground for holding that the latter application is made for the purpose of delay or vexation¹¹

Where a Magistrate summons a number of witnesses under this section, he must be presumed to have concluded that their production has not been sought for vexation or delay and the Magistrate cannot thereafter arbitrarily limit the number of witnesses to be examined¹⁵

See also the undermentioned cases¹⁶

5. Production of documentary evidence by accused. — An accused is entitled to produce documentary as well as oral evidence in his defence. The Magistrate should inspect the documents offered by the accused before excluding them.¹ This section also entitles the accused to apply for process to compel the production of documentary evidence in his favour. Before issuing process, the Magistrate should satisfy himself that the documents called for have some bearing on the issues in the case and are relevant.²

12 (37) 24 AIR 1937 Pat 131 (133) 39 Cri L Jour 484 *Ishar Singh v Shama Dusañ* (Although the accused files his list of witnesses late, if the Magistrate does not consider that the witnesses are being summoned in order to cause delay in the trial of the case it is the duty of the Magistrate to summon them.)

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13 (12) 13 Cr L Jour 218 (221) 14 Ind Cas 314 39 Cal 781 *Kudryntsi v. Tsaroyev*
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* Mahalunna v Emperor (Accused
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refuse to summon witnesses on the ground that they are implicated in the charge)

Note 5

1 (09) 10 Cri L Jour 492 (1993) 4 Ird Cas 67 (Cal) *Brundage v. Istoguddin* (Value of a document cannot be judged before it is produced and inspected)

2 (14) 1 ARI 1914 Sind 135 (136) 8 Sind L R 267 10 Ch L Jeur 215, Tahitram Lalaram v. J. Ambardas

See also the undermentioned cases³

This section does not control the provisions of S 94. Therefore even before the case has reached the stage indicated by this section it is open to the Magistrate to summon the production of a document at the instance of the accused if the conditions laid down in S 94 are satisfied⁴. See S 94, Note 2.

Under S 139 of the Evidence Act a person merely summoned to produce a document does not become a witness and cannot be cross examined unless and until he is called as a witness⁵.

6 Right of accused to cross examine prosecution witnesses — It has been seen in the Notes on S 256 that an accused in warrant cases has three opportunities to cross examine prosecution witnesses (a) before the charge is framed (b) after the charge is framed and before the accused is called upon to enter upon his defence and (c) under this section after the accused has entered upon his defence. Hence subject to the restrictions contained in this section an accused is entitled even after he has entered upon his defence to have re-summoned for cross examination any prosecution witness that he may name¹. The distinction between the right of the accused under this section and his right under S 256 is that while his right to recall and cross examine prosecution witnesses under S 256 is an absolute one his right under this section is subject to the discretion of the Magistrate². Where a prosecution witness is re-summoned under this section at the instance of the accused he does not thereby lose his character as a prosecution witness and can be cross examined by him³. Where there are two accused in a case and their cases are adverse to each other the witnesses called by one of the accused in his defence can be cross examined by the other accused⁴.

See also Note "

3

(

be determined at the hearing of the case)

- 4 (35) 22 AIR 1935 Snd 13(18) 99 Sind L R 9 36 Cri L Jour 581(FB) *Mohamed Rahim v Emperor*
5 (37) 24 AIR 1937 Oudh 331 (337) 33 Cri L Jour 491 *Kankaiya Lal v Emperor* (Accused summoning complainant at the close of trial to produce account books — Cross-examination of complainant by prosecution to fill up gaps in evidence — Procedure condemned)

Note 6

- 1 (20) 7 AIR 1900 Pat 149 (150) 21 Cri L Jour 814 5 Pat L Jour 91 *Raniyad v Emperor*
(75) 12 AIR 1925 Cal 411 (411) 51 Cal 1041 26 Cri L Jour 334 *Manomohan v Bankim Behari*
(23) 10 AIR 1923 Mad 609 (613) 46 Mad 449 24 Cri L Jour 547 (FB) *Varisai Bowther v Emperor*
(29) 16 AIR 1929 Lah 578 (579) 30 Cri L Jour 380 *Emperor v Sadhu Singh*

- 3 (97) 1 Cal W N 19 (91) *Moula Bux v Derasatulla*
(01) 28 Cal 594 (596) *Sheoprahkash Singh v W D Hawkins*

1 one accused to cross-examine the witness of another co-accused is that the evidence of the witness is to be used against the co-accused)

The mere fact that an application for process is made at a late stage of the proceeding is not by itself a ground for refusing it¹² But an unduly belated application for process is liable to be construed as made for the purpose of delay or vexation¹³

Where an application for process is first made in respect of some witnesses and then in respect of others that by itself is no ground for holding that the latter application is made for the purpose of delay or vexation¹⁴

Where a Magistrate summons a number of witnesses under this section he must be presumed to have concluded that their production has not been sought for vexation or delay and the Magistrate cannot thereafter arbitrarily limit the number of witnesses to be examined¹⁵

See also the undermentioned cases¹⁶

5 Production of documentary evidence by accused — An accused is entitled to produce documentary as well as oral evidence in his defence. The Magistrate should inspect the documents offered by the accused before excluding them¹ This section also entitles the accused to apply for process to compel the production of documentary evidence in his favour. Before issuing process the Magistrate should satisfy himself that the documents called for have some bearing on the issues in the case and are relevant²

12 (37) 24 AIR 1937 Pat 131 (133) 38 Cr L Jour 484 *Ishar Singh v Shama Dusaad* (Although the accused files his list of witnesses late if the Magistrate does not consider that the witnesses are being summoned in order to cause delay in the trial of the case it is the duty of the Magistrate to summon the defence —)

depends upon the circumstances

(Trifling delay in applying)

13
(1)
14
[

under Mahlon

Emperor (Accused originally applying to Magistrate to call competent clerk from canal department to prove khasras and other papers of that department and naming one and leaving it to that department to send any other competent person—Person sent found unable to prove papers—Accused at once applying to have another clerk summoned—Accused held entitled to have another clerk put into witness box)

Emperor
If once he

1

reasons for

16 (1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12) (13) (14) (15) (16) (17) (18) (19) (20) (21) (22) (23) (24) (25) (26) (27) (28) (29) (30) (31) (32) (33) (34) (35) (36) (37) (38) (39) (40) (41) (42) (43) (44) (45) (46) (47) (48) (49) (50) (51) (52) (53) (54) (55) (56) (57) (58) (59) (60) (61) (62) (63) (64) (65) (66) (67) (68) (69) (70) (71) (72) (73) (74) (75) (76) (77) (78) (79) (80) (81) (82) (83) (84) (85) (86) (87) (88) (89) (90) (91) (92) (93) (94) (95) (96) (97) (98) (99) (100)

Malwan v Emperor (Accused him for summons to the persons)

Pohker (The inconvenience and from Coimbatore to Calcutta was made for their presence)

(Magistrate cannot

Note 5

1 (69) 10 Cr L Jour 492 (493) 4 Ind Cas 67 (Cal) *Prindalan v Illogiddin* (Value of a document cannot be judged before it is produced and inspected)

2 (14) 1 AIR 1914 Sml 13, (136) 8 Sml L R 26 16 Cr L Jour 215 *Talilram Lilaram v Isambardas*

also the undermentioned cases³

This section does not control the provisions of S 91. Therefore, even before the witness has reached the stage indicated by this section, it is open to the Magistrate to summon the production of a document at the instance of the accused if the conditions laid down in S 91 are satisfied⁴. See S 91, Note 2.

Under S 153 of the Evidence Act a person merely summoned to produce a document does not become a witness and cannot be cross-examined unless and until he is called as a witness⁵.

6. Right of accused to cross-examine prosecution witnesses. — It has been seen in the Note on S 256 that an accused in warrant cases has three opportunities to cross-examine prosecution witnesses: (a) before the charge is framed (b) after the charge is framed and before the accused is called upon to enter upon his defence and (c) under this section, after the accused has entered upon his defence. Hence subject to the restrictions contained in this section, an accused is entitled, even after he has entered upon his defence, to have re-summoned for cross-examination any prosecution witness that he may name¹. The distinction between the right of the accused under this section and his right under S 256 is that while his right to recall and cross-examine prosecution witnesses under S 256 is an absolute one, his right under this section is subject to the discretion of the Magistrate². Where a prosecution witness is re-summoned under this section at the instance of the accused he does not thereby lose his character as a prosecution witness and can be cross-examined by him³. Where there are two accused in a case and their cases are adverse to each other the witnesses called by one of the accused in his defence can be cross-examined by the other accused⁴.

See also Note 7.

(23) 10 AIR 1923 Lah 420 (422) 24 Cri L Jour 686 *Ganpat v. Emperor* (Accused is entitled to production of Court records instead of being put to the expense of obtaining copies.)

(70) 14 Suth W R Cr 77 (77) 6 Beng L R App 53 *In re Shib Prasad* (Application for copies should be granted irrespective of question of their being material or necessary — Question of admissibility is to be determined at the hearing of the case.)

4 (35) 22 AIR 1935 Sind 13(18) 29 Sind L R 92 36 Cri L Jour 581(FB) *Mohamed Rahim v. Emperor*

5 (37) 24 AIR 1937 Oudh 331 (337) 33 Cri L Jour 491, *Kanhaya Lal v. Emperor* (Accused summoning complainant at the close of trial to produce account books — Cross examination of complainant by prosecution to fill up gaps in evidence — Procedure condemned.)

Note 6

1 (20) 7 AIR 1920 Pat 149 (150) 21 Cri L Jour 814 5 Pat L Jour 91 *Ramiyad v. Emperor*

(23) 12 AIR 1925 Cal 411 (411) 51 Cal 1014 26 Cri L Jour 384 *Manomohan v. Banhim Behari*

(23) 10 AIR 1923 Mad 609 (613) 46 Mad 449 24 Cri L Jour 517 (FB) *Varisan Rowther v. Emperor*

(29) 16 AIR 1929 Lah 578 (579) 30 Cri L Jour 380, *Emperor v. Sadhu Singh*

v. Emperor

(Magistrate directing accused to be released on bail and adjourning case—Accused actually not released till day previous to hearing — Accused applying for adjournment for recalling prosecution witnesses for cross-examination — Held that accused should be given the opportunity asked for.)

2 (20) 7 AIR 1920 Mad 201 (205) 43 Mad 411 21 Cri L Jour 297 W H Lockley v. Emperor (Application to re-summon witness discharged on accused's representation falls under S 257.)

(1900) 27 Cal 370 (372) 4 Cal W N 469 *Zamunia v. Pam Tahal*

3 (97) 1 Cal W N 19 (21) *Moutia Bux v. Derasatulla*

(01) 23 Cal 591 (596) *Sheoprahash Singh v. W D Paulins*

Accused need not

(A witness men-

tioned by prosecution but not examined must still be recalled for all practical purposes as prosecution witnesses even if examined by defence.)

4. (40) 27 AIR 1940 Lah 210 (215) 11 Cri L Jour 639, *Chaman Lal v. Emperor* (Reason for allowing one accused to cross-examine the witness of another co-accused is that the evidence of the witness may be used against the co-accused.)

258 (1) If in any case under this Chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal

(2) Where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law

a. Sub-section (2) was substituted for the original sub-section (2) by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1923. The original sub-section (2) ran as follows

(2) If in any such case the Magistrate finds the accused guilty he shall pass sentence upon him according to law

Synopsis

- | | |
|---|---|
| 1 Legislative changes | 4 'He shall record an order of acquittal' |
| 2 'In which a charge has been framed' | 5 Sub section (2)—Procedure under S 349 |
| 3 'The Magistrate finds the accused not guilty' | 6 Sentence |

NOTE to the Synopsis. See the Notes indicated for the following topics

- | | |
|---|---|
| Abolition of charge—Effect. See Note 2 | Sending co-accused under S 349. See Note 4 |
| Abolition of complaint. See Note 3 | Strength of prosecution and of weakness of defence. See Section 257. Note 1 |
| Acquittal—Not discharge or dismissal. See Note 4 | Withdrawal by complainant. See Note 8 |
| No evidence after charge—Conviction not necessary. See Note 8 | |

1 Legislative changes

Difference between the Codes of 1861 and 1872 —

The following explanation was added to S 270 of the Code of 1872

If a charge is drawn up the prisoner must either be acquitted or convicted. If no charge is drawn up there can be no judgment of acquittal or conviction except in the case provided for in Explanation 1 to section 216

This gave legislative effect to the undermentioned decisions¹ under the Code of 1861.

Changes made in 1882 —

The explanation to S 270 of the Code of 1872 was omitted and the words 'if in any case' were introduced into the section

Changes made by Act 18 [XVIII] of 1923 —

The words 'where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of S 349 or S 562' were added in sub section (2)

2 "In which a charge has been framed" — In warrant cases an order of acquittal or conviction can be passed only after a charge has been framed¹. But the mere fact that a charge has not been framed does not invalidate the proceedings unless a failure of justice has in fact been occasioned thereby². See S 535. Moreover in warrant cases tried

* 1882 S 258 1872 S 220 1861 S 255

Section 258 — Note 1

(69) 12 Buth W R Cr 65 (65-66) 4 Beng L R App Cr 1 *Queen v Goburdhun Bera*

Note 2

1 (74) 22 Buth W R Cr 25 (76) *Queen v Japit Ahar* (Acquittal)

not been framed lends corroboration

(61) 1881 All W N 142 (142) *Hanuman v Ahmad Ali*

on the date of hearing¹

4. "Complainant is absent." — See Notes on Section 247.

5. Death of complainant. — See Note 6 on Section 247.

6. Withdrawal of complaint. — See Notes on Section 248

7. "The offence may be lawfully compounded, or is not a cognizable offence." — As the section stood prior to the amendment of 1923, it applied only to cases where the offence charged was a *compoundable* one¹. The scope of the section has now been enlarged by the addition of the words "or is not a cognizable offence" after the words "the offence may be lawfully compounded" in the section. The section therefore applies not only to cases where the offence is a compoundable one but also where though it is not compoundable, it is *non cognizable*. Where the offence is neither compoundable nor non cognizable, the section does not apply.² Where several offences are charged against the accused, it is necessary that *all* of them should be compoundable or non cognizable in order that the section may apply.³

For the meaning of "cognizable," see s 4 (i), cls (f) and (n)

8. "May in his discretion." — Under this section the Magistrate is not bound to discharge the accused on the absence of the complainant on the date of hearing¹. It only confers a *discretion* on the Magistrate to discharge the accused in the circumstances specified in it² and Magistrate should exercise such discretion only sparingly and discharge the accused³. Where the presence of the complainant is not at all necessary for proceeding with the case, the Magistrate ought not to discharge the accused merely because of his

Note 3

1. (27) 14 AIR 1927 Oudh 352 (352) : 29 Cri L Jour 816, *Emperor v. Mannu Singh*.

Note 7

1. (27) 14 AIR 1927 Oudh 352 (352) : 29 Cri L Jour 816, *Emperor v. Mannu Singh*.

(20) 7 AIR 1920 Low Bur 137 (137) : 10 Low Bur Bul 375 : 22 Cri L Jour 753, *Emperor v. A Far-
kaya* (Case under S 394, Penal Code non-cognizable but not compoundable—Order of discharge was
held to be wrong)

(14) 1 AIR 1914 Oudh 261 (261) : 17 Oudh Cas 18 : 15 Cri L Jour 230, *Ramphal v. Emperor* (In
such a case the case cannot also be struck off as the Code does not provide for such a course)

in the interests of the general public, to see whether an offence has been committed and to punish the
culprit)

not apply)

[See (27) 14 AIR 1927 Oudh 352 (352) : 29 Cri L Jour 816, *Emperor v. Mannu Singh*]

[See also (91) 1901 All W N 116 (116) *Empress v. Kura*]

Note 8

1. (26) 13 AIR 1926 Bom 178 (179) : 27 Cri L Jour 491, *Mahomed Azim v. Emperor*. (Death of com-
plainant in a non-cognizable case — Magistrate allowed complaint to be continued by a fit complainant)
2. (41) 24 AIR 1911 Rang 202 (203) : 1911 Rang L R 224 : 42 Cri L Jour 801 : 196 Ind Cas 51
1. *Tin Maung v. The King* (Complainant police officer alleging defamation against him and police
force in general—Death of complainant—Discretion by Magistrate in continuing with trial held
properly exercised)

(29) 16 AIR 1929 Rang 14 (15) : 6 Rang 661 : 30 Cri L Jour 345, *U Mo Gaung v. U Mo Sin*.
(Discretion not to be lightly interfered with by High Court)

3. See (81) 6 Cal 523 (524) : 8 Cal L Rep 106, *Empress v. Thompson* (Case under S 121, 1st Part
Magistrates Act, 4 [11] of 1-77)

absence⁴ The Magistrate is bound to consider whether there is a *prima facie* case against the accused and where there is no *prima facie* case he will be justified in discharging the accused if the complainant absents himself on the date of hearing. But at the same time it must be remembered that the primary reason for a discharge under this section is the absence of the complainant which raises a presumption of his wish not to proceed with the case. Hence where despite the absence of the complainant the circumstances are such as do not give rise to the inference that he did not wish to proceed with the case the Magistrate ought not to discharge the accused under this section⁵. Thus where the absence of the complainant is due to a reasonable cause the Magistrate ought not to discharge the accused under this section⁶.

9 "At any time before the charge is framed"—This section only applies to cases where the complainant is absent on a day fixed for the hearing *before the charge is framed*. If the complainant absents himself *after* the charge is framed the Magistrate has no power to discharge the accused on the ground of the absence of the complainant¹. Nor can the accused be acquitted under s 259 in such a case as an order of acquittal under that section can only be based on a finding of 'not guilty' (see notes on s 258). The only course open to the Magistrate in such circumstances is to proceed with the case in the absence of the complainant² unless he decides to adjourn the case³.

10. Discharge the accused — The procedure laid down in this section is to discharge the accused. The section does not provide for an acquittal of the accused in the

4 (96) 1896 Rat 847 (45) *Queen v Whatarji* (Case ripe for charge being framed—Accused ought not to be discharged merely because of complainant's absence)

(69) 12 Suth W R Cr 97 (28) 7 Beng L R 9n *Queen v Bedoor*

[See (81) 6 Cal 593 (28) 8 Cal L Rep 106 *Empress v Thompson* (Dismissal of case under S 124 Presidency Magistrates Act 4 (IV) of 1877)]

5 (11) 12 Cri L Jour 184 (184) 9 Ind Cas 1007 (Sind) *Harun v Abdul Satar*

6 (23) 10 AIR 1993 Cal 403 (404) *Hrishu Kesh v Paresk Nath* (Complainant absent as he had to attend as a witness in another Court but his pleader present and applying for adjournment—Accused not to be discharged)

(11) 12 Cri L Jour 184 (184) 9 Ind Cas 1007 (Sind) *Harun v Abdul Satar* (Prevented from attending by floods)

[See also (71) 1871 Rat 59 (59) *Rag v Virabhadra* (Incarceration of complainant in jail after he had preferred his complaint is a sufficient cause and complaint may be revived—Case under the Code of 1861 S 259 (now S 247))]

Note 9

1 (25) 12 AIR 192; Oudh 306 (306) 27 Oudh Cas 316 26 Cri L Jour 261 *Pam v Jaurasi*

(2) 12 AIR 190; Oudh 314 (314) 26 Cri L Jour 400 *Emperor v Colhan*

(33) 20 AIR 1933 Pesh 78 (78) 3, Cri L Jour 170 *Abdul Hakim v Haji Abdul Is* (Change in the constitution of Bench after framing charge—Accused claiming de non vult—Accused discharged on complainant's absence—*Held* the order of discharge did not amount to acquittal but was an order of discharge under S 259)

(90) 1890 Rat 524 (524) *Queen Empress v Vanaji*

(18) 5 AIR 1918 Nag 76 (76) 20 Cri L Jour 763 *Ras Singi v Patla*

[But see (30) 17 AIR 1930 All 795 (796) 53 All 39 32 Cri L Jour 366 *Emperor v Nazir Husain*]

2 (43) 30 AIR 1943 All 9 (9) 1 L R (1943) All 31 44 Cri L Jour 196 904 Ind Cas 968 *Chiranjilal v Rams Swarup*

(43) 30 AIR 1943 Sind 148 (148) 44 Cri L Jour 768 1 L R (1943) Kar 103 905 Ind Cas 256 (DB) *Emperor v Naro* (Acquitting accused for non appearance of complainant is illegal)

(49) 29 AIR 1942 Mad 559 (552) 44 Cri L Jour 171 203 Ind Cas 672 *Varadaraju Chetty v Janakirama Chetty* (Acquitting accused on ground of complainant's absence is illegal)

(37) 24 AIR 1937 All 127 (129) 38 Cri L Jour 361 *Har Kishan v Emperor*

(33) 20 AIR 1933 Cal 383 (383) 34 Cri L Jour 492 *Nutbhari v Sarola Prasad Choudhury* (Magistrate cannot acquit the accused because of complainant's absence)

(74) 11 AIR 1914 Lah 677 (677) 25 Cri L Jour 67 *Vahi Dabshi v Emperor* (After charge complainant's position is reduced to that of a witness—He cannot be ordered to pay costs of adjournment)

3 See (37) 24 AIR 1937 All 127 (129) 38 Cri L Jour 361 *Har Kishan v Emperor* (Complainant and his witnesses absent—Afterwards complainant appearing and asking for adjournment of fifteen minutes—Court acts irregularly in refusing to grant adjournment)

absence of the complainant¹ Similarly there are other provisions in the Code under which the accused may be discharged (See Ss 209 and 253) Under Ss 203 and 204 the Magistrate can *dismiss a complaint* But the Code nowhere provides for the passing of an order *striking off* a case though such an order may, in suitable circumstances, be construed and treated as an order of discharge²

11 Revival of case after discharge — See Note 13 on Section 403 See also Section 436 and Notes thereon

12 Revision — See Note 14 on Section 439

CHAPTER XXII

OF SUMMARY TRIALS

Power to try summarily **260.** (1) Notwithstanding anything contained in this Code,—

- (a) the District Magistrate,
- (b) any Magistrate of the first class specially empowered in this behalf by the ^a[Provincial Government], and
- (c) any Bench of Magistrates invested with the powers of a Magistrate of the first class and especially empowered in this behalf by the ^a[Provincial Government],

may, if he or they think fit, try in a summary way all or any of the following offences —

- (a) Offences not punishable with death, transportation or imprisonment for a term exceeding six months,
- (b) offences relating to weights and measures under sections 264, 265 and 266 of the Indian Penal Code,
- (c) hurt, under section 323 of the same Code,
- (d) theft, under sections 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees;
- (e) dishonest misappropriation of property under section 403 of the same Code, where the value of the property misappropriated does not exceed fifty rupees,
- (f) receiving or retaining stolen property under section 411 of the same Code, where the value of such property does not exceed fifty rupees,
- (g) assisting in the concealment or disposal of stolen property, under section 414 of the same Code, where the value of such property does not exceed fifty rupees,
- (h) mischief, under section 427 of the same Code,
- (i) house-trespass, under section 448, and offences under sections 451, ^b[453, 454], 456 and 457 of the same Code,

^a 1862 S 260 1872 Ss 222, 223, 224, 1861 — Nil

Note 10

1 (43) 30 AIR 1912 544 143 (143) 11 Cri L Jour 769 1 L R (1913) 148 103 203 Ind Cas 256 (DB) *Emperor v. Nar*

2 (14) 1 AIR 1911 Oudh 261 (261) 17 Oudh Cas 18 15 Cri L Jour 230 *Ramphal v. Emperor* (In this case the offence charged being not compoundable it was held that the order striking off the complaint was not tantamount to order of discharge)

(j) insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, under section 506, of the same Code,

(k) abetment of any of the foregoing offences,

(l) an attempt to commit any of the foregoing offences, when such attempt is an offence,

(m) offences under section 20 of the Cattle-trespass Act, 1871

Provided that no case in which a Magistrate exercises the special powers conferred by section 34 shall be tried in a summary way.

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily, the Magistrate or Bench shall re-call any witnesses who may have been examined and proceed to re-hear the case in manner provided by this Code

a. Substituted by A O for Local Government

b. Inserted by the Amending Act 1903 (1 [I] of 1903), Section 3 and Schedule II, Part II

Synopsis

- | | |
|--|---|
| 1 Legislative changes | 4 'May, if he or they think fit |
| 2 Scope and object of the section | 5 Offences to which the section applies |
| 3 Magistrates empowered to try cases summarily | 6 Sub-section (2) |

NOTE to the Synopsis See the Notes indicated for the following topics

- | | |
|--|---|
| Allegations in complaint in sworn statement to decide summary trial See Note 2 | Police report See Note 5 |
| Allegation of informant to police See Note 2 | Pre-decency Magistrate See Notes 2 and 3 |
| Cattle-trespass Act clause (m) See Note 5 | Previous conviction See Note 2 |
| Clause (a) independent of clauses (b) to (k) See Note 5 | Question of title See Note 4 |
| Compensation See S 262 Note 2 | Record — To how summary trials See S 263 Note 5 |
| Complicated question See Note 4 | Section 195 See Note 4 |
| Content of accused — No value See Note 2 | Security proceeding See Note 2 |
| Deaf and dumb accused See Note 4 | Serious offence See Note 4 |
| Forest Act of 1917 S 67 See Note 2 | Several offences — All summary See Note 2 |
| Government servants — Cases against See Note 4 | Short and long trials See Note 4 |
| Ignoring facts alleged See Note 5 | Subsequent change of procedure See Notes 2 and 6 and S 261 Note 4 |
| Joint trial of summary with other offences See Note 5 | Summary procedure — When appropriate and when not See Note 4 |
| Magistrate at Bangalore cannot try See Note 3 | Summary powers — Careful exercise See S 261 Note 2 |
| Magistrate taking cognizance himself See Note 4 | Summary trial — Meaning and effect See Note 2 |
| Municipal cases See Note 4 | |
| Offences under Workmen's Breach of Contract Act 13 (XIII) of 1879 See Note 5 | |

1 Legislative changes

Difference between Codes of 1861 and 1872 —

There was no section corresponding to this in the Code of 1861. The corresponding sections in the Code of 1872 were ss 222, 223 and 224.

Changes made in 1882 —

(1) The offence referred to in clause (c) of the present section was added to the list of offences triable summarily under the section.

(2) The proviso to sub (1) of the present section was added giving legal effect to the unformulated decision¹

- (3) The words 'and on conviction of the offender, may pass such sentence as may be lawfully inflicted under S 20 (corresponding to S 32 of the present Code) of this Code' which occurred in S 222 of the prior Code were omitted and the second paragraph of S 262 providing that in summary trials no sentence of imprisonment for a term exceeding three months can be passed was added

Changes made in 1898 —

The following additions were made

- (1) The words 'if he or they think fit'
- (2) Clause (c)
- (3) Clause (m) This gave legislative effect to the undermentioned decision² and rendered obsolete decision noted below³
- (4) The words and figures and offences under Ss 451 456 and 457 of the same Code in clause (i)
- (5) Sub section (2)

Changes made after 1898 —

By the amending Act I of 1903 the offences under Ss 453 and 454 of the Penal Code were added to the offences enumerated in clause (i) of sub s (1) thus rendering obsolete the undermentioned decision⁴

2 Scope and object of the section. — This section and the next lay down the offences that can be tried summarily and the Magistrates by whom they can be so tried. While this section lays down the offences that can be tried in a summary way by District Magistrates Magistrates of the first class and Benches of Magistrates with first class powers the next section lays down the offences that can be tried summarily by Benches of Magistrates with second or third class powers. The procedure to be followed in summary trials is laid down in Ss 262 to 265.

Under S 262 sub s (2) it is provided that in case of conviction in summary trials the Magistrate cannot pass any sentence of imprisonment for a term exceeding three months. Under S 414 a person convicted at a summary trial by a Magistrate empowered to try cases summarily has no right of appeal in any case where the sentence is one of fine not exceeding two hundred rupees only.

These sections apply to trials before Magistrates and Benches of Magistrates other than Presidency Magistrates. As regards summary procedure in trials before the latter, see S 262 sub s (4) S 370 and S 411.

The object of this section and the sections following it in this chapter is to shorten the record and the work of the Magistrate in making the record; it is not intended to deprive the accused person of any of the rights under Chapter XX or Chapter XXI.¹

3 Magistrates empowered to try cases summarily — The power to try cases summarily is confined to the Magistrates and Benches of Magistrates mentioned in this section and the next section. While the offences mentioned in this section can be tried by District Magistrates Magistrates of the first class specially empowered in this behalf by the Provincial Government and Benches of Magistrates with first class powers specially empowered in this behalf by the Provincial Government the offences mentioned in S 261 can be tried by Benches of Magistrates with second or third class powers specially empowered in this behalf by the Provincial Government.

2 (1896) 41 W N 136 (136) *Queen Empress v Jaiswal*

3 (1902) 23 Cal 249 (214) *Nelaram Thakur v Joonab*

4 (1911) 11 C P L R Cr 154 (153) *Feroz v La'an Singh*

Note 2

1 (1922) 26 AIR 1979 (1922) 87 (22) I L R (1932) Nag 457 40 Cr L Jour 816 *Munna v Emperor*

As to the power of the District Magistrate of the Civil and Military Station of Bangalore to try European British subjects summarily, see the undermentioned case.¹

4. "May, if he or they think fit." — Under this section the Magistrate is not bound to adopt the summary procedure in the case of the offences mentioned in it. The section only confers a discretion to try such offences in a summary way if the Magistrate thinks fit to do so. In each case he ought to consider whether the summary procedure would be appropriate to the case. As a rule, such procedure should be confined to cases of a simple nature where not much evidence is needed.¹ The procedure is inappropriate to cases of a complicated or serious nature.² Thus, it would not be proper to try in a summary way cases which are hotly contested,³ cases involving intricate questions of title and possession⁴ and cases necessitating the taking of lengthy evidence⁵ or requiring a local inquiry to be made.⁶ Similarly, the summary procedure is inappropriate in warrant cases in which the prosecution includes evidence given on commission in other presidencies, as the evidence so recorded militates in its very nature against the object of a trial by summary procedure.⁷ Where owing to the bulk of evidence or the complication of the matters or owing to the difficult nature of the points at issue, it is not possible for the Magistrate to keep in his mind, without taking exhaustive notes, the evidence of important facts, then, even though the offence may be technical and be punishable only with a light sentence, the Magistrate will not be acting properly if he applies the summary procedure.⁸ Similarly, serious cases, where a heavy sentence would be deserved in case of conviction,

Note 3

1. (16) 3 AIR 1916 Mad 539 (539) : 39 Mad 942 : 16 Cri L Jour 773 (774), *In re G. G. Jeramiah*. (No power)

Note 4

1. (76) 25 Suth W R Cr 65 (66), *Issur Chunder v. Rohim Sheikh* (Don't *vide* claim of right deprives Magistrate of jurisdiction to deal with criminal charge in summary way)
2. (21) 6 AIR 1921 Bom 370 (371) : 23 Cri L Jour 21, *Emperor v. Rustumji* (Accused charged under S 290, Penal Code, for working flour mill in residential neighbourhood—Trial should not be summary)
- (13) 14 Cri L Jour 105 (107) : 18 Ind Cas 665 35 All 173, *Dinanath v. Emperor*. (Great deal of correspondence having to be gone through)
3. (31) 18 AIR 1931 Mad 233 (233) : 32 Cri L Jour 689, *Subramania v. Nachiar Ammal* (See (39) 26 AIR 1939 Lah 467 (468) : 1 L R (1939) Lah 221 : 41 Cri L Jour 19, *M. A. Khan v. Emperor* (Contest on point whether trespass was committed on railway land or land of P. W. D. does

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title involved — Case need not necessarily be tried in regular manner)]

5. (39) 26 AIR 1939 Lah 467 (469) : 1 L R (1939) Lah 221 : 41 Cri L Jour 19, *M. A. Khan v. Emperor*.
- (21) 8 AIR 1921 Lah 236 (236) : 22 Cri L Jour 145, *Ghanta Mal v. Emperor* (Number of accused large and number of witnesses even greater — Case should not be tried summarily)
- (91) 1891 All W N 183 (183), *In the matter of Sheo Sahai*. (Trial taking ten hearings, summary trial not proper)
- (34) 21 AIR 1934 Lah 213 (245) : 15 Lah 610 : 35 Cri L Jour 1094, *Md Abdulla v. Emperor*. (Case complicated and extending over months — Elaborate judgment necessary — Case should not be tried summarily)
- [But see (27) 14 AIR 1927 All 136 (137) : 28 Cri L Jour 140, *Naubat v. Emperor* (Mere fact that number of accused is large is not conclusive reason against summary trial)
- (92) 1892 All W N 30 (30), *In the matter of Mansa* (Summary jurisdiction is not affected by length

- (3) The words "and on conviction of the offender, may pass such sentence as may be lawfully inflicted under S 20 (corresponding to S 32 of the present Code) of this Code" which occurred in S 222 of the prior Code were omitted and the second paragraph of S 262 providing that in summary trials no sentence of imprisonment for a term exceeding three months can be passed was added

Changes made in 1898 —

The following additions were made

- (1) The words "if he or they think fit"
- (2) Clause (e)
- (3) Clause (m) This gave legislative effect to the undermentioned decision* and rendered obsolete decision noted below³
- (4) The words and figures "and offences under Ss 451 456 and 457 of the same Code in clause (i)
- (5) Sub section (2)

Changes made after 1898 —

By the amending Act I of 1903 the offences under Ss 453 and 454 of the Penal Code were added to the offences enumerated in clause (i) of sub s (1) thus rendering obsolete the undermentioned decision⁴

2 Scope and object of the section. — This section and the next lay down the offences that can be tried summarily and the Magistrates by whom they can be so tried. While this section lays down the offences that can be tried in a summary way by District Magistrates Magistrates of the first class and Benches of Magistrates with first class powers the next section lays down the offences that can be tried summarily by Benches of Magistrates with second or third class powers. The procedure to be followed in summary trials is laid down in Ss 262 to 265.

Under S 262 sub s (2) it is provided that in case of conviction in summary trials the Magistrate cannot pass any sentence of imprisonment for a term exceeding three months. Under S 414 a person convicted at a summary trial by a Magistrate empowered to try cases summarily has no right of appeal in any case where the sentence is one of fine not exceeding two hundred rupees only.

These sections apply to trials before Magistrates and Benches of Magistrates other than Presidency Magistrates. As regards summary procedure in trials before the latter, see S 262, sub s (4), S 370 and S 441.

The object of this section and the sections following it in this chapter is to shorten the record and the work of the Magistrate in making the record, it is not intended to deprive the accused person of any of the rights under Chapter XX or Chapter XXI¹.

3. Magistrates empowered to try cases summarily. — The power to try cases summarily is confined to the Magistrates and Benches of Magistrates mentioned in this section and the next section. While the offences mentioned in this section can be tried by District Magistrates Magistrates of the first class specially empowered in this behalf by the Provincial Government and Benches of Magistrates with first class powers specially empowered in this behalf by the Provincial Government, the offences mentioned in S 261 can be tried by Benches of Magistrates with second or third class powers, specially empowered in this behalf by the Provincial Government.

2 (96) 1896 All W N 136 (136) *Queen Empress v Jawahar*

3 (96) 23 Cal 249 (249) *Nedaram Thakur v Joonab*

4 (01) 14 C P L R Cr 158 (158) *Emperor v Ratan Singh*

NOTE 2

1 (39) 96 AIR 1939 Nag 87 (98) 1 L R (1939) Nag 457 40 Cr L Jour 846 *Munna v Emperor*

As to the power of the District Magistrate of the Civil and Military Station of Bangalore to try European British subjects summarily see the undermentioned case¹

4 "May, if he or they think fit" — Under this section the Magistrate is not bound to adopt the summary procedure in the case of the offences mentioned in it. The section only confers a discretion to try such offences in a summary way if the Magistrate thinks fit to do so. In each case he ought to consider whether the summary procedure would be appropriate to the case. As a rule such procedure should be confined to cases of a simple nature where not much evidence is needed¹. The procedure is inappropriate to cases of a complicated or serious nature². Thus it would not be proper to try in a summary way cases which are hotly contested³ cases involving intricate questions of title and possession⁴ and cases necessitating the taking of lengthy evidence⁵ or requiring a local inquiry to be made⁶. Similarly the summary procedure is inappropriate in warrant cases in which the prosecution includes evidence given on commission in other presidencies as the evidence so recorded militates in its very nature against the object of a trial by summary procedure⁷. Where owing to the bulk of evidence or the complication of the matters or owing to the difficult nature of the points at issue it is not possible for the Magistrate to keep in his mind without taking exhaustive notes the evidence of important facts then even though the offence may be technical and be punishable only with a light sentence the Magistrate will not be acting properly if he applies the summary procedure⁸. Similarly serious cases where a heavy sentence would be deserved in case of conviction,

Note 3

- 1 (16) 8 AIR 1916 Mad 539 (589) 39 Mad 94² 16 Cri L Jour 773 (774) *In re G G Jeramiah* (No power)

Note 4

- 1 (76) 90 Suth W R Cr 6, (66) *Issur Chunder v Rohim Sheikh* (Bona fide claim of right deprives Magistrate of jurisdiction to deal with criminal charge in summary way)
 2 (21) 8 AIR 1901 Bom 370 (371) 23 Cri L Jour 21 *Emperor v Pustomyi* (Accused charged under S 90 Penal Code for working flour mill in residential neighbourhood—Trial should not be summary)
 (13) 14 Cri L Jour 105 (107) 18 Ind Cas 665 35 All 173 *Dinanath v Emperor* (Great deal of correspondence having to be gone through)
 3 (31) 18 AIR 1931 Mad 233 (233) 32 Cri L Jour 689 *Subramania v Nalliar Ammal*
 [See (39) 26 AIR 1939 Lah 467 (468) 1 L R (1939) Lah 221 41 Cri L Jour 19 *M A Khan v Emperor* (Contest on point whether trespass was committed on railway land or land of P W D does not make case one not triable summarily)]
 4 (16) 20 Suth W R Cr 65 (66) *Issur Chunder v Rohim Sheikh*
 (1900) 4 Cal W N 247 (249) *Sri Ramchand v Dinanath* (Cases under Bengal Private Fisheries Protection Act 2 [II] of 1899 should not be tried in summary way)
 (12) 13 Cri L Jour 771 (771) 17 Ind Cas 403 6 Snd L R 190 *Emperor v Tirth Das*
 (99) 9 AIR 1907 Pat 265 (265 267) 21 Cri L Jour 374 *Bhajan Baladur v Emperor*
 (29) 9 AIR 1907 Pat 296 (297) 23 Cri L Jour 410 *Parmeshwar Lal v Emperor*
 (23) 10 AIR 1903 Rang 157 (157) 24 Cri L Jour 99 *Mauig Shue Ku v Emperor*
 [See also (93) 10 AIR 1923 Pat 157 (157) 23 Cri L Jour 120 *Ud Ishaq v Emperor*]

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- (21) 8 AIR 1901 Lah 236 (236) 22 Cri L Jour 145 *Chanta Mal v Emperor* (Number of accused large and number of witnesses even greater — Case should not be tried summarily)
 (91) 1891 All W N 183 (183) *In the matter of Sheo Salai* (Trial taking ten hearings summary trial not proper)
 (34) 91 AIR 1934 Lah 943 (245) 15 Lah 610 35 Cri L Jour 1094 *Ud Abdulla v Emperor* (Case complicated and extending over months — Elaborate judgment necessary — Case should not be tried summarily)
 [But see (27) 14 AIR 1907 All 136 (137) 28 Cri L Jour 110 *Naubal v Emperor* (Mere fact that number of accused is large is not conclusive reason against summary trial)
 (97) 1897 All W N 30 (30) *In the matter of Mansa* (Summary jurisdiction is not affected by length

cannot appropriately be tried summarily.⁹ So also, cases where the result of the trial would have further consequences of a serious nature ought not to be tried in a summary way.¹⁰ For instance cases against public servants in which the whole career of the accused would depend on the result of the trial should not be tried summarily.¹¹ Similarly, where the owner of a flour mill is prosecuted for public nuisance for starting the mill in a residential locality, he should not be tried summarily if the result of the trial would have the effect, in case of conviction of compelling him to permanently close down his business.¹²

But the mere fact that there are a number of accused persons is not a conclusive reason against trying a case summarily.¹³

A summary trial is undesirable when a Magistrate takes cognizance of a case upon his own knowledge as in such a case he is himself in the position of a prosecutor and it would not be proper for him to deal with the case in a summary way in such case.¹⁴

Where the accused is deaf and dumb it has been held that the summary mode of trial is not suitable.¹⁵

Whether the procedure actually adopted is summary or ordinary is to be seen from the record. Thus where the evidence of all the witnesses is recorded in full together with their cross examination and an exhaustive judgment is delivered it may be said that the case was not tried summarily as a reference to Ss 263 and 264 will show that such a detailed record is not necessary.¹⁶

5 Offences to which the section applies — This section empowers cert. a

- 9 (16) 3 AIR 1918 All 53 (54) 17 Cri L Jour 413 38 All 506 *Ajag Hussain v Emperor*
(93) 7 C P L R App Cr 8 (8) *Empress v Gangarai*
(93) 1900 1893 1900 Low Dor Rul 193 (193) *Queen Empress v Nga San* (Boat thefts and cattle thefts call ordinarily for a severe sentence)
(12) 18 Cri L Jour 780 (781) 17 Ind Cas 412 6 Sind L R 101 *Emperor v Allahrahio* (Cattle lifting is serious offence and should not be tried summarily)
(27) 14 AIR 1977 Sind 257 (257) 28 Cri L Jour 959 *Amir Buz v Emperor* (Do)
10 (29) 16 AIR 1919 All 267 (268) 80 Cri L Jour 503 *Emperor v Bashir*
(21) 8 AIR 1921 Bom 370 (371) 23 Cri L Jour 21 *Emperor v Justomji*
11 (83) 6 Mad 396 (399) 2 We r 328 *Subramanja Iyer v Queen*
(11) 12 Cri L Jour 143 (144) 9 Ind Cas 831 (Lab) *Sohan Singh v Emperor* (No matter what their rank)
(82) 19 AIR 1932 Lab 188 (189) 33 Cri L Jour 108 *Robert John Bradley v Emperor* (Station

19 M A Khan v

Emperor (It cannot be laid down as a broad proposition that a Government servant should not be tried summarily or that generally the summary procedure is inappropriate in cases in which Government servants are accused — It is a question on the facts of each case whether one mode of trial or the other should be employed)

- (26) 13 AIR 1926 Oadh 63 (63) 26 Cri L Jour 1472 *Sukhpal Lal v Emperor*
(29) 16 AIR 1919 Pat 716 (717) 30 Cri L Jour 869 *Jagdish Prasad v Emperor* (Petty theft by railway watchman — Summary trial appropriate though accused liable to be dismissed from service on his conviction)

- 12 (21) 8 AIR 1921 Bom 370 (371) 23 Cri L Jour 21 *Emperor v Justomji*

- 13 (27) 14 AIR 1927 All 136 (137) 28 Cri L Jour 140 *Nandlal v Emperor*.

[But see (21) 8 AIR 1921 Lab 236 (236) 22 Cri L Jour 115 *Ghansta Mal v Emperor* (Number of accused large and number of witnesses even greater — Case should not be tried summarily)]

- 14 (76) 25 South W R Cr 69 (71) *In re Romanath Bannerjee*

- (99) 3 Cal C W N co xxx *Empress v Hamed Hossein*

- 15 (06) 4 Cri L Jour 441 (445) 8 Pom L R 849 *In re A Deaf and Dumb man*

Also see S 311 Note 2

- 16 (41) 45 Cal W N 139 (140) *Jagnannayan Haluwas v Bhatpara Municipality* (The mere fact that at the top of the record appears a Form kept under S 263 of Act 10 [X] of 1862 cannot be taken to mean that the summary procedure was actually adopted)

Magistrates to try summarily the offences specified therein¹. These offences are classified in clauses (a) to (m) of sub s (1) of the section. Clause (m) refers to offences under the Cattle trespass Act. All the offences mentioned in clauses (b) to (l) are offences under the Penal Code. Clause (a) is general and applies to all offences whether under the Penal Code or other Acts. Hence the section applies to offences under other Acts also provided they are not offences punishable with death transportation or imprisonment for a term exceeding six months.* The fact that several offences are charged against the accused does not make the section inapplicable where all the offences are triable summarily³. But the summary procedure cannot be extended to offences not mentioned in the section⁴. Thus, offences for which the maximum punishment available under the law exceeds the limits mentioned in clause (a) and which are not covered by any of the other clauses in sub s (1), cannot be tried summarily⁵. Even the consent of the accused will not enable a Magistrate to try summarily an offence not covered by the section⁶. Where there are several accused persons the fact that the offence of which one of them is accused is not triable summarily will make the summary procedure inapplicable to all the accused persons⁷. Similarly

Note 5

- 1 (23) 10 AIR 1923 All 432 (433) *Emperor v Buti* (Theft under S 379 in which the value of property stolen does not exceed Rs 50)
- (19) 6 AIR 1919 All 64 (64) 21 Cr L Jour 28 *Udit Narain v Emperor* (In case of theft etc the value of the property stolen should be found to be less than Rs 50)
- 2 (94) 1 Weir 906 (907) *In re Nattoo Houthen* (Offence under S 654 Stamp Act 1 [I] of 1870)
- (29) 15 AIR 1923 All 719 (720) 50 All 718 30 Cr I Jour 214 *Emperor v Dikhar Bhar* (Offence under S 22 cl (2) subcl (i) Criminal Tribes Act 6 [VI] of 1921)
- (90) 1902 All W N 24 (94) *King Emperor v Bindestri* (Offence under S 121 Railways Act 1890)
- (10) 6 AIR 1919 Bom 173 (174) 43 Poon 808 20 Cr I Jour 699 *Esipuro v Dhondya* (Section 130 read with S 120 (a) Railways Act)
- (34) 21 AIR 1934 All 331 (332) 33 Cr L Jour 677 *Jwala Prasad v Emperor* (Offence under Child Marriage Restraint Act of 1929)
- 3 (84) 10 Cal 408 (409) *Gaurullah Sarkar v Abdul Sheikh* (Suicide trial for criminal trespass and mischief)
- (76) 25 Suth W R Cr 5 (6) *Empress v Ramaotar* (Summary trial for mischief and theft)
- 4 (74) 21 Suth W R Cr 12 (13) *Queen v Bobbeli Pathak*
- (75) 24 Suth W R Cr 71 (72) *Kopli Dolai v Kanhaijenua*
- (22) 9 AIR 1923 Lat 297 (298) 23 Cr L Jour 515 *Bray Nandan v Emperor* (Before the Magistrate can assume jurisdiction to try offence of theft in a summary way he has to satisfy himself that the property in respect of which offence is committed is less than Rs 50 in value)
- 5 (39) 26 AIR 1939 All 693 (693) 11 R (1939) All 631 41 Cr L Jour 91 *Balwant Singh v Emperor* (Magistrate trying summarily a case under Ss 147 457 Penal Code after issuing summons under S 414—Trial is void)
- (24) 11 AIR 1924 All 675 (676) 46 All 416 23 Cr L Jour 806 *Emperor v Ram Narain* (Offence under S 6 U 1 Penal Code)
- (72 92) 1 Low Bur Ital 63 (63) *Solai Reddy v Gowri* (Offence under S 304 Penal Code)
- (81) 1681 Pun Re No 26 Cr p 56 *Nauab v Empress* (Offence under Ss 304 147 and 332 Penal Code)
- (91) 1891 Pat 10 410 P 10 410 (Offence under S 497 Penal Code)

st (Do)

Code)

) *Habon v Kiri* 11

(Theft of property exceeding Rs 50 in value)

(12) 13 Cr I Jour 28 (28) 13 Ind Cis 394 (Upp Bur) *Emperor v Ajit Singh* (Offence under S 9 Opium Act 1878)

(79) 1 Weir 64 (64) *In re Mangama* (Offence under S 19 Arms Act)

123 26 Cr I Jour 200 *Jahkhar v Emperor* (Offence

under S 304 Penal Code)

(Cal) *Chandru Mohan Das v Emperor* (One of the

accused is liable under S 123

that the inquiry made by a Magistrate under the first part of S 2 of the Workmen's Breach of Contract Act 19 [XIII] of 1859 (repealed afterwards) was not a trial for an offence and such inquiry could not be held in a summary manner.¹⁷ A contrary view however was held by the Allahabad High Court.¹⁸

The section applies only to cases where the charge is exclusively for any of the offences mentioned in the section. Hence, where the accused in case of conviction would be liable to an enhanced punishment under S 75 of the Penal Code by reason of a previous conviction and such conviction is set out in the charge as provided for in S 291, the accused cannot be tried summarily although the trial may be for an offence mentioned in the section.¹⁹

The High Court as a superior Court of Record has a *special jurisdiction* to punish summarily contempt of its authority, and this jurisdiction is independent of and unaffected by the provisions of the Code.²⁰

Under S 6 of the Forest Act of 1907 it is provided that the Magistrates of the classes mentioned therein can try summarily offences of the kind specified in the section.²¹

6 Sub section (2) — This sub section provides for the procedure to be followed in cases in which in the course of a summary trial the Magistrate comes to the conclusion that the case ought not to be tried in a summary way. The Code does not contain any express provision for the procedure to be followed in cases in which in the course of a regular trial the Magistrate finds that the case may be tried summarily. The question arises whether in such circumstances the Magistrate is at liberty to change his procedure to that of a summary trial. As to this see Section 261 Note 4.

261.* The [Provincial Government] may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences.

Lower to the Bench of Magistrates invested with less power

- (a) offences against the Indian Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, 447 and 504,

* 1882 S 261, 1872 S 225 1851 — \ L

(191) 20 Cal 301 (309) *Ka : Dassi v Durga Charan*

Also see S 489 Note 25

17 (87) 1 We r 696 (696) *In re (contempt)*

(193-04) 2 Low Bur Rul 163 (161) *Asij Emperor v Praisamj telari*

(87) 4 Mad 234 (231) 1 We r 696 *Pollard v Mothial* (Because it is enquiry of peculiar character sometimes requiring much care and patience)

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(21) 8 All 19 1 All 290 (31) 43 All 291 292 Cr L Jour 160 *Abdus Samat v Yusuf*
19 (87) 1 We r 31 (311) (Theft in holding and theft by servant are not triable summarily when

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21 See (7) 1907 Ind L L No 1 2 p 53 *Narain Singh v Emperor*

- (b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month with or without fine,
- (c) abetment of any of the foregoing offences,
- (d) an attempt to commit any of the foregoing offences, when such attempt is an offence.

¹ Substituted by A.O. for Local Government

1 Legislative changes — The following amendments were made in the section 1 of the Code of Criminal Procedure (Amendment) Act 1923 (18 XXXIII of 1923) s 75 —

(1) For the word and figures and 417 appearing at the end of cl (a) the word and figures 447 and 501 were substituted

(2) The words with or without fine were added after the words one month in clause (b)

2 Offences triable summarily — A Bench of Magistrates with second or third class powers cannot try summarily any offences except those mentioned in this section¹

3 Conservancy clauses of Police Acts — It has been held by the Madras High Court that s 49 of the General Police Act 21 [XXIV] of 1859 (corresponding to s 34 of the General Police Act 5 [V] of 1861) which relates to obstructions and nuisances in roads within the limits of towns is a conservancy clause within the meaning of this section¹

4 Municipal Acts. — The Bengal Food Adulteration Act (8 [XI] of 1919) is not a Municipal Act within the meaning of cl (b) of this section¹

262.* (1) In trials under this Chapter, the procedure prescribed

Procedure for summons for summons cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant cases, except as hereinafter mentioned,

(2) No sentence of imprisonment for a term exceeding three months

Limit of imprisonment shall be passed in the case of any conviction under this Chapter.

Synopsis

- 1 Legislative changes
- 2 Procedure to be followed in summary trials
- 3 Sentence that can be passed in summary trials — Sub-section (2)

NOTE to the Synopsis See the notes indicated for the following topics

Appeal See S 260 Note 2	Security proceeding See Note 3
Offences requiring severe punishment See Note 3	Sentences of fine See Note 3
and S 260 Note 4	Solitary confinement See Note 3

* 1862 S 262 1872 S 226 1881 — Nil

Section 261 — Note 2

1 (11) 12 Cr I Jour 331 (334) 1 Lpp Bur Pul 70 11 Ind Cas 247 *Aga San Hani v Emperor*
(14) 21 South W R Cr 12 (13) *Queen v Deblakhi Pathal*

Note 3

1 (90) 13 Mad 142 (143) 1 We r 910 *Queen-Empress v Colagaradar*

Note 4

1 (1941) 45 Cal W N 139 (140) *Jagrarayan Halut as v Halpura Municipality* (Provision in S. 15 to the effect that in case of offence committed within a Municipality no prosecution can be instituted without consent in writing of Chairman of Commissioners is not sufficient to make the Act a Municipal Act)

1. Legislative changes.

Difference between the Codes of 1861 and 1872 —

There was no corresponding section in the Code of 1861. The corresponding section in the Code of 1872 was S. 226

Changes made in 1882 —

The second paragraph was added. At the same time the provision in S 222 of the prior Code authorizing the infliction in summary trials of any sentence that might be lawfully passed under S. 20 of the Code (corresponding to S 32 of the present Code) was omitted

2. Procedure to be followed in summary trials. — This section and the following three sections provide for the procedure to be followed in summary trials. Offences that can be tried summarily comprise both summons cases and warrant cases. This section provides that in the summary trial of summons cases the procedure to be followed is that of summons cases and in the summary trial of warrant cases the procedure to be followed is that of warrant cases, except as otherwise provided in the chapter. In other words, the procedure to be followed in summary trials is the same as that provided for ordinary trials except as otherwise prescribed. Such exceptions are provided in sub s (2) of this section and in Ss 263 and 264. It has been held that a breach of the provisions of this section is not a mere irregularity but illegality.¹

Where there is no provision for the departure from the ordinary procedure, such procedure should be followed in summary trials as strictly as in ordinary trials. Thus, proceedings in summary trials as in ordinary trials should commence with the issue of a summons or warrant for the appearance of the accused.² Similarly, the following provisions apply to summary trials equally with ordinary trials. S. 191,³ S 213,⁴ S 237,⁵ S 312⁶ and section 250⁷

As to the applicability of S. 256 to warrant cases, see S 256, Note 2.

Even in cases where a departure from the ordinary procedure is provided for, Magistrate should be careful not to exceed the limits up to which such departure is allowed

Section 262 — Note 2

1 (145) 32 AIR 1945 All 98 (99) : 46 Cri L Jour 539 : ILR (1945) All 131 : 219 Ind Cas 232, *Mangru Lal v. Emperor* (Case under Defence of India Rules—Warrant case—Accused asked to plead guilty or not guilty on appearance—No evidence adduced by prosecution—Accused convicted on his pleading guilty—Trial held illegal)

2 (92) 15 Mad 83 (87) : 2 Weir 326, *Queen-Empress v. Prugadu*

3 (05) 2 Cri L Jour 187 (189) (Lab), *Kanhaya Lal v. Emperor*.

4 (92) 15 Mad 83 (87, 88) : 2 Weir 326 *Queen-Empress v. Prugadu*.

5 (09) 9 Cri L Jour 583 (584) : 2 Ind Cas 365 : 5 Low Bur Bul 20, *Ameer Dalcha v. Emperor*.

(Adjournment to accused for calling their witnesses refused)

(93) 1895 Rat 768 (769), *Empress v. Keru*

6 (40) 27 AIR 1910 Bom 314 (314) : ILR (1910) Bom 842 : 191 Ind Cas 655, *Emperor v. Kondi Bai*

(36) 23 AIR 1936 Oudh 16 (17) : 36 Cri L Jour 1303 : 11 Luck 461, *Emperor v. Karuna Shanlar*

7 (22) 9 AIR 1922 Pat 5 (6) : 23 Cri L Jour 114, *Balkesar Singh v. Emperor*.

(27) 14 AIR 1927 Cal 250 (252) : 51 Cal 286 : 29 Cri L Jour 297, *Dechu Lal Kayastha v. Injured Lady*

Also see S 262, Note 6

[But see (21) 11 AIR 1921 Mad 30 (30) : 46 Mad 766 : 24 Cri L Jour 847 (FB), *Dharamsingh v. Emperor*. [Section 312 does not apply to summons-cases whether tried in the regular way or summarily]]

7 (30) 17 AIR 1930 Mad 929 (929) : 32 Cri L Jour 207, *Palani Goundan v. Krishnappa Goundan*.

(Reasons for ordering compensation must be recorded)

(84) 11 Mad 142 (144) : 2 Weir 314, *Queen-Empress v. Basica*.

and they should follow strictly any special procedure that may be provided for summary trials in such cases. Thus S 263 dispenses with the recording of evidence and the drawing up of a formal charge but requires the Magistrate to draw up a statement giving the particulars mentioned in the section. Magistrates should be careful to prepare this statement as required by the section.⁵ Similarly in appealable cases it is provided that a judgment containing the particulars mentioned in S 264 should be drawn up. An omission to comply with this requirement will be an irregularity in the trial.⁶

3 Sentence that can be passed in summary trials—Sub section (2) —

This sub-section prohibits the infliction in summary trials of a sentence of imprisonment for any term exceeding three months.¹ The object of the section is to restrict the passing of sentences of imprisonment of considerable length in a summary trial from a conviction in which the right of appeal is greatly restricted.²

Where an accused is convicted of a number of offences in a summary trial a separate sentence must be passed in respect of each offence³ (as in any other mode of trial). But it has been held that where in such a case the accused is sentenced to imprisonment for a term of three months in respect of each offence the sentences must be ordered to run *concurrently* and not *consecutively*, as otherwise the object of the section will be defeated.⁴

Where a case is tried summarily and referred to a superior Magistrate under S 349, the mere fact of such a reference being made does not make the trial other than a summary one and the Magistrate to whom the case is referred, if he does not try the case again in any way as he is authorized to do under S 349 cannot pass any sentence of imprisonment for a term exceeding the three months period mentioned in this section.⁵

But the prohibition applies only to *substantive* sentences of imprisonment.⁶ Hence, where imprisonment is ordered in default of the payment of fine the term for which such imprisonment is ordered may exceed the limits imposed by this section.⁷ So also this section will not render illegal a sentence of imprisonment in default of payment of fine merely by reason of the fact that the aggregate of the terms of substantive sentence of imprisonment and of the sentence of imprisonment in default of payment of fine exceeds three months or by reason of the Magistrate having passed a substantive sentence of imprisonment for the maximum term allowed by the section.⁸ Similarly the jurisdiction of a Magistrate to order security for keeping the peace in cases coming under S 106 is not

adu
r Das v Emperor (Reasons for conviction)

Also see S 263 Note 4

9 (34) 1894 Rat 725 (725) *Queen Express v Hussain*

Also see S 264 Note 1 and S 537, Note 1⁹

Note 3

1 (24) 23 Cri L Jour 240 (240) 76 Ind Cas 701 (704) (Rang) *Nga San Ba v Emperor*

(09) 9 Cri L Jour 23 (23) 4 Low Bur Bol 338 *Po Ka v Emperor*

2 (34) 21 AIR 1934 Rang 116 (117) 12 Rang 122 35 Cri L Jour 1413 *Emperor v Nga Po Tay*

3 (34) 21 AIR 1934 Sind 185 (186 187) 28 Sind LR 336 36 Cri L Jour 602 *Chetumal v Emperor*

4 (34) 21 AIR 1934 Sind 185 (186 187) 28 Sind LR 336 36 Cri L Jour 602 *Chetumal v Emperor*

limits a sentence of imprisonment in the alternative to the length of the substantive sentence of imprisonment he can impose under the provision of S 263 () sentence was reduced from 6 months to 3 months (23) 6 All 61 (61) 1003 All W N 90 *Express v Asghar Ali*

[But see (24) 6 AIR 19 1 Lab 236 (36) 22 Cri L Jour 145 *Ghazanfar Ma v Emperor*]

8 (40) 27 AIR 1910 Lan 171 (17) 1910 Rang LP 223 (223) 41 Cri L Jour 762 *The King v Ibrahim*
Also see S 37 Note 8

affected by this section⁹ and where such security is ordered the power to commit to prison in default of furnishing the security under S 193 is again unaffected by this section¹⁰

The section only restricts the term for which a sentence of imprisonment can be passed it does not set any limits to the amount of fine that can be imposed on the convicted person¹¹ Nor is the power of the Magistrate to sentence the convicted person to solitary confinement under S 73 of the Penal Code in any way affected by the section¹²

263. * In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge, but he or they shall enter in such form as the * [Provincial Government] may direct the following particulars

- (a) the serial number,
- (b) the date of the commission of the offence;
- (c) the date of the report or complaint,
- (d) the name of the complainant (if any),
- (e) the name, parentage and residence of the accused;
- (f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d), clause (e) clause (f) or clause (g) of sub section (i) of section 260 the value of the property in respect of which the offence has been committed,
- (g) the plea of the accused and his examination (if any),
- (h) the finding and, in the case of a conviction, a brief statement of the reasons therefor,
- (i) the sentence or other final order, and
- (j) the date on which the proceedings terminated

a Substituted by A O for Local Government

Synopsis

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|--|---|
| 1 Legislative changes | 5 Clause (i)—Particulars of offence charged and proved |
| 2 Scope and applicability of the section | 6 Clause (g)—Plea of accused and his examination (if any) |
| 3 The Magistrate or Bench of Magistrates need not record the evidence of the witnesses | 7 Clause (h)—Finding and in case of conviction, brief statement of reasons therefor |
| 4 He or they shall enter particulars | |

NOTE to the Synopsis See the Notes indicated for the following topics

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|---|--|
| Accused to know the charges against him See Note 5 | Hearing of evidence—Essential See Note 2 |
| Appeal—Summary cases See S 260 Note 2 | Non-compliance—Effect See Notes 2 and 7 |
| Delegation to clerk of preparation of record See S 265 Note 2 | Notes of evidence See Note 3 |
| Entries by whom to be made See Note 4 | Record to show the nature of offences See Note 2 |
| | Revision See Note 7 |
| | Strict compliance—Essential See Notes 4 and 2 |

* 1882 S 263 1872 S 227 1861 — Nil

- 9 (86) 1886 All W N 181 (181) *Empress v Lachman*
 (04) 1 Cr L Jour 1054 (1055) 7 Oudh Cas 338 *Meghu v Emperor* (1886 All W N 181 followed)
 Also see S 106 Note 13
 10 (86) 1886 All W N 181 (181) *Empress v Lachman*
 (04) 1 Cr L Jour 1054 (1055) 7 Oudh Cas 338 *Meghu v Emperor* (Imprisonment to be undergone in default of furnishing security is not a part of substantive sentence)
 Also see S 123 Note 8
 11 (13) 14 Cr L Jour 105 (106) 3 All 173 18 Ind Cas 665 *Dhanath v Emperor*
 12 (63) 6 All 83 (63) 1883 All W N 224 *Empress v Annu Khan*

1 Legislative changes — The words "nor the reasons for passing the judgment" occurring in the Code of 1872 after the words "need not record the evidence of the witnesses" have been omitted in the subsequent Codes.

The following words were for the first time introduced in the Code of 1882 —

(a) and in cases coming under clause (d) clause (e) or clause (f) of S 260, has been committed in clause (f)

(b) and his examination if any in clause (g),

(c) or other final order in clause (i)

Code of 1898 —

The words "or clause (g) of sub section (i)" were added

2. Scope and applicability of the section — It has been seen under S 262 that the procedure to be followed in summary trials is the same as that in ordinary trials except as otherwise provided. This section provides for some of the matters in respect of which the ordinary procedure may be departed from in summary trials. It provides that in such trials the evidence of witnesses need not be recorded and that no formal charge is necessary, but that the Magistrate or Bench of Magistrates as the case may be should enter in the prescribed form the particulars mentioned in the section. But the form prescribed under the section will not be the only record of the case for all purposes¹

The section applies only to cases in which no appeal lies². The procedure applicable to cases in which an appeal lies is provided for in S 264.

That section provides that in appealable cases in summary trials a judgment should be prepared containing the particulars mentioned in this section and the substance of the evidence and that such judgment shall be the only record in cases coming under that section. The question has arisen whether the exemption from recording the evidence of witnesses for which express provision is made in this section applies in cases coming under S 264 also. As to this see Notes on Section 264.

It has been seen in the Notes under S 262 that, except in regard to matters for which a different procedure is prescribed or permitted for summary trials, it is the duty of the Magistrate in such trials to follow the rules of ordinary procedure as strictly as in ordinary trials. Thus though this section dispenses with the recording of evidence it does not dispense with the hearing of evidence and a finding in a summary trial which is based on a refusal or failure to hear evidence is as much liable to be upset as a finding in an ordinary trial which is based on a similar ground³.

This section and the other sections in this chapter refer only to the summary procedure in trials before Magistrates and Benches of Magistrates other than Presidency Magistrates. As to summary procedure in trials before Presidency Magistrates, see S 362, sub s (4) Section 370 and section 441.

There being so little to be recorded under this section and consequently there being so little protection from without to the accused against the risk of error, haste or inaccuracy the scanty provisions of this section must be strictly complied with and the

Section 263 — Note 2

1 (40) 27 AIP 1940 Pat 272 (274) 41 Cr L Jour 283 126 Ind Cas 312 *Mohsin Sheikh v Emperor* (First information lodged with police may be referred to)

2 (7-) 2 Cal I P p 511 (14) *In the matter of Sher Mohamed*

3 (3-) 25 AIR 1939 Snd 70 (71) 32 S L R 684 39 Cr L Jour 474 *Challaram Menjraj v Emperor*

(12) 13 Cr L Jour 759 (760) 39 Cal 931 17 Ind Cas 71 *Jalbar Sheikh v Torani Shah*

(07) 2 Cr L Jour 187 (188) (189) *Kanlaya Lal v Emperor*

(13) 14 Cr L Jour 12 (123) 35 All 156 1-1 Ind Cas 622 *Baria v Emperor* (Evidence was taken on a certain essential point)

(05) 9 Cal W N 683333 (683333) *Firdul Sardar v Emperor* (Evidence was taken on a certain essential point)

accused to a false evidence in charge of them

record must be sufficiently exact and full to enable the revisional Court to say whether the law has been complied with or not on the points to be recorded⁴

See also Notes on Section 262.

3 "The Magistrate or Bench of Magistrates need not record the evidence of the witnesses" — This section exempts the Magistrate or Bench of Magistrates holding a summary trial from recording the evidence of witnesses as in ordinary trials¹. The contrary view² is against the express provisions of this section and S 354 and cannot be supported.

Although the Magistrate or Bench of Magistrates trying a case summarily is not bound to record the evidence of witnesses such recording of evidence is not prohibited and in cases of importance, it has been held that Magistrates would do well to record the evidence³. The Sind Judicial Commissioner's Court has held that evidence so recorded will not form part of the record⁴.

Moreover, Magistrates in such cases may take notes of the evidence for their own information and use and it has been laid down that where a case is likely to be adjourned to a long date the Magistrate ought to take such notes⁵. The question arises as to whether such notes of evidence, where they are taken form part of the record or are the private property of the Magistrate which he can destroy at his option. On this question there is a conflict of decisions. On the one hand it has been held by the High Courts of Allahabad⁶

4 (34) 21 AIR 1934 Lah 598 (507) 15 Lah 277 35 Cri L Jour 1464 *Abdul v Emperor*
(08) 10 Cal W N 79 (81) 3 Cri L Jour 178 2 Cal L Jour 565 *Kosh Md v Empress*
[See also (38) 25 AIR 1938 Sind 70 (71) 32 Sind L R 684 39 Cri L Jour 474 *Choithram Menghraj v Emperor*]

Note 3

1 (40) 27 AIR 1940 Pat 272 (274) 41 Cri L Jour 283 186 Ind Cas 312 *Mohsin Sheikh v Emperor*
(Section 263 must be read as an exception to the general provision contained in S 355 (1))
(38) 25 AIR 1938 Sind 70 (71) 32 Sind L R 684 39 Cri L Jour 474 *Choithram Menghraj v Emperor*.
(36) 23 AIR 1938 All 319 (319) 87 Cri L Jour 710 *Hafiz Md Rafiq Ahmad v Emperor*
(08) 10 Cal W N 79 (81) *Mahomed Hossein v Keshab Chandra*
(27) 14 AIR 1907 All 124 (124 125) 49 All 261 28 Cri L Jour 97 *Manloo Tewari v Emperor* (Notes if any taken for own use by Magistrates form no part of record)
(05) 2 Cri L Jour 336 (337 338) 1905 All W N 143 *Emperor v Someshwar Das*
(13) 14 Cri L Jour 122 (123) 35 All 136 18 Ind Cas 682 *Rama v Emperor*
(32) 19 AIR 1932 Oudh 98 (98) 7 Luck 498 83 Cri L Jour 342 *Ahmad Jan v Emperor* (But

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(Section 355 does not apply to summary trials)

(27) 14 AIR 1907 All 124 (124 125) 49 All 261 28 Cri L Jour 97

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(Summary trial — Magistrate should give brief statement of reasons for convicting accused — That would necessitate short summary of prosecution evidence — If there be defence evidence Magistrate

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was used later and was a Bench decision]]

Bombay⁷ and Rangoon,⁸ the Chief Court of Oudh⁹ and the Judicial Commissioner's Court of Sind,¹⁰ that such notes do not form part of the record and can be destroyed by the Magistrate at his option. But on the other hand, it has been held by the High Court of Calcutta¹¹ and the Judicial Commissioner's Court of Nagpur¹² that such notes form part of the record and cannot be destroyed by the Magistrate. In the undermentioned case¹³ it has been held that the failure of the Magistrate to sign the memorandum of evidence, assuming that the Magistrate is bound to make such memorandum, is not by itself sufficient to vitiate the trial and conviction. See also the undermentioned cases¹⁴.

This section applies only to cases where no appeal lies. As to the question whether in cases in which an appeal lies the Magistrate is bound to record the evidence as in ordinary trials, see Notes on section 263.

4 "He or they shall enter . . . particulars" — This section requires the Court in a summary trial to prepare a record in the form that may be prescribed by the Provincial Government containing the various particulars mentioned in clauses (a) to (j) of the section. By implication this dispenses with the recording of a judgment in the form laid down by s 367¹. But the record prescribed by this section must be prepared scrupulously and carefully and must be complete in all the particulars specified in the section². The particulars must be recorded in separate columns, lumping together in the same column all the particulars is not proper³. The record must be prepared at the time of the trial, its preparation after the close of the trial is not sufficient⁴. Further, the record must be prepared by the presiding officer of the Court itself. Except in cases where he is authorized to use the services of an officer appointed for the purpose under s 265, sub s (2), he cannot depute a clerk to prepare the record⁵.

But the failure of the Magistrate to prepare the record as required by this section will not by itself justify the quashing of the conviction unless it has caused prejudice or occasioned failure of justice. Thus, where a Magistrate failed to enter the date of the commission of the offence it was held that the conviction could not be set aside unless it was

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 10 (25) 12 AIR 1925 Sind 284 (284) 19 Sind L R 136 26 Cri L Jour 1026, *Rahimtullah Ibrahim v Emperor*
 11 (21) 8 AIR 1921 Cal 165 (165 166) 48 Cal 280 22 Cri L Jour 462, *Satish Chandra v Manmatha Nath*
 12 (26) 13 AIR 1926 Nag 79 (79) 26 Cri L Jour 1451 *Lal Chand v Emperor*
 13 (40) 27 AIR 1940 Pat 272 (274) 41 Cri L Jour 283 186 Ind Cas 312 *Mohsin Sheikh v Emperor*
 14 (90) 7 AIR 1920 Pat 654 (654) 21 Cri L Jour 229 *Jagdish Prasad v Emperor* (The Court will insist upon the production of the original record of statements made by witnesses on which the accused

to with great care)

Note 4

- 1 (20) 7 AIR 1920 All 79 (80) 21 Cri L Jour 442 *Bhola Nath v Emperor* (Section requires only a finding accompanied by statement of reasons therefor)
 2 (74) 22 Sat W R Cr 28 (28) *Queen v Johra Singh*
 (06) 4 Cri L Jour 40 (41) 12 Bar L R 151, *Saminathan Chetty v Rangoon Municipality*
 (99) 21 All 189 (192) 1899 All W N 34 *Queen Empress v Musurda La'*
 (87) 1882 All W N 59 (59) *Empress v Madho* (No compliance with provisions in clauses (f) and (h) — illegal)
 Also see S 262 N 10 2
 3 (24) 23 Cri L Jour 161 (16) 65 Ind Cas 625 (Lab) *Gulam Md v Emperor*.
 4 (95) 15 Mad 83 (87) 2 We - 36 *Queen Empress v Erugadu* (Record prepared after close of trial from memory of presiding officer — illegal)
 5 (83) 6 Mad 306 (300) 2 We - 32, *Su'ramar, J Iyer v Queen*.

shown that the defect had led or could possibly have led to any prejudice or failure of justice⁶

The register prepared under this section forms part of the record and under S 513 the accused is entitled to copies of it if he applies for them⁷

5 Clause (f)—Particulars of offence charged and proved — Though this section dispenses with the framing of a formal charge in cases coming under it the record prepared under the section must specify both the offence complained of and proved¹ The accused is entitled to know clearly the offence with which he is charged to the same extent as in ordinary trials² The record must show that the accused was not in any way prejudiced in this respect The specification of the offence in the record should be sufficiently full and clear to give the accused sufficient notice of what he is charged with and what he has to meet³ The principles in conformity with which charges must be framed in warrant-cases apply to the particulars to be recorded under this section⁴ The mere mention of the section is not sufficient, the particulars of the offence must be stated in plain language and should be distinctly stated⁷

Where the offence complained of is an offence of theft or other offence falling under clauses (d) to (g) of sub s (1) of S 260 the value of the property in respect of which the offence was committed must also be specified in the record in order to make it clear that the offence was one which could be tried in a summary way⁵ But the mere failure to do so is not sufficient to raise any question of possible or probable prejudice or failure of justice so as to warrant the setting aside of the conviction unless it is shown that there was a real defect of jurisdiction by reason of the property exceeding Rs 50 in value⁶

6 Clause (g) — Plea of accused and his examination (if any) — The record should contain the plea of the accused and particulars as to his examination by the Court¹ The accused must be asked to state his plea as in ordinary trials² Further the

6 (40) 27 AIR 1940 Pat 272 (273) 41 Cri L Jour 283 186 Ind Cas 312 *Mohsin Sheikh v Emperor*
Also see S 265 Note 2

7 (10) 11 Cri L Jour 17 (18) 4 Ind Cas 611 1909 Pun Re No 9 Cr *Mangar Ram v Emperor*
Note 5

1 (06) 4 Cri L Jour 40 (41) 12 Bor L R 151 *Saminathan Chellu v Pangoon Municipality*

(82) 1882 All W N 242 (242) *Empress v Chotey Lal*

(80) 1880 All W N 59 (59) *Empress v Madho*

2 (82) 1882 All W N 59 (59) *Empress v Madho*

[See (39) 26 AIR 1939 Nag 87 (88) 11 LR (1939) Nag 457 40 Cri L Jour 816 *Munna v Emperor*
(The circumstances of the offences complained of should be explained to the accused whether in

Note 6

1 (30) 99 AIR 1935 S and 193 (193) 36 Cri L Jour 1484 *Devrajmal v Emperor* (It is not a compliance
a and examination

v Emperor

accused must be examined under S 312 with a view to enable him to explain any circumstances appearing against him after the case for the prosecution has been closed and before the accused is called on to enter upon his defence³. The general view is that the Court is bound to examine the accused under S 312 in summary trials whether of summons cases or of warrant cases⁴. The use of the words "if any" in this clause does not make it optional with the Court to apply the provisions of S 312 to summary trials⁵. The words cover only cases where the accused pleads guilty or owing to the weakness of the prosecution evidence the accused can be acquitted without his being examined under S 312⁶. But the examination of the accused need not be recorded in the manner laid down in S 364⁷.

3 (38) 25 AIR 1938 Snd 70 (71) 32 Snd L R 684 39 Cri L Jour 474 *Chaitras Menghray v Emperor*

(37) 24 AIR 1937 Snd 301 (304) 32 Snd L R 30 39 Cri L Jour 59 *Emperor v Shitalamal*

(36) 23 AIR 1936 Oudh 16 (17) 11 Luck 461 30 Cri L Jour 1303 *Emperor v Karunashakar*
(Prejudice may be presumed where S 312 has not been complied with)

(22) 9 AIR 1922 Pat 5 (6) 23 Cri L Jour 114 *Balkeshar Singh v Emperor*

(20) 13 AIR 1926 Nag 300 (300 301) 22 Nag L R 65 27 Cri L Jour 632 *Bhagwan v Emperor*

(22) 9 AIR 1922 Pat 296 (297) 23 Cri L Jour 440 *Parvateshwar Lal Vitar v Emperor*

(21) 8 AIR 1921 Pat 11 (12) 6 Pat L Jour 171 22 Cri L Jour 477 *Gulam Rasul v Emperor* (Offence under S 218 Bengal Municipal Act 1884)

(26) 13 AIR 1926 Sind 1 (?) 20 Snd L R 34 26 Cri L Jour 1564 (FB) *Emperor v Nabu*

(14) 1 AIR 1914 Cal 663 (663) 41 Cal 743 15 Cri L Jour 190 *Md Hossein v Emperor*

(22) 9 AIR 1922 Lah 45 (17) 23 Cri L Jour 154 *Haji Muhammad Baksh v Emperor*

4 (40) 27 AIR 1940 Bom 314 (314 315) 1 LR (1940) Bom 842 191 Ind Cas 655 *Emperor v Kondiba Dalaji*

(36) 23 AIR 1936 Oudh 16 (17) 36 Cri L Jour 1303 11 Luck 461 *Emperor v Karunashakar*
(Summons-case)

(35) 22 AIR 1935 All 217 (218) 30 Cri L Jour 1290 57 All 668 *Siaras v Emperor* (Do)

(35) 22 AIR 1935 Sind 193 (193) 36 Cri L Jour 1484 *Daryamal v Emperor* (Warrant-case)

(34) 21 AIR 1934 Lah 96 (96) 15 Lah 60 35 Cri L Jour 1394 *Karam Din v Emperor* (Summons-case)

(31) 18 AIR 1931 Lah 153 (154) 32 Cri L Jour 708 *Dhimesh Saccar v Emperor* (Do)

(30) 31 Cri L Jour 618 (614) 124 Ind Cas 70 (Cal) *Moysuddin Mean v Emperor* (Do)

(27) 14 AIR 1927 Pat 369 (370) 61 at 504 28 Cri L Jour 1037 *Parsoji Das v Emperor* (Do)

(27) 0 AIR 1922 Pat 296 (297) 23 Cri L Jour 440 *Parvateshwar Lal v Emperor* (Do)

(14) 1 AIR 1914 Cal 663 (663) 41 Cal 743 15 Cri L Jour 190 *Maloued Hossein v Emperor* (Warrant-case)

[See also (39) 39 Cri L Jour 811 (842) 177 Ind Cas 50 (Oudh) *Randhas v Municipal Board Rai Bareilly* (After closing of defence evidence Magistrate examining prosecution witnesses under S 510—Held Magistrate should have followed provisions of Sect on 312)]

Also see S 267 Note 2

[But see (24) 11 AIR 1924 Mal 30 (31) 46 Mad 766 21 Cri L Jour 847 (FB) *Dilaram Singh v Emperor* (Summons-case)

(93 1900) 1893 1900 Low Bur Rul 638 *Nga Po Hay v Queen Elizabeth*

(35) 22 AIR 1935 Snd 193 (193) 30 Cri L Jour 1484 *Daryamal v Emperor* (Examination under S 312 need not be taken with all formalities under S 364 Cr P C)

6 (37) 24 AIR 1937 Nag 67 (67) 1 LR (1937) Nag 273 33 Cri L Jour 354 *Dudhital v Emperor*

(26) 13 AIR 1926 Snd 1 (?) 20 Snd L R 34 26 Cri L Jour 1554 (FB) *Emperor v Nabu*

(26) 13 AIR 1926 Nag 300 (300) 22 Nag L R 65 27 Cri L Jour 632 *Bhagwan v Emperor*

[See (40) 27 AIR 1940 Bom 314 (315) 1 LR (1940) Bom 842 191 Ind Cas 655 *Emperor v Kondiba Dalaji* (Do)]

1303 *Emperor v Karunashakar* (Do)

(See on 364 itself says that it is not necessary for the Magistrate in a summary trial to record the examination in detail)

(35) 22 AIR 1935 Snd 193 (193) 36 Cri L Jour 1484 *Daryamal v Emperor*

shown that the defect had led or could possibly have led to any prejudice or failure of justice.

The register prepared under this section forms part of the record and under s 513 the accused is entitled to copies of it if he applies for them.⁷

5 Clause (f)—Particulars of offence charged and proved—Though this section dispenses with the framing of a formal charge in cases coming under it the record prepared under the section must specify both the offence complained of and proved.¹ The accused is entitled to know clearly the offence with which he is charged to the same extent as in ordinary trials.² The record must show that the accused was not in any way prejudiced in this respect. The specification of the offence in the record should be sufficiently full and clear to give the accused sufficient notice of what he is charged with and what he has to meet.³ The principles in conformity with which charges must be framed in warrant-cases apply to the particulars to be recorded under this section.⁴ The mere mention of the section under which the accused is charged is not enough.⁵ Similarly, the prohibition of misjoinder of charges applies to summary trials as well as to ordinary trials and the record must show that there was no misjoinder.⁶ Where there are several accused the offences charged against each should be distinctly stated.⁷

Where the offence complained of is an offence of theft or other offence falling under clauses (d) to (g) of sub s (1) of s 260 the value of the property in respect of which the offence was committed must also be specified in the record in order to make it clear that the offence was one which could be tried in a summary way.⁸ But the mere failure to do so is not sufficient to raise any question of possible or probable prejudice or failure of justice so as to warrant the setting aside of the conviction unless it is shown that there was a real defect of jurisdiction by reason of the property exceeding Rs 50 in value.⁹

6 Clause (g)—Plea of accused and his examination (if any)—The record should contain the plea of the accused and particulars as to his examination by the Court.¹ The accused must be asked to state his plea as in ordinary trials.² Further the

6 (40) 27 AIR 1940 Pat 272 (273) 41 Cri L Jour 293 186 Ind Cas 312 *Mohsin Sheikh v Emperor*
Also see S 265 Note 2

7 (10) 11 Cri L Jour 17 (18) 4 Ind Cas 611 1909 Pan Re No 9 Cr *Mangal Rai v Emperor*
Note 5

1 (06) 4 Cri L Jour 40 (41) 12 Bur L R 151 *Saravathan Chetty v Rangoon Municipality*

451 40 Cri L Jour 340 *Munna v Emperor*
(The circumstances of the offences complained of should be explained to the accused whether in

5 (03-04) 2 Low Bur Rul 43 (44) *Emperor v Maung Cho*

(06) 4 Cri L Jour 40 (41) 12 Bur L R 151 *Saravathan Chetty v Rangoon Municipality*

6 (12) 13 Cri L Jour 224 (224) 14 Ind Cas 320 (Cal) *Jharu Sheikh v Emperor*

7 (03-04) 2 Low Bur Rul 43 (44) *Emperor v Maung Cho*

v Emperor

Note 6

1 (35) 22 AIR 1935 Sind 193 (193) 36 Cri L Jour 1494 *Devinmal v Emperor* (It is not a compliance
a and examination

accused must be examined under S 312 with a view to enable him to explain any circumstances appearing against him after the case for the prosecution has been closed and before the accused is called on to enter upon his defence³ The general view is that the Court is bound to examine the accused under S 312 in summary trials, whether of summons cases or of warrant cases⁴ The use of the words 'if any' in this clause does not make it optional with the Court to apply the provisions of S 312 to summary trials⁵ The words cover only cases where the accused pleads guilty or owing to the weakness of the prosecution evidence the accused can be acquitted without his being examined under S 312⁶ But the examination of the accused need not be recorded in the manner laid down in S 361⁷

3 (38) 25 AIR 1938 Sind 70 (71) 32 Sind L R 681 39 Cri L Jour 474 *Chothram Menghray v Emperor*

(37) 21 AIR 1937 Sind 304 (304) 32 Sind L R 30 39 Cri L Jour 59 *Emperor v Shitalomal*

(36) 23 AIR 1936 Oudh 16 (17) 11 Luck 461 36 Cri L Jour 1303, *Emperor v Karunashankar* (Prejudice may be presumed where S 342 has not been complied with)

(22) 9 AIR 1922 Pat 5 (6) 23 Cri L Jour 114 *Balkeshar Singh v Emperor*

(20) 13 AIR 1916 Nag 300 (300 301) 22 Nag L R 65 27 Cri L Jour 632 *Bhagwan v Emperor*

(22) 9 AIR 1922 Lat 296 (297) 23 Cri L Jour 440 *Parmeshwar Lal Mittar v Emperor*

(21) 8 AIR 1921 Pat 11 (12) 6 Lat L Jour 174 22 Cri L Jour 427, *Gulam Rasul v Emperor* (Offence under S 218 Bengal Municipal Act 1884)

(26) 13 AIR 1926 Sind 1 (?) 20 Sind L R 84 26 Cri L Jour 1554 (TD) *Emperor v Nabu*

(14) 1 AIR 1914 Cal 663 (663) 41 Cal 743 15 Cri L Jour 190 *Ud Hossein v Emperor*

(22) 9 AIR 1922 Lah 45 (47) 23 Cri L Jour 164 *Haji, Muhammad Baksh v Emperor*

4 (40) 27 AIR 1910 Bom 314 (314 315) ILR (1940) Bom 842 191 Ind Cas 655 *Emperor v Kondiba Dalaji*

(36) 23 AIR 1936 Oudh 18 (17) 36 Cri L Jour 1303 11 Luck 461 *Emperor v Karunashankar* (Summons-case)

(33) 22 AIR 1935 All 217 (218) 36 Cri L Jour 1290 57 All 666 *Siam v Emperor* (Do)

(35) 22 AIR 1935 Sind 193 (193) 36 Cri L Jour 1484 *Devjimal v Emperor* (Warrant-case)

(34) 21 AIR 1934 Lah 90 (96) 15 Lah 60 35 Cri L Jour 1394 *Karam Din v Emperor* (Summons-case)

(31) 18 AIR 1931 Lah 153 (154) 32 Cri L Jour 708 *Bhimse & Sacnar v Emperor* (Do)

(30) 31 Cri L Jour 613 (614) 124 Ind Cas 70 (Cal) *Moyssuddin Mean v Emperor* (Do)

(27) 14 AIR 1927 Lat 369 (370) 6 Lat 504 28 Cri L Jour 1037, *Parsolam Das v Emperor* (Do)

(27) 9 AIR 1922 Pat 296 (297) 23 Cri L Jour 440 *Parmeshwar Lal v Emperor* (Do)

(14) 1 AIR 1914 Cal 663 (663) 41 Cal 743 15 Cri L Jour 190 *Mahomed Hossein v Emperor* (Warrant-case)

[See also (39) 39 Cri L Jour 841 (812) 177 Ind Cas 56 (Oudh), *Kandhas v Municipal Board Ras Jareills* (After closing of defence evidence Magistrate examining prosecution witnesses under S 510—He d Magistrate should have followed provisions of Section 342)]

Also see S 262 Note 2

[But see (24) 11 AIR 1924 Mad 30 (31) 46 Mad 766 24 Cri L Jour 817 (FD) *Dharam Singh v Emperor* (Summons-case)]

(93 1900) 1893 1900 Low Bur Rul 634, *Aga Po Way v Queen Empress*

(35) 22 AIR 1935 All 217 (219) 57 All 666 : 36 Cri L Jour 1290 *Sia Ram v Emperor*

nder

Kondiba Dalaji (The words 'if any' merely indicate that if the accused makes no statement there is nothing to record)]

7 (36) 23 AIR 1936 Oudh 16 (17) 11 Luck 461 36 Cri L Jour 1303 *Emperor v Karunashankar*. (But some notes must be made of the examination of the accused)

(27) 14 AIR 1927 Lat 369 (370) 6 Lat 504 29 Cri L Jour 1037, *Parsolam Das v Emperor* (Section 361 itself says that it is not necessary for the Magistrate in a summary trial to record the examination in detail)

(35) 22 AIR 1935 Sind 193 (193) 36 Cri L Jour 1484, *Devjimal v Emperor*

(See S. 364, sub s (4)) It has been held that even the failure to record the particulars of the examination as required by this section is only an irregularity covered by S 537 and does not vitiate the trial where the accused has not been prejudiced⁸

7. Clause (h)—Finding and, in case of conviction, brief statement of reasons therefor. — Where the finding is one of conviction, the record must contain a brief statement of the *reasons* for conviction¹ The statement of reasons may be brief,² but the brevity must not tend to obscurity³ The statement must be sufficient to enable a Court of revision to judge whether the lower Court had sufficient material before it for convicting the accused⁴ The reasons must refer briefly to the evidence in support of the conclusions

8 (35) 22 AIR 1935 All 217 (219) 35 Cri L Jour 1290 57 All 656, *Sia Ram v Emperor*.

Note 7

1 (40) 27 AIR 1940 All 195 (195) : 41 Cri L Jour 493, *Dal Chand v Emperor* (A judgment which merely states that the accused 'is fined Rs 25 or two months rigorous imprisonment in default' is no judgment at all according to law)

(39) 26 AIR 1936 Oudh 37 (39) 40 Cri L Jour 141 • 14 Luck 325, *Darjoo v Emperor*

(37) 24 AIR 1937 Mad 480 (480) 38 Cri L Jour 531, *Kannayya v Venkatesam*

(27) 14 AIR 1927 Nag 250 (251) 23 Cri L Jour 495, *Nisarali v Secretary, Municipal Committee, Nagpur*

(21) 8 AIR 1921 Oudh 240 (240) • 24 Oudh Cas 293 23 Cri L Jour 427, *Emperor v. Mian Jan*

(32) 19 AIR 1932 Oudh 98 (98) • 7 Luck 498 • 33 Cri L Jour 342, *Ahmad Jan v Emperor*.

(19) 6 AIR 1919 Pat 253 (253) : 20 Cri L Jour 431, *Jankey Rai v Emperor*

error

or

v Emperor. (It is not clear

—Illegal)

(99) 21 All 189 (192) 1899 All W N 34, *Queen Empress v Mukundi Lal*

. Das
must show necessary

(Offence under S 30.

Act, 1901)

(1921) 10 AIR 1921 Pat 1185 (1185) • 10 Pat 1185

(100) 1899 Pat 118 (119) *Queen Empress v Harigopal*

(18) 5 AIR 1918 Pat 484 (485) 19 Cri L Jour 719, *Janinder v Raghunath Lal*

(81) 6 Cal 579 (580, 581) *Empress v Punjab Singh*

Notes

of the Court⁶. Merely saying 'I believe the prosecution is not enough as this is only a conclusion and not a reason'⁶. Where the reasons for conviction are not properly recorded with the result that when the matter goes before a Court of revision the latter feels a doubt as to the guilt of the accused the benefit of the doubt must go to the accused⁷. But where, despite the defectiveness of the record in this particular the Court of revision is satisfied from the other material on the record that the conviction was right it will not be upset merely because of the non-compliance with this section such non-compliance being merely an irregularity within s. 478⁸.

Section 40 provides that when the record of the proceeding of any Presidency Magistrate is called for by the High Court under s. 435 he may submit a written statement of the grounds of his decision and that the High Court should consider such statement before upsetting his decision. There is no such provision in the case of other Magistrates and so, when the reasons for conviction are not recorded as required by this section and the matter goes up before a Court of revision the lower Court cannot send any written statement of reasons for its decision for the consideration of the Court of revision⁹.

{ 94 } 18 Bom 97 (3-), *Empress v Shidgauda* (Simply stating "witnesses called by complainant support the complainant, witnesses for accused do not say that accused has not committed the offence", is not sufficient)

{ 99 } 1899 All W N 81 (89) *Empress v Muhammad Haniff*

{ 89 } 1893 Pun Re No 5 Cr p 37 (40) *Sher Singh v Empress*

{ 1900 } 27 Cal 450 (431) *Ainuddis Sheikh v Empress* (Offence under S 25 Indian Forest Act 1878 now S 20 of Indian Forest Act 1927)

{ 93 } 3 Cal W N 231 (782) *Lalit Mohan v Chunder Mohan*

{ 86 } 1886 All W N 181 (181) *Empress v Lachman*

{ 93 } 13 C P L R 17 (16) *Empress v Bhikta Varar*

{ 1900 09 } 1 Low Bur Pal 95 (95) *Vadivaloo Swamy v Croton*

{ 28 } 13 AIR 1928 All 266 (1927) 23 Cr L Jour 265 *Murat Singh v Emperor* (No compliance with cl (g) also)

{ 39 } 19 AIR 1932 Oudh 93 (93) 7 Luck 493 33 Cr L Jour 312 *Imridjan v Emperor*

{ 74 } 22 Suth W R Cr 28 (28) *Queen v Johrie Singh*

{ 34 } 21 AIR 1934 Lah 596 (597) 15 Lah 277 35 Cr L Jour 1461 *Abdul Rahman v Emperor* (Bare reference to section of statute is not enough)

[See also { 40 } 27 AIR 1910 All 195 (190) 41 Cr L Jour 498 *Dal Chand v Emperor* (Statement must show on the face of it that the cases of both parties have been carefully and properly considered)]

5 { 06 } 10 Cal W N cclxix (cclxix) *Mahomed Hossein v Kesi ab Chandra*

{ 99 } 21 All 189 (190) 1899 All W N 31 *Empress v Mukundi*

{ 30 } 17 AIR 1930 Lah 481 (482) 32 Cr L Jour 60 *Atam Parkash v Emperor*

{ 1900 09 } 1 Low Bur Rul 45 (46) *Empress v Dasha* (S 336 Penal Code—Where offence is not one which is defined in the way in which for example the offence of theft is defined these reasons must include a statement of facts sufficient *prima facie* to constitute the offence—Held facts proved no offence)

{ 35 } 22 AIR 1935 Sind 144 (144) 37 Cr L Jour 715 *Dayaram Saloomal v Emperor* (Record should ingredients

..

[See also { 49 } 29 AIR 1942 Mad 669 (670) 44 Cr L Jour 85 203 Ind Cas 433 *In re Govindan* (A brief statement of his reasons would necessitate at least a short summary of what the prosecution witnesses had said so as to indicate that the evidence had made out the case with which the accused had been charged and also an indication that the Magistrate had believed that evidence. If there is defence evidence it would further perhaps be necessary to say why he preferred the evidence of the prosecution to that of the defence. He should also make it clear what the defence case was)]

6 { 34 } 21 AIR 1934 Lah 596 (598) 15 Lah 277 35 Cr L Jour 1464 *Abdul Rahman v Emperor*

7 { 31 } 18 AIR 1931 Lah 33 (38) 32 Cr L Jour 632, *Bali Ram v Emperor*, (Offence under S 31, Police Act)

8 { 25 } 12 AIR 1925 Bom 138 (139) 26 Cr L Jour 466, *Emperor v, Namdeo Lakman*

9 { 05 } 9 Cal W N lxxv (lxxv) *Emperor v Haladar Mahts*

The section requires reasons to be recorded only in case of conviction; no reasons need be recorded for an *acquittal*¹⁰ or a sentence¹¹

264.* (1) In every case tried summarily by a Magistrate or Bench Record in appealable cases in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record judgment embodying the substance of the evidence and also the particulars mentioned in section 263.

(2) Such judgment shall be the only record in cases coming within this section.

1. "Judgment embodying the substance of the evidence."—The language of the section is imperative. In a case coming within the section, the judgment ought to embody the substance of the evidence adduced on both sides.¹ The substance of every separate deposition need not be recorded, but only the substance of the evidence as a whole need be given.² But, it is not sufficient compliance with the law to state that "the witnesses for the prosecution support the statement of the complainant" and "the statement of the witnesses examined by the accused is very conflicting."³ Further, it must be remembered that the substance of the evidence is a matter quite distinct from the facts which may be considered as proved by the evidence. Hence, a mere statement of the facts which the evidence of certain witnesses is considered to have proved is not sufficient.⁴ The substance must be stated plainly and must not be left to be deduced by inference.⁵ The substance of the evidence should be so recorded as to enable the appellate Court to judge if there are sufficient materials for the decision.⁶

* 1882 S 264, 1872 S 228, 1861 — Nil

10 (42) 29 AIR 1912 Sind 51 (52) : 43 Cri L Jour 473 I L R (1911) Kar 545 : 199 Ind Cas 119 (DB).
Emperor v Sugnomal Dhojraj

(06) 3 C

11 (40)

Dharam.

1. (24)

(09) 9 C

(74) 197

sufficient,

nce is not

(28) 15 AIR 1928 Bom 433 (433) : 29 Cri L Jour 1005, Nurudin v Emperor. (Substance to be plainly stated and not to be left for inference by High Court)

(94) 1894 Rat 725 (725), Queen-Empress v Hussein

(34) 21 AIR 1934 Oudh 177 (178) : 35 Cri L Jour 677, Emperor v Akbar Ali (Where the Magistrate made mistake in case of acquittal)

Also see S 264, Note 2

2. (76) 25 Suth W R Cr 6 (7), Kristodhone Dutt v. Chairman, Municipal Commissioners of Calcutta.

(29) 16 AIR 1929 Oudh 151 (152) : 30 Cri L Jour 557, Jamna Prasad v Emperor.

[But see (09) 9 Cri L Jour 23 (23) : 4 Low Bur Rul 338, Po Ka v Emperor. (Personality of each witness and the circumstances in which he was in a position to observe relevant facts should appear)]

3

(Record ought to show

4

not be

... and Magistrate as to have such complete summary of evidence as to afford material for appeal or merely a statement of evidence which he thinks substantial rests with the Magistrate.]

The failure to set forth the substance of the evidence is fatal to the case¹ because it precludes the appeal in that it prevents the proper disposal of the appeal that has to be made to make²

The word 'substance' must not make it clear that the Magistrate need not record the substance of the evidence in the case of acquittal³

2 Sub section (2)—“Such judgment shall be the only record in cases coming within this section” — Section 261 expressly provides that in cases coming under that section it is not necessary to record the evidence of witnesses or frame a formal charge. There is no such express provision in this section. But the effect of the provision in sub s (2) that the judgment prepared in accordance with sub s (1) should be the only record in the case is to be in accordance with the recording of the evidence of witnesses⁴ and the framing of a formal charge⁵ even in cases coming under this section. Even if the evidence of witnesses is actually recorded or the Court takes rough notes of the evidence such evidence or notes cannot form part of the record in view of the express provision of sub s (2),⁶ and the appellate Court cannot travel beyond the judgment to any other material in order to test the substance of the evidence forming part of the judgment⁷. But sub s (2) does

7 (24) 15 AIR 1928 Bom 431 (433) 23 Cr L Jour 1005 *Murad Ali Sheikh v Emperor*

(74) 1874 Lun Re No 2 Cr p 3 *Itikkhu v Croton*

(94) 1891 Rat 725 (725) *Queen-Empress v Hussein*

(82) 1892 All W N 178 (179) *Empress v Talji*

[But see (78) 1 All 640 (642) *Empress of India v Kansan Singh* (Appellate Court need not quash conviction) but may remand case directing trial Court to remedy defect if necessary by re-examining witnesses)]

8 (24) 15 AIR 1928 Bom 431 (433) 23 Cr L Jour 1005 *Murad Ali Sheikh v Emperor*

Also see S 262 Note 2 and S 517 Note 12

9 (49) 20 AIR 1912 Sind 52 (52) 43 Cr L Jour 473 1 F R (1911) par 545 199 Ind Cas 110 (DB) *Emperor v Sugomal Bhayraj*

Note 2

1 (27) 14 AIR 1927 All 124 (124 125) 49 All 261 23 Cr L Jour 97 *Mantoo Tewaris v Emperor* (Section 264 is not controlled by S 35, Cr P C)

(27) 14 AIR 1927 Bom 426 (426) 23 Cr L Jour 537 *Chimaniat v Emperor* (Rough notes of evidence do not form part of the record)

(05) 2 Cr L Jour 375 (376) 3 Low Bur Bul 3 *Kuchi v Emperor* (Section 35 Cr P C merely prescribes a briefer record to summons cases and other cases which may be tried summarily when they are as a matter of fact tried regularly)

(20) 12 AIR 1925 Sind 234 (234) 19 Sind L R 136 26 Cr L Jour 1076 *Pahimullah v Emperor* (Rough notes should not be attached to the record — An attempt to increase the record by so doing is illegal)

(31) 18 AIR 1931 Mad 233 (233) 32 Cr L Jour 639 *Subramansa v Nachiar Ammal*

(34) 21 AIR 1934 Bom 167 (158) 54 Bom 298 35 Cr L Jour 841 *In re Tippanna Koulji Man natadar* (Section 35, Cr P C has no application whatever to summary trials)

[But see (21) 8 AIR 1921 Cal 165 (165) 49 Cal 280 22 Cr L Jour 462 *Satish Chandra v Vamaththa Nath* (Submitted not correct)]

2 (26) 13 AIR 1926 Lab 301 (301 307) 7 Lab 303 27 Cr L Jour 639 *Emperor v Salig Ram*

(25) 12 AIR 1925 Oudh 722 (722) 26 Cr L Jour 1334 *Aallu Bars v Emperor* (AIR 1924 Cal 63 23 Cr L Jour 1270 or treated as defect ve)

[See (26) 13 AIR 1926 Cal 1202 (1203) 53 Cal 738 27 Cr L Jour 1290 *Mañib Chandra v Emperor* (In any case failure to frame charge is not fatal in view of S 535 (2))]

[But see (24) 11 AIR 1924 Cal 63 (64) 23 Cr L Jour 1270 *Natabar Khan v Emperor* (Submitted not correct)]

3 (36) 23 AIR 1936 Sind 40 (40) 37 Cr L Jour 433 *Emperor v Hemandas Devasingh* (Evidence so recorded does not come within the meaning of S 350)

(25) 12 AIR 1925 Sind 244 (284) 19 Sind L R 136 26 Cr L Jour 1026 *Rafikulullah v Emperor* (The rough notes taken by the Magistrate should not be attached to the record)

4 (44) 31 AIR 1944 Mad 168 (169) 45 Cr L Jour 574 219 Ind Cas 8 *Kampasari v Puttappa* (Notes of evidence cannot be looked into by the appellate Court when they are not embodied in the judgment)

(28) 15 AIR 1928 Mad 597 (597 598) 29 Cr L Jour 625 *Cholalinganparam v Emperor*

(26) 1926 Mad W N xc (xc)

recorded by the section¹. As to what "each" in falling in fact of signing the full name amounts to, it is held to be or a less irregularity within the meaning of S. 5² see Notes on S. . The signature should be in ink with a pen and not with a stamp³.

Section 27 provides that a judgment should be signed by the presiding officer of the Court. When a case is tried summarily by a Bench of Magistrates it is provided by S. 15(1) of the section that the judgment or record prepared by a member of the Bench should be signed by every member of the Bench. When the judgment or record is prepared by the Chairman of the Bench, will the signature of the Chairman alone be sufficient as that of the presiding officer under S. 27 or is it necessary that the record or judgment should be signed by each of the other members of the Bench also⁴. On this question it has been held by the High Court of Madras that the words "the presiding officer of the Court" in S. 27 are no more than a comprehensive description of all classes of judicial officers, Magistrates and Judges who have to pronounce judgment, that they do not afford any assistance in the construction of the section and that the intention of this section is that by whoever the record or judgment is written it should be signed by all the members present. Hence the fact that the record or judgment has been written and signed by the Chairman of a Bench does not dispense with the signatures of the other members of the Bench⁵. See also Notes on S. 27.

Where copies are furnished to the parties of the judgment or record the copy should contain a copy of the signature of all the members of the Bench who signed the original. A copy, where it is given the signature of only the Chairman of the Bench is incorrect and defective⁶.

CHAPTER XXIII

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION

A — Preliminary.

266.* In this Chapter, except in sections 276 and 307, and in "High Court defined. Chapter XVIII, the expression "High Court" [means a High Court within the meaning of the Government of India Act, 1935, and includes such other Courts as the Provincial Government may by notification in the Official Gazette], declare to be High Courts for the purposes of this Chapter [and of Chapter XVIII].

a. Substituted by A. O. F. "means a High Court of Judicature established under the India High Courts Act, 1861 or the Government of India Act, 1915 and includes the Chief Court of Oudh, the Court of the Judicial Commissioner of Sind and such other Courts as the Governor-General in Council may be notified on in the Gazette of India.

b. These words were inserted by the Code of Criminal Procedure (Amendment) Act, 1913 (IS [XVIII] of 1913 Section 76

Synopsis

- | | |
|--|-------------------------|
| 1 Legislative changes (Original) | 3 High Court |
| 2 Scope and applicability of the section | 4 Judicial Commissioner |

* 1857 S. 266 1872 and 1861 — Nil.

† See Section 19 of the Government of India Act, 1935

Note 3

1 (301) 17 AIR 1930 Mad 867 (66) 51 Mad 251 33 Cri L Jour 430 *Drakmanish v Emperor*

Also see S. 367 Note 11

2 (33) 6 Mad 306 (33) 2 Weir 373 *Su'ramanya Iyer v Queen* [signature with stamp — It is no more than an irregularity]

3 (30) 17 AIR 1930 Mad 147 (18) 14 53 Mad 165 31 Cri L Jour 715 *Nathian v Emperor* (Dissenting from AIR 1930 Mad 117) 53 Mad 237 39 Cri L Jour 873

4 (30) 17 AIR 1930 Mad 867 (66) 51 Mad 251 33 Cri L Jour 430 *Drakmanish v Emperor* Also see S. 367 Note 11

not require the exclusion of the *complaint* from the record and the appellate Court is not prohibited from looking at the complaint⁵

265.* (1) Records made under section 263 and judgments recorded

Language of record under section 264 shall be written by the presiding officer, and judgment either in English or in the language of the Court, or, if the Court to which such presiding officer is immediately subordinate so directs, in such officer's mother-tongue

(2) The *{Provincial Government} may authorize any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings

(3) If no such authorization be given, the record prepared by a member of the Bench and signed as aforesaid shall be the proper record

(4) If the Bench differ in opinion any dissentient member may write a separate judgment

a Substituted by A O for Local Government

1 Legislative changes — Sub sections (3) and (4) were newly added in the Code of 1898

2 'Shall be written by the presiding officer'—This section provides that the record or the judgment in summary trials should be written by the presiding officer. The preparation of such record is thus the duty of the Magistrate himself and he cannot depute a clerk to do it¹. But in cases falling under sub s (2) the record or judgment may be prepared by the officer appointed for the purpose under it and the members of the Bench trying the case may sign the record or judgment so prepared. Where a case is tried by a Bench of Magistrates it has been held that the record or judgment ought to be prepared in the presence of all the Magistrates forming the Bench and they must all be aware of their contents and approve of them even though the formal pronouncement of the same may be left to be made by the Chairman of the Bench in their absence. Therefore a record or judgment prepared by the Chairman in the absence of the other Magistrates is not valid in law even though the others may have concurred in the *decision*²

3 Signature on judgment or record — The requirements of public policy necessitate the writing of the full name of the Magistrate who signs the judgment and the mere putting in of the initials is not a sufficient compliance with the law. Therefore where one of the three members of a Bench trying a case summarily merely initials the judgment instead of signing his full name in it he cannot be held to have signed the judgment as

* 1882 S 265 1872 Ss 229 230 1861 — Nd

(27) 14 AIR 1927 Mad 298 (299) 28 Cr L Jour 136 *Nagoor Kannu Nadura v Sithu Naick* (Rough notes of ex den a

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Section 265 — Note 2

1 (63) 6 Mad 396 (399) 2 We r 378 *Subramania Iyer v Quzen* (Preparation of record deputed to clerk — Irregularity is grave)

Also see S 263 Note 4

2 (28) 15 AIR 1908 Mad 1172 (1173) 50 Mad 237 29 Cr L Jour 973 *Ramakotiah v Subba Rao* (Preparation of judgment after the other members had left the Court is not a proper judgment)

Also see S 366 Note 3

required by the section¹ As to whether such initialling instead of signing the full name amounts to an illegality or a mere irregularity within the meaning of S 537, see Notes on S 537. The signature should be made with a pen and not with a stamp²

Section 367 provides that a judgment should be signed by the presiding officer of the Court. Where a case is tried summarily by a Bench of Magistrates, it is provided by sub s (3) of this section that the judgment or record prepared by a member of the Bench should be signed by every member of the Bench. Where the judgment or record is prepared by the Chairman of the Bench will the signature of the Chairman alone be sufficient as that of the presiding officer under S 367 or is it necessary that the record or judgment should be signed by each of the other members of the Bench also? On this question it has been held by the High Court of Madras that the words 'the presiding officer of the Court' in S 367 are no more than a compendious description of all classes of judicial officers, Magistrates and Judges who have to pronounce judgments: that they do not afford any assistance in the construction of this section and that the intention of this section is that by whomsoever the record or judgment is written it should be signed by all the members present. Hence, the fact that the record or judgment has been written and signed by the Chairman of a Bench does not dispense with the signatures of the other members of the Bench.³ See also Note 3 on S 367.

Where copies are furnished to the parties of the judgment or record, the copy should contain a copy of the signature of all the members of the Bench who signed the original. A copy, wherein is given the signature of only the Chairman of the Bench is incorrect and defective.⁴

CHAPTER XXIII

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION

A — Preliminary.

266.* In this Chapter, except in sections 276 and 307, and in High Court defined Chapter XVIII, the expression "High Court" means a High Court within the meaning of the Government of India Act, 1935, and includes such other Courts as the Provincial Government may by notification in the Official Gazette, declare to be High Courts for the purposes of this Chapter [and of Chapter XVIII].

a Substituted by A O for 'means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915 and includes the Chief Court of Oudh, the Court of the Judicial Commissioner of Sind and such other Courts as the Governor-General in Council may by notification in the Gazette of India

b These words were inserted by the Code of Criminal Procedure (Amendment) Act, 1923 (18 [XVIII] of 1923) Section 78

Synopsis

- | | |
|--|-------------------------|
| 1 Legislative changes (Omitted) | 3 "High Court" |
| 2 Scope and applicability of the section | 4 Judicial Commissioner |

* 1882 S 266 1872 and 1861 — Nil

† See Section 219 of the Government of India Act 1935

Note 3

1 (30) 17 AIR 1930 Mad 867 (868) 51 Mad 252 31 Cri L Jour 430 *Brahmatah v Emperor*
Also see S 367 Note 11

2 (83) 6 Mad 390 (398) 2 Weir 328 *Subramanya Iyer v Queen* (Signature with stamp — It is no more than an irregularity)

3 (30) 17 AIR 1930 Mad 187 (187 188) 53 Mad 165 31 Cri L Jour 715 *Nathan v Emperor*.
(Dissenting from A I R 1928 Mad 1172 52 Mad 937 29 Cri L Jour 973)

4 (30) 17 AIR 1930 Mad 867 (868) 51 Mad 252 30 Cri L Jour 430 *Brahmatah v Emperor*.
Also see S 367 Note 11

1. Legislative changes (*Omitted*)

2 **Scope and applicability of the section** — This chapter deals with the procedure to be adopted by a Court of Session or a High Court in the trial of cases committed to it under chap XVIII of the Code. The language of ss 193 and 191 implies that this chapter has reference only to cases committed to a Court of Session. It would appear therefore that the procedure laid down in this chapter was not intended to be applicable to the trial of such exceptional cases as a Court of Session or a High Court may take cognizance of, otherwise than on commitment as provided for in ss 193 and 191.

The material distinction between a trial held by a Magistrate and a trial under this chapter is that while in the former the right and duty to decide a case rests solely in the Magistrate in trials under this chapter the Judge is bound by the verdict of a jury or to consider the opinion of assessors as the case may be.

3 **"High Court"** — The expression 'High Court' is defined in s 4 (1) (b) of the Code. But that definition is subject to the provision in s 266 giving the expression a different meaning for certain purposes.

A High Court exercising original criminal jurisdiction is not a Sessions Court within the meaning of the Code.¹

4 **Judicial Commissioner** — The effect of the definition of 'High Court' in this section is not to confer the status of a High Court on Courts which are not statutory High Courts but is only to extend to such Courts the procedure applicable to statutory High Courts in the trial of sessions cases. The Judicial Commissioner's Court of Sind for example is in its constitution a Sessions Court under s 1A of the Sind Courts Act 12 [XII] of 1866. But in the trial of sessions cases it is deemed to be a High Court to the extent prescribed in this section.¹ As such when a Judicial Commissioner of that Court in a sessions trial disagrees with the verdict of the jury the procedure to be adopted is that of a High Court as provided in s 305 of this chapter and the Judge has no power of reference under s 307.² The Court of a Judicial Commissioner as for example of Sind, is a High Court only for the purposes of Chap XXIII (and of Chap XVIII) and remains a Sessions Court for other purposes notwithstanding s 266 and an appeal lies under s 418 of the Code from the decision of a Judge of that Court in a sessions trial.³ Under Bombay Act 7 [VII] of 1926, which came into force from the 15th April of 1940,⁴ the Sind Judicial Commissioner's Court has become the Chief Court of Sind. The Sind Courts Act, 12 [XII] of 1866 has been repealed by the above Act but under s 8 thereof the Chief Court of Sind continues to be a Court of Session. So the above principles will apply also in the case of the Chief Court of Sind.⁵

Section 266 — Note 3

1 (32) 19 AIR 1932 Cal 867 (868) 59 Cal 1243 34 Cri L Jour 107 *Sukumar Majumdar v Emperor*
Also see S 6 Note 3 S 9 Note 3 and S 528A Note 5

Note 4

1 (39) 26 AIR 1930 S nd 209 (218) 41 Cri L Jour 28 I L R (1940) Kar 249 *Shewaram Jellanaud v Emperor*

(25) 12 AIR 1925 S nd 249 (249) 19 Sind L R 309 26 Cri L Jour 562 (FB) *Khudabuz v Emperor*
2 (28) 15 AIR 1928 Sind 149 (152 157 161) 22 Sind L R 349 29 Cri L Jour 945 (FB) *Emperor v Jnanand*

(25) 12 AIR 1925 S nd 34 (35) 25 Cri L Jour 498 *Emperor v Mitloo*
Also see S 307 Note 2

3 (39) 26 AIR 1930 S nd 209 (211) I L R (1940) Kar 249 41 Cri L Jour 28 *Shewaram Jellanaud v Emperor*

(25) 12 AIR 1925 Sind 249 (250 to 252) 19 Sind L R 309 26 Cri L Jour 562 (FB) *Khudabuz v Emperor*

4 See Government of Sind Notification No 1499 H/39 of 27 3 1940

5 (44) 31 AIR 1944 Sind 65 (66) 45 Cri L Jour 503 I L R (1944) Kar 239 212 Ind Cas 79 (DB) *Emperor v Hundraj Lachram* (Trial by Judge of Sind Chief Court exercising Sessions jurisdiction—Appeal and revision lie to Chief Court)

267.* All trials under this Chapter before a High Court to be by jury Court shall be by jury,

and, notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the Indian High Courts Act, 1861, * [or the Government of India Act, 1915.] † [or the Government of India Act, 1935,] the trial may, if the High Court so directs, be by jury

a These words were inserted by the amending Act 13 (XIII) of 1916

b The c word were inserted by A O

1 Trial by jury — The word jury means a company of men sworn to deliver a verdict upon evidence delivered to them touching the issue¹ The system of trial by jury in England is based on the common law and on the constitutional principle that every person is entitled to demand that he be not restrained of his liberty except *per legale judicium parium suorum vel per legem terra* so that trial by jury is the rule except in particular cases In this country there is no such inalienable right to be tried by jury² It is only a creation of statute³ and is simply a mode of trial prescribed by the Legislature in certain cases⁴ The verdict of the jury in India has therefore not got the same sacrosanct character as it has in England and repugnancy in the verdict is not in itself sufficient to justify the quashing of a conviction based on such verdict⁵

2 Criminal cases transferred to the High Court under this Code — Where a criminal case is transferred to the High Court and there is no order under the section that it should be tried by jury the trial will be by assessors if that is the mode of trial prescribed in the Court from which the case is transferred

See Sections 419 and 506

3 Transfer under Letters Patent — See clause 29 of the Letters Patent (Madras, Bombay and Calcutta) and the corresponding clause of the Letters Patent for the other High Courts

268.† All trials before a Court of Session to be by jury or with assessors shall be either by jury, or with the aid of assessors

Synopsis

- 1 Scope of the section
- 2 'With the aid of assessors'
- 3 Position of the jury and of the assessors
- 4 Recording evidence in the absence of jurors or assessors

NOTE to the Synopsis See the Notes indicated for the following topics

Effect of trial of jury case with assessors and vice versa See Note 1 and S 269 Note 3 Sessions Court—Trial when by jury and when with aid of assessors See Note 1

1 Scope of the section — The ordinary rule is that a trial before a Court of Session is to be with the aid of assessors. A trial by jury is an exception and is provided for by S 269 In the absence of a notification under S 269 trials before Sessions Courts

* 1882 S 267, 1872 and 1861 — Nil

† 1882 S 268 1872 S 232 1861 S 234

Section 267 — Note 1

1 Wharton's Law Lexicon

2 (69) 11 South W R Cr 29 (29 30) (1872) *In re Gorael and Glase*

3 (95) 19 Bom 749 (760) *Queen Empress v Ramachandra Govind*

4 (69) 11 South W R Cr 29 (30) (1872) *In re Gorachand Chose*

5 (14) 1 AIR 1914 Cal 696 (637) 41 Cal 751 15 Cal L Jour 400 *Manindra Chandra v Emperor*

Also see S 308 Note 1

must be with the aid of assessors¹

As to the effect of a jury trying a case triable with the aid of assessors and vice versa, see Section 536 and Note 3 on Section 269

See also the undermentioned case²

2 "With the aid of assessors" — In cases triable with the aid of assessors it is mandatory that the trial should commence with the requisite number of competent assessors under S 281 but where in the course of the trial some of them are unable to attend, the trial may proceed with the aid of the other assessors see S 285

The jurisdiction of the Sessions Judge to commence his trial and his jurisdiction to continue the trial are dependent upon his choosing the requisite number of competent assessors to aid him and on the continuation of at least one of them throughout the trial. Any finding or sentence passed by a Sessions Judge in contravention of these requisites will not be one passed by a Court of competent jurisdiction¹. The defect is not one which can be cured by Section 537²

The scheme of the Code shows that in the view of the Legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury³

3 Position of the jury and of the assessors — The jury form a tribunal or body with a foreman and their verdict is the verdict of the body, or where there is no unanimity, of the majority (S 301). In cases tried by jury, the jury is the real tribunal but is aided by the Judge and in certain matters directed by the Judge¹. They are invested

Section 268 — Note 1

- 1 (86) 23 AIR 1938 Cal 527(528) 38 Cr L Jour 212 1 L R (1937) 1 Cal 306, *Jogeeswar v Emperor*
 (88) 1888 Pun Re No 18 Cr p 32 (33) *J Skilling v Empress*
 (96) 1896 Pun Re No 11 Cr p 29 (32) *Mullineaux v Empress*
 2 (87) 24 AIR 1937 P C 119 (120) 38 Cr L Jour 498 61 Ind App 148 1 L R (1937) Bom 711
 (P C) *Fakira v Emperor* (This section as applicable to the cantonment of Secunderabad has been modified by Notification No 2601 dated 24th April 1929 in exercise of powers conferred by the Indian (Foreign Jurisdiction) Order in Council and gives a Sessions Judge the discretion of dispensing with jury or assessors — An Additional Sessions Judge can also exercise such discretion)

Note 2

- 1 (01) 24 Mad 523 (535) 2 Weir 340 11 Mad L Jour 241 *King Emperor v Thirumalai Peddi*
 (98) 21 All 106 (107) 1898 All W N 229 (FB) *Queen Empress v Dabu Lal* (Out of three assessors one was discovered to be deaf before the trial commenced — Out of the remaining two one was found to be so deaf as to be incapable of understanding the case when it was closed by the Public Prosecutor — Held that the trial was void)
 (94) 1894 All W N 207 (207) *Queen Empress v Badri* (Trial begun with only one competent assessor)
 (69) Weir 3rd Edn 927 (Do)

¹ *Tanjore v Thyagaraja*

- Ahetan* (Do)
 (02) 6 Cal W N 715 (716) *King Emperor v Messeruddin Shikdar*
 (91) 13 All 337 (338 339) 1891 All W N 93 *Queen Empress v Md Mahmud Khan* (Continuous attendance of at least one assessor essential)
 (10) 11 Cr L Jour 724 (725) 8 Ind Cas 874 13 Oudh Cas 337, *Khub Singh v Emperor* (Only one competent assessor)
 (24) 11 AIR 1924 Nag 287 (287) 20 Nag L R 129 23 Cr L Jour 459 *Jairam Kumbi v Emperor* (Trial begun with less than the number of assessors required by law)
 Also see S 285, Note 2
 2 (01) 25 Bom 694 (696) 3 Bom L R 274, *King Emperor v Jayram* (15 Bom 514 and 21 All 106 followed)

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Jayji v

Emperor

Note 3

- 1 (01) 24 Mad 523 (536 538) 2 Weir 340 11 Mad L Jour 241 *King-Emperor v Thirumalai Reddi*

with a special status and given special powers and the ultimate responsibility for all decisions within their sphere is meant to be theirs and theirs alone.²

The assessors on the other hand do not form a body, but each acts and expresses his opinion *individually*. They are only to assist the Judge and take no part in the judgment. The Judge is the sole judge of law and fact and the responsibility for the decision rests only with him.³ Thus an assessor does not form an essential part of the Sessions Court.⁴

As a juror stands on a higher footing, speaks with greater authority and takes a larger share in the decision of a criminal case than does an assessor, it may be taken as axiomatic that in the absence of a specific prohibition an objection that could not be upheld regarding a juror would be ruled out in the case of an assessor.⁵

In trials by jury the Judge is bound to sum up the whole case to the jury and record their verdict (S 297), while in trials with the aid of assessors, the Judge *may* sum up the case and should record their opinion (S 309).⁶

An appeal in a case tried by jury will lie on a matter of *law* only, while an appeal in a case tried with the aid of assessors will lie on a matter of fact as well as on a matter of law (S 418).

4 Recording evidence in the absence of jurors or assessors — A Court of Session is authorized to record evidence in the absence of the jury or assessors only when *additional evidence* is called for by the appellate Court under S 428 sub s (3) or by the High Court under Section 375, sub s (2). Hence, a Court has no jurisdiction to record material evidence after the discharge of the assessors.¹ This view has been supported on the ground that the assessors form part of the Court.² But this does not seem to be correct in view of the fact that the *decision* in cases tried with the aid of assessors is solely that of the Judge and the assessors merely *assist* the Judge with their opinions. See Note 2 above.

See also Section 235 Note 5

269.* (1) The [Provincial Government] may, by order in the

Provincial Government
may order trials before
Court of Session to be by
jury

Official Gazette, direct that the trial of all offences, or
of any particular class of offences, before any Court of
Session, shall be by jury in any district, and may
revoke or alter such order.

* 1852 S 269, 1872 S 233, 1861 S 322

v Pahlu
assessors do not form
imperor *v Pahlu*

Note 4

1 (93) 15 All 136 (136-137) 1893 All W N 50 *Queen-Empress v Pam Lall*

2 (21) 8 AIR 1921 All 284 (285) 43 All 125 22 Cr L Jour 127, *Jaisukh v Emperor*
all
lappa (Jury case — Evidence

(2) The [Provincial Government], by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge, on application made to him or of his own motion so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

n Substituted by A O for "Local Government"

Synopsis

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| <p>1 Legislative changes</p> <p>2 Scope of the section</p> <p>3 'Trial of shall be by jury in any district'</p> <p>4 Trial for substantive offence read with section 149 of the Penal Code</p> <p>5 "Or of any particular class of offences"</p> <p>6 Special jury list—Sub-section(2) See S 325</p> | <p>7 Charge for offences, some triable by jury and others with assessors — Sub-section (3)</p> <p>8 "Same trial"</p> <p>9 Judgment in cases tried under sub-section (3)</p> <p>10. "With the aid of the jurors as assessors"</p> |
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NOTE to the Synopsis See the Notes indicated for the following topics

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| <p>Appeal See Note 8</p> <p>Code interfering with right of trial by jury <i>infra</i> See Note 2</p> <p>Conviction for minor offence not charged See Note 3</p> <p>Failure to object at proper stage—Effect of See Note 3</p> | <p>Independent and not joint opinion of assessors. See Note 7, See also S 268, Note 3</p> <p>Notification as to certain persons in respect of offences triable by jury valid See Note 5</p> <p>Offences triable by jury See Note 2</p> <p>Offences triable with assessors, See Note 3</p> <p>Final of jury case with assessors and <i>vice versa</i> See Note 3, See also S 536</p> |
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1. **Legislative changes**—There is no material difference between s 322 of the Code of 1861 and s 233 of the Code of 1872.

Difference between the Codes of 1872 and 1882 —

A new paragraph was added in s 269 of the Code of 1882 to the effect that where the accused was charged with several offences some of which were and some were not triable by jury, he should be tried by jury for all such offences¹

Difference between the Codes of 1882 and 1898 —

- (1) Sub section (2) of the present section is new
- (2) The words 'he shall be tried jury' in sub s (3) have been substituted for the words 'he shall be tried by jury for all such offences' which occurred in the old Code

Changes made in the Code of 1898 —

- (1) The words "with the previous sanction of the Governor General in Council" occurring after the words "Local Government may" in sub s (1) were repealed by the Devolution Act, 38 [XXXVIII] of 1920
- (2) The words "with the like sanction" occurring between the words "may" and "revoke" in sub s (1) were repealed by the Repealing and Amending Act, 10 [X] of 1927

2. **Scope of the section.**—This section empowers the Provincial Government to direct by order in the Official Gazette that the trial of all offences or of any particular

Section 269 — Note 1

1. See (86) 9 Mad 42 (43) *Queen Empress v Lekshmana*

class of offences before any Court of Session shall be by jury. As has been seen in the Notes on S 267 there is no such inalienable right to be tried by jury as exists under the common law of England. This section, therefore, limiting the right of trial by jury to the cases notified by the Provincial Government under this section and impliedly negating such a right in other criminal cases is *infra vires* of the Indian Legislature and does not offend against S 22 of the Indian Council's Act 1901¹.

The power of the Provincial Government under this section is not limited to merely adding a jury to the Court of Session. The plain wording of the section implies that the offences must be triable before the Court of Session and does not derogate from the power otherwise given to the Provincial Government to prescribe which offences should not come before the Court of Session. Thus, the section cannot be interpreted in such a way as to invest the Provincial Government with the power to direct that all or any class of offences not punishable with death shall be tried by jury before the Sessions Court, and not by Magistrates invested with power under S 30².

See also the undermentioned case³.

3 "Trial of . . . shall be by jury in any district." — Where any district in a division in which the Provincial Government has directed that the trial of certain offences shall be by jury, ceases to belong to such division, the right of trial by jury for such offences also ceases in that district⁴.

The words "trial of . . . in any district" mean that the trial shall be by jury in any district *when so ordered by a notification* and not that the trial shall be by jury of offences committed in any district. There is not only no prohibition against the trial being otherwise than by jury in a district not affected by a notification under this section,⁵ but in view of S 205, a trial in a Court of Session *must* in the absence of a notification under this section, be with the aid of assessors⁶. But a trial by jury in a case which is triable by the Judge with the aid of assessors is not invalid merely on that ground. Nor is a trial with assessors in a case triable by jury invalid unless objection is taken for such trial before the Court records its finding. See Section 536.

When a person is charged with an offence triable by the Judge with the aid of assessors and is tried accordingly but the assessors express the opinion that he is not guilty of the offence charged but guilty in respect of a minor offence with which he was not charged, a conviction on the opinion of the assessors for such minor offence is not invalid, even though such minor offence is triable by jury⁷.

Conversely, where an accused is charged with an offence triable by a jury and is accordingly tried by a jury, the latter has power under S 233 to find the accused guilty of

Note 2

- 1 (10) 11 Cr L Jour 453 (456) 37 Cal 467 7 Ind Cas 359 *Barindra v Emperor*
- 2 (38) 25 AIR 1938 Nag 56 (58) ILR (1938) Nag 248 39 Cr L Jour 660 *In re Prithwinath*
- 3 (39) 26 AIR 1939 Cal 335 (336, 337) ILR (1939) 1 Cal 511 40 Cr L Jour 667 *Nural Amin v Emperor* (Notifications of Bengal Government under — Anomaly resulting from present Notifications pointed out)

Note 3

- 1 (67) 8 Suth W R Cr 39 (39) *Queen v Khoodegram*
[See also (67) 8 Suth W R Cr 53 (53) *Queen v Bhagudhane Katchari* (8 Suth W R Cr 39 followed — Trial with aid of assessors ordered)]
- 2 (17) 4 AIR 1917 Sind 42 (43) 18 Cr L Jour 51 (51) 10 Sind L R 154, *Emperor v Jumo* (Hence High Court can transfer sessions case from jury district to non jury district under S 526, Cr P C)
- 3 (36) 23 AIR 1936 Cal 57 (528) 38 Cr L Jour 212 ILR (1937) 1 Cal 306 *Jogneswar Ghose v Emperor*
- 4 (19) 6 AIR 1919 Oudh 193 (194) 22 Oudh Cas 130 20 Cr L Jour 691 *Sripal Singh v Emperor* (Offence under S 395 Penal Code notified as triable by jury—Offence under S 396 cannot be tried by jury though it includes offence under Section 395)
Also see S 263 Note 1
- 4 (21) 8 AIR 1921 Bom 59 (59 60 61) 45 Bom 619 22 Cr L Jour 51 *Changouda v Emperor* (Conviction in such cases is permissible by virtue of S 233 Cr P C)

a minor offence not included in the charge though such offence is not triable by a jury but is triable with the aid of assessors⁵

Where an offence which is not triable by a jury is tried by a jury as a matter of fact, the trial does not become other than one by a jury for purposes of appeal and an appeal is competent under S 418, only on a matter of law⁶. In such a case, it is not also open to the Judge to treat the verdict of the jury as the opinion of the assessors⁷. See also Section 306, Note 3

The powers of transfer conferred on the High Court under S 526 are not in any way limited or controlled by this section. Hence, the trial of an offence which would in the ordinary course be by jury in a particular district, may be transferred to another district where it would be held with the aid of assessors only.⁸

4. Trial for substantive offence read with section 149 of the Penal Code — Where the offence under S 325 of the Penal Code was triable by jury, but all offences of rioting were excluded from jury trial and a person was charged under Ss 325 and 149 by reason of his being a member of an unlawful assembly, it was held by the High Court of Allahabad that the essential part of the offence was rioting and not the offence under S 325 and that, therefore, the offence charged should be tried by the Judge with the aid of assessors¹. On the other hand the High Court of Patna has held that in all cases in which an accused is charged with an offence triable by jury read with S 149 of the Penal Code, the Court must always *first* determine whether the particular offence has been committed by an individual and *next* whether S 149 makes the accused responsible as a participator, and that therefore if the particular offence is triable by jury, such offence read with S 149 must also be triable by jury². It is submitted that the latter view is correct.

5. "Or of any particular class of offences." — The words "class of offences" are not restricted to any classification recognized by the Legislature such as is found in the Penal Code (e.g., offences against the State or against the person), or in the Criminal Procedure Code (e.g., bailable offences, cognizable offences). It may include a classification according to the persons who commit the offences or in regard to the particular occasion in connection with which they were committed. Therefore, a notification withdrawing an order for trial by jury previously notified in respect of certain offenders whose case is pending before a Court is not incompetent³.

5 (26) 13 AIR 1926 Bom 134 (185) 27 Cr L Jour 650 *Emperor v Gulab Chand*

Also see S 238 Note 1

6 (31) 1931 Mad W N 129 (129-130) *Manikala Ramanna v Emperor*

(193) 26 Mad 243n (247n-248n) 6 Mad L Jour 14 *Muthusami Pillai v Queen Empress* (Per Bhaskar Iyengar J — Bedson J, *contra* — In such a case decision must be deemed to be by Judge with the aid of assessors and appeal lies on facts also)

Also see S 418 Note 2

7 (26) 13 AIR 1926 Bom 134 (185)

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[See also (35) 22 AIR 1935 Pat 433 (435) 158 Ind Cas 1131 (DB) *Emperor v Bhagwat Sahu* (Offence triable with aid of assessors tried by jury by mistake — Judge discovering mistake may treat

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Note 4

1 (33) 20 AIR 1933 All 128 (129) 34 Cr L Jour 441 55 All 63 *Dakhani v Emperor*

2 (26) 13 AIR 1926 Pat 253 (254) 5 Pat 238 27 Cr L Jour 512 *Ramsundar v Emperor*

Note 5

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6 Special jury list—Sub-section (2) — See Sect on 323

7 Charge for offences, some triable by jury and others with assessors

—Sub section (3) — There was no provision corresponding to this sub section in the Codes of 1861 and 1872 but as a matter of practice a procedure similar to that contemplated by this sub section was followed where at the same trial an accused was charged with offences some of which were triable by jury and others by the Judge with the aid of assessors¹ In the code of 1882 it was however enacted that, in such cases the accused should be tried for *all* the offences only by *jury* The present sub s. (3) directs that the jury should themselves act as assessors in respect of the offences triable with the aid of assessors² and has thus given effect to the view that had been held before the Code of 1882 But the system has often been found fault with as leading to unsatisfactory and anomalous results³

A joint trial for different offences some of which are and others are not triable by jury is not illegal⁴ In fact the procedure at the trial for both classes of offences (i.e., those triable by jury and those with assessors) is the same up to the point of summing up.⁵ Where the charge to the jury is combined with the summing up to the jurors as assessors, the Judge should clearly explain to the jurors the double capacity of jurors and assessors in which they are acting⁶ The Judge should take the verdict of the jury in respect of the offences triable by jury and the opinion of the jurors as *assessors* in respect of the other offences charged He should not take the verdict of the jury as jurors in respect of the latter offences⁷ In *Maising Bechar v Emperor*,⁸ Chandavarkar, J., observed as follows

"The law makes no distinction as to the procedure at the trial between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken It is at this latter point that there is a departure of ways and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of assessors enforced he cannot be heard to complain."

Where a verdict is given by the jury in respect of the offences triable by jury and an opinion is given by them as assessors in respect of the other offences the Judge should in respect of the verdict follow the procedure laid down in Ss 306 and 307, and in respect

Note 7

1 (1865) 5 Buth W R Cr Letters 7 (7) *In re Smith*

2 (28) 15 AIR 1908 Mad 275 (276) 29 Cr L Jour 351 *Arumuga Koile v Emperor*

3 (37) 24 AIR 1937 Pat 662 (664) 39 Cr L Jour 156 *Emperor v Haria Dhobi*

(36) 40 Cal W N 1374 (1376) *Cheru Sheikh v Emperor* (Trial of same person for different charges on same facts — Same set of persons acting as jury in respect of some and as assessors in respect of others — Verdict of not guilty in all — Acquittal by Judge in former and conviction in latter in disregard of opinion of assessors — The combined system or practice of trial of having the same set of men acting as a jury at one moment in respect of certain charges and assessors at another moment in respect of certain other charges though legal under the Criminal Procedure Code is a most undesirable one)

[See (37) 24 AIR 1937 Nag 50 (51) 38 Cr L Jour 830 *Sakhawat v Emperor* (The cumbersome device of a mixed trial with the help of jurors and assessors is apt to lead to unsatisfactory and illogical results)]

4 (15) 2 AIR 1915 Mad 1036 (1037) 16 Cr L Jour 717 (718) *In re Sennimalai Goundan*. (As a matter of fact such a trial is justified by S 269 (3) Criminal Procedure Code)

5 (09) 10 Cr L Jour 30 (31) 33 Bom 423 2 Ind Cas 480 *Mav Singh Dechar v Emperor*

6 (02) 2 Weir 334 (334) *In re Sivaga*

7 (08) 7 Cr L Jour 236 (238) 9 Bom LR 1057 *Emperor v Jyankat Singh*

8 (09) 10 Cr L Jour 30 (31) 33 Bom 423 2 Ind Cas 480

[See also (76) 13 AIR 1926 Bom 134 (135) 27 Cr L Jour 650 *Emperor v Gulabchand Dasji*]

Also see S 336 Note I

of the opinions, the procedure laid down in S 309⁹ Where the jury gave a verdict of not guilty in respect of the offences triable by jury and expressed a similar opinion as assessors in respect of the other offences charged, whereupon the Judge disagreeing with the opinion of the assessors convicted the accused in respect of the latter charges, and in the interests of justice made also a reference under S 307 in respect of the verdict, it was held that the procedure followed by the Judge was correct and that he was not bound to wait before convicting on the latter charges, till the reference to the High Court was answered¹⁰ Where the conviction for the offences triable by jury is set aside owing to certain defect in the verdict, it does not follow as a necessary consequence that the conviction for the other offences for which the accused has been tried with the aid of jurors as assessors must also be set aside¹¹

Where an accused is charged with a number of offences some of which are triable by a jury and some by the Judge with the aid of assessors, but the Judge fails to follow the procedure laid down in sub s (3) and all the offences are tried by the jury, the irregularity in the procedure does not make the trial illegal or other than a trial by jury¹² Conversely, where an accused is charged with a number of offences which are all triable by jury but the Judge thinking that some of the offences are triable with the aid of assessors, follows the procedure laid down in this sub section and no objection is taken to such a procedure, the legality of the trial is saved by S 536 (2)¹³

The sub section only applies to cases where a person is charged with offences triable by a jury as well as those triable with the aid of assessors It does not apply to a case where the accused is only charged with an offence triable by a jury but subsequently it is found on the evidence that he has committed a different offence which is triable with the aid of assessors¹⁴ Nor does it apply to a case where none of the accused persons is charged with more than one offence Thus, where one of the accused is charged with murder, an offence triable by jury, and the other is charged with conspiracy to murder, an offence triable with the aid of assessors, the section does not apply and a joint trial of the two accused is bad¹⁵

9 (36) 23 AIR 1936 Cal 527 (528) 38 Cr L Jour 212 1 L R (1937) 1 Cal 308, *Jogannar Ghose v Emperor* (Judge, while accepting verdict of jury, can at the same time disregard their opinions as to charges and take a contrary view if necessary)

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Emperor. (Judge may accept

to the charge triable by Judge with the aid of assessors is concerned he is the sole judge of facts and the opinion of the jury does not count)

(98) 8 Bom L R 599 (600) *Emperor v Kaldas Bhudar* (Reference to High Court with regard to offence not triable by jury is illegal)

[See also (90) 13 Mad 498 (198) 1 W & A 300 C 17

al against the
court dismissed

(See however (36) 40 Cal W N 1314 (1316) *Cheru Sheikh v Emperor* (Where the jury acquits the
old in favour
rejecting the
having regard
to jury on the

first set of charges]]

10 (32) 19 AIR 1932 Bom 61 (63) 33 Cr L Jour 172 *Emperor v Chandasappa*
Also see S 307, Note 15

11 (36) 23 AIR 1936 Oudh 164 (165, 166) 37 Cr L Jour 183 11 Luck 687, *Satdeo v Emperor*

12 (100) 22 B 1 598 (from 100) 22 B 1 598, *Queen Empress v Jayram Haridhas* (Case can be sub-

278 (1 B), *King Emperor v Parbhushankar* (Offence
P C)

The provisions of this subsection may be followed where the accused is charged with an offence triable by a jury and in the alternative with an offence triable with the aid of assessors¹⁶

But the subsection does not apply merely because an offence triable by a jury is included in an offence triable with the aid of assessors or *vice versa*, where only one of the offences is actually charged¹⁷

8 "Same trial"—Where in the same trial a person is tried by a jury and there is also another charge tried by the Judge with the jurors as assessors there is a right of appeal from the conviction on the latter charge under s 410 of the Code. The words same trial in sub s (3) must be read in a distributive sense and cannot be read as taking away the right of appeal¹

9 Judgment in cases tried under sub-section (3)—Where the procedure laid down in sub s (3) of the section was followed and the Judge stated both cases for the benefit of the jury and his summing up covered both the charges it was held that the failure to write a separate judgment in respect of the charges triable with the aid of assessors did not vitiate the trial¹

10 "With the aid of the jurors as assessors"—A person charged with distinct offences some of which are triable by jury and others by the Judge with assessors is entitled under sub s (3) to be tried for the latter offences by the Judge with all the jurors as assessors. A trial with some of the jurors alone as assessors would be illegal¹

Trial before Court of
Session to be conducted
by Public Prosecutor

270.* In every trial before a Court of Session the
prosecution shall be conducted by a Public Prosecutor

1 Legislative changes (Omitted)

2 Scope of the section.—The Public Prosecutor appointed under s 492 represents the Crown in all trials before the Court of Session¹ and it is only such Public Prosecutor that is entitled to conduct prosecutions in a Court of Session. A counsel instructed by a private person cannot do so without being specially empowered by the Magistrate of the District². In fact a private prosecutor has no position at all in litigation³. But a private

* 1882 S 270, 1872 S 235, 1861 S 360

16 See (98) 22 Mad 15 (18) 2 Weir 705 *Queen Empress v Anga Valayan*

17 (19) 6 AIR 1919 Oudh 193 (194) 22 Oudh Cas 130 20 Cr L Jour 691 *Sripal Singh v Emperor* (In this case offence under S 396 Penal Code, was tried by jury though triable with aid of assessors on the ground that S 396 Penal Code included offence under S 395 Penal Code which was triable by jury)

[See also (37) 24 A I R 1937 Pat 662 (664) 39 Cr L Jour 156 *Emperor v Maria Dholi* (Offence under Ss 392 and 325 Penal Code—Entire offence triable by jury)]

Note 8

1 (18) 5 AIR 1918 Mad 821 (873 874) 18 Cr L Jour 346 *Karuppa Goundan v Emperor*

Note 9

1 (30) 17 AIR 1930 Oudh 57 (57 58) 4 Luck 721 31 Cr L Jour 599 *Disheshwar v Emperor*

(73) 15 AIR 1978 Mad 275 (275) 29 Cr L Jour 351 *Arunaga Koila v Emperor*

Note 10

1 (03) 26 Mad 598 (599) 2 Weir 333 *Ramkrishna Reddi v Emperor* (Failure to take the opinion of all is not an omission or irregularity within the meaning of S 537 which can be cured)

(11) 12 Cr L Jour 233 (240) 10 Ind Cas 281 (Mad) *Panjari Pakeerappa v Emperor*

(27) 14 AIR 1927 Pat 13 (16) 6 Pat 208 27 Cr L Jour 1100 *Abdul Hamid v Emperor*

Section 270 — Note 2

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116 *Gulli Bhagat v Varan Singh* (Crown is the prosecutor and the custodian of the public peace and if it decides to let an offender go, no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance)

of the opinions, the procedure laid down in S 309⁹ Where the jury gave a verdict of not guilty in respect of the offences triable by jury and expressed a similar opinion as assessors in respect of the other offences charged, whereupon the Judge disagreeing with the opinion of the assessors convicted the accused in respect of the latter charges, and in the interests of justice made also a reference under S 307 in respect of the verdict, it was held that the procedure followed by the Judge was correct and that he was not bound to wait before convicting on the latter charges, till the reference to the High Court was answered¹⁰ Where the conviction for the offences triable by jury is set aside owing to certain defect in the verdict, it does not follow as a necessary consequence that the conviction for the other offences for which the accused has been tried with the aid of jurors as assessors must also be set aside¹¹

Where an accused is charged with a number of offences some of which are triable by a jury and some by the Judge with the aid of assessors, but the Judge fails to follow the procedure laid down in subs (3) and all the offences are tried by the jury, the irregularity in the procedure does not make the trial illegal or other than a trial by jury¹² Conversely, where an accused is charged with a number of offences which are all triable by jury but the Judge thinking that some of the offences are triable with the aid of assessors, follows the procedure laid down in this sub section and no objection is taken to such a procedure, the legality of the trial is saved by S 536 (2)¹³

The sub section only applies to cases where a person is charged with offences triable by a jury as well as those triable with the aid of assessors It does not apply to a case where the accused is only charged with an offence triable by a jury but subsequently it is found on the evidence that he has committed a different offence which is triable with the aid of assessors¹⁴ Nor does it apply to a case where none of the accused persons is charged with more than one offence Thus, where one of the accused is charged with murder, an offence triable by jury, and the other is charged with conspiracy to murder an offence triable with the aid of assessors, the section does not apply and a joint trial of the two accused is bad¹⁵

9 (36) 23 AIR 1936 Cal 527 (528) 38 Cri L Jour 212 1 L R (1937) 1 Cal 306 *Jagannath Ghose v Emperor* (Judge, while accepting verdict of jury, can at the same time disregard their opinions as assessors and take cognizance of the charges)

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opinion of the jury does not count)

(98) 8 Bom L R 599 (600), *Emperor v Kalidas Bhudar* (Reference to High Court with regard to offence not triable by jury is illegal)

[See also (90) 13 Mad 426 (428) 1 Writ 290 *Chandraswami v Emperor* (Judge cannot act as assessor and take cognizance of the charges)]

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accused of one set of charges and the verdict is accepted and acting as assessors they hold in favour of the accused in respect of the other charges the Judge acts in an unfair manner in rejecting the opinions of the assessors and convicting the accused on the second set of charges where having regard to the nature of the charges, the Judge thereby practically sets aside the verdict of the jury on the first set of charges)]

10 (32) 19 AIR 1932 Bom 61 (62) 33 Cri L Jour 172 *Emperor v Chandraswami*

v Emperor
(Case can be sub-

stantiated (Offence
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trial

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The provisions of this sub section may be followed where the accused is charged with an offence triable by a jury and in the alternative with an offence triable with the aid of assessors¹⁶

But the sub section does not apply merely because an offence triable by a jury is included in an offence triable with the aid of assessors or *vice versa*, where only one of the offences is actually charged¹⁷

8 'Same trial'—Where in the same trial a person is tried by a jury and there is also another charge tried by the Judge with the jurors as assessors there is a right of appeal from the conviction on the latter charge under S 410 of the Code. The words 'same trial' in sub s (3) must be read in a distributive sense and cannot be read as taking away the right of appeal¹

9 Judgment in cases tried under sub section (3)—Where the procedure laid down in sub s (3) of the section was followed and the Judge stated both cases for the benefit of the jury and his summing up covered both the charges it was held that the failure to write a separate judgment in respect of the charges triable with the aid of assessors did not vitiate the trial²

10 "With the aid of the jurors as assessors"—A person charged with distinct offences some of which are triable by jury and others by the Judge with assessors, is entitled under sub s (3) to be tried for the latter offences by the Judge with all the jurors as assessors. A trial with some of the jurors alone as assessors would be illegal³

Trial before Court of
Sessions to be conducted
by Public Prosecutor

270.* In every trial before a Court of Session the
prosecution shall be conducted by a Public Prosecutor.

1 Legislative changes (Omitted)

2. Scope of the section — The Public Prosecutor appointed under S 403 represents the Crown in all trials before the Court of Session¹ and it is only such Public Prosecutor that is entitled to conduct prosecutions in a Court of Session. A counsel instructed by a private person cannot do so without being specially empowered by the Magistrate of the District². In fact a private prosecutor has no position at all in litigation³. But a private

* 1882 S 270 1872 S 235, 1851 S 360

16 See (98) 22 Mad 15 (18) 2 Weir 705 *Queen Empress v Anga Valayan*

17 (19) 6 AIR 1919 Oudh 193 (191) 22 Oudh Cas 130 20 Cri L Jour 691 *Sripal Singh v Emperor* (In this case offence under S 396 Penal Code was tried by jury though triable with aid of assessors on the ground that S 396 Penal Code included offence under S 395 Penal Code which was triable by jury)

[See also (37) 24 A I R 1937 Pat 669 (661) 39 Cri L Jour 156 *Emperor v Haria Dholi* (Offence under Ss 392 and 325 Penal Code—Entire offence triable by jury)]

Note 8

1 (18) 5 AIR 1918 Mad 871 (823 874) 18 Cri L Jour 346 *Karuppa Goundan v Emperor*

Note 9

1 (30) 17 AIR 1930 Oudh 57 (57 58) 4 Luck 721 31 Cri L Jour 599 *Bisheshwar v Emperor*

(28) 15 AIR 1928 Mad 275 (275) 29 Cri L Jour 351 *Arumuga Kone v Emperor*

Note 10

1 (03) 26 Mad 598 (599) 2 Weir 333 *Ramkrishna Reddi v Emperor* (Failure to take the opinion of all is not an omission or irregularity within the meaning of S 637 which can be cured)

(11) 19 Cri L Jour 239 (240) 10 Ind Cas 281 (Mad) *Panjari Pakeerappa v Emperor*

(27) 14 AIR 1907 Pat 113 (16) 6 Pat 209 27 Cri L Jour 1100 *Abdul Hamid v Emperor*

Section 270 — Note 2

1 (93) 16 All 84 (86) 1894 All W N 7 (FB) *Queen Empress v Durga*

2 (76) Oudh Sel Cas No 31 p 30 *Crown v Chaitan Lal*

3 (24) 11 A I R 1974 1st 283 (784) 2 Pat 708 25 Cri L Jour 116 *Gulli Bhagat v Narain Singh* (Crown is the prosecutor and the custody of the public peace and if it decides to let an offender go, no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance)

complainant may under the provisions of S 493 instruct a counsel to appear in the case who can watch the case and act under the directions of the Public Prosecutor

3. "Shall be conducted"—Notwithstanding the use of the word "shall" in the section it has been held that the section is only directory and not mandatory, and the absence of a Public Prosecutor at the beginning of the trial by reason of the omission of the Government or of the District Magistrate to appoint a Public Prosecutor is only an irregularity curable by S 537 of the Code¹

B — Commencement of Proceedings.

271. (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

Synopsis

- | | |
|---|---|
| 1 Scope of the section | 9 'Claims to be tried' |
| 2 'Commencement of proceedings' | 10 Plea must be by the accused himself |
| 3 'The accused shall appear or be brought | 11 Record of the plea |
| 4 "And the charge shall be read out in Court and explained to him | 12 Plea of guilty — When may be accepted |
| 5 'He shall be asked whether he is guilty' | 13 Thereon' in sub section (2) |
| 6 Alternative charges | 14 Procedure where plea of guilty is not accepted |
| 7 If the accused pleads guilty" | 15 Plea of guilty by a co-accused |
| 8 Partial plea of guilty | 16 Appeal |

NOTE to the Synopsis See the Notes indicated for the following topics

Conviction—Discretionary See Note 1⁹

Convict on on the plea See Note 13

Effect of not reading the charge See Note 4

Plea by the pleader See Note 10

Plea of 'not guilty' See Note 9

Plea of not guilty — Convict on on a confess on before Magistrate See Note 13

Plea to be considered as a whole. See Note 7

Plea — Held to be sufficient or otherwise See Note 7

Postponement of convictions See Note 15

Record should show the explaining of the charge See Note 4

1 Scope of the section — This section and the next contain all that is necessary as to pleading and there is no need to supplement their contents by a reference to any other system of jurisprudence Under this section the accused can plead guilty or claim to be tried or he can refuse to plead which is taken to be the same as claiming to be tried¹

2. "Commencement of proceedings" — As to when the trial before a High Court or Court of Session begins see S 4 (1) (k) Note 4 and the undermentioned case.¹

3 "The accused shall appear or be brought" — As a general rule a person should be relieved of his chains when brought before a Court for trial or as a witness There can be no question that the display of fetters must have a prejudicial effect

* 1882 S 271 1872 S 237 1861 S 362

Note 3

1 (87) 1887 Pun Re No 35 Cr p 77 (78 79) *Ismail v Empress*

Section 271 — Note 1

1 (14) 1 AIR 1914 Cal 901 (904) 41 Cal 1272 15 Cr L Jour 460 *Emperor v Nirmal Kanta Roy*
Also see Note 9 and S 272 Note 2

Note 2

1 (38) 25 A I R 1938 Sind 9 (11) 39 Cr L Jour 294 32 Sind L R 129 *Munio Mohno v Emperor*
(Sind Frontier Regulation 3 [III] of 1892—Offence punishable with death or transportation for life—
Trial only commences when case is proceeded with in Sessions Court)

against him in the eyes of jurors or assessors. The exception to this rule should be when the superintendent or the keeper of the jail certifies that the use of the chain is necessary to guard against violence or an attempt to escape. But the Judge cannot refuse to try an accused brought in fetters though he can direct the removal of the same¹.

4 "And the charge shall be read out in Court and explained to him." — The actual charge sheet is an important document, and should be drawn up with care and caution so that the accused may have no doubt whatever as to the offences which he is called upon to answer. When a record is prepared for an appeal, it should be seen whether there is on the record a charge which has been read and explained to the accused and if it is absent the reason therefor should be ascertained¹. A mere reading out of the charge is not enough: it should be *explained* to the accused² and the record should show that the charge has been read out and explained to the accused³. Where a deaf and dumb person was convicted of an offence upon a trial without an attempt to communicate with him respecting the charge against him, the conviction was set aside⁴. But where the accused is defended by a counsel and the charge is read out and the counsel does not object, the omission to explain is only an irregularity if it has not caused any prejudice to the accused, and is cured by s 537⁵.

Before reading out the charge, the Judge should scrutinize the charge as to whether it requires any amendment before the accused is called on to plead thereto⁶. Thus, where two sets of accused persons are committed by two different Magistrates to the same Court of Session on identical charges in respect of the same offences, the Judge can, in the exercise of his powers under s 226, reframe the charge and charge all the accused together to stand their trial jointly⁷. See also ss 226 and 227 and Notes thereon.

NOTE 3

1 (69) 4 Mad H C R App 1111 (1112)

Also see S 81, Note 4

NOTE 4

1 (20) 7 AIR 1920 All 72 (72-73) 21 Cri L Jour 410 *Jagdeo Prasad v Emperor*

(38) 1888 Rat 386 (388) *Empress v Saruel*

[See also (35) 22 AIR 1935 Oudh 241 (243) 36 Cri L Jour 477, *Munoo Lal v Emperor*]

2 (19) 1888 Rat 386 (388) *Empress v Saruel*

3 (19) 1888 Rat 386 (388) *Empress v Saruel*

4 (19) 1888 Rat 386 (388) *Empress v Saruel*

5 (19) 1888 Rat 386 (388) *Empress v Saruel*

6 (19) 1888 Rat 386 (388) *Empress v Saruel*

7 (19) 1888 Rat 386 (388) *Empress v Saruel*

8 (19) 1888 Rat 386 (388) *Empress v Saruel*

9 (19) 1888 Rat 386 (388) *Empress v Saruel*

10 (19) 1888 Rat 386 (388) *Empress v Saruel*

11 (19) 1888 Rat 386 (388) *Empress v Saruel*

12 (19) 1888 Rat 386 (388) *Empress v Saruel*

13 (19) 1888 Rat 386 (388) *Empress v Saruel*

14 (19) 1888 Rat 386 (388) *Empress v Saruel*

15 (19) 1888 Rat 386 (388) *Empress v Saruel*

16 (19) 1888 Rat 386 (388) *Empress v Saruel*

17 (19) 1888 Rat 386 (388) *Empress v Saruel*

18 (19) 1888 Rat 386 (388) *Empress v Saruel*

19 (19) 1888 Rat 386 (388) *Empress v Saruel*

20 (19) 1888 Rat 386 (388) *Empress v Saruel*

21 (19) 1888 Rat 386 (388) *Empress v Saruel*

22 (19) 1888 Rat 386 (388) *Empress v Saruel*

23 (19) 1888 Rat 386 (388) *Empress v Saruel*

24 (19) 1888 Rat 386 (388) *Empress v Saruel*

25 (19) 1888 Rat 386 (388) *Empress v Saruel*

26 (19) 1888 Rat 386 (388) *Empress v Saruel*

27 (19) 1888 Rat 386 (388) *Empress v Saruel*

28 (19) 1888 Rat 386 (388) *Empress v Saruel*

29 (19) 1888 Rat 386 (388) *Empress v Saruel*

30 (19) 1888 Rat 386 (388) *Empress v Saruel*

31 (19) 1888 Rat 386 (388) *Empress v Saruel*

32 (19) 1888 Rat 386 (388) *Empress v Saruel*

33 (19) 1888 Rat 386 (388) *Empress v Saruel*

Emperor

Also see S 255 Note 3

3 (81) 7 Cal 96 (97) 8 Cal L Rep 471, *Empress v Copal Dhanuk*

(93 1900) 1893 1900 Low Bur Rul 328 (329) *Nga Nge v Queen Empress*

Also see S 255 Note 11

4 (70) 6 Mad H C R App vii (vii)

Also see S 341 Note 2

5 (84) 8 Bom 200 (212) *Queen Empress v Appa Subhana*

(86) 1886 Rat 229 (236) *Queen Empress v Nepal*

6 (45) 32 AIR 1945 Lah 1 (3) 46 Cri L Jour 648 219 Ind Cas 464 (DB) *Bhagat Panu v P T. James*

(Charge by Magistrate not precise — It should be examined afresh before Sessions Court to see if it can be made precise)

(45) 32 AIR 1945 Lah 286 (290) (FB) *Sardara Qasam v Emperor*

(18) 5 AIR 1918 Mad 821 (822) 18 Cri L Jour 346 *Karuppa Goundan v Emperor*.

7 (45) 32 AIR 1945 Lah 286 (289) (FB) *Sardara Qasam v Emperor*

A plea of guilty on which the Court can act must be a plea of guilty of the offence charged *without any qualification*. The Judge should see whether or not the man understood what the charge was in order to ascertain what he meant by his plea of guilty.⁷ Thus where the accused instead of pleading guilty in the words of the section makes a rambling statement more or less admitting guilt it would be much safer if the Judge records a plea of not guilty and proceeds to try the case in the ordinary way.⁸ A plea of guilty can only be made in response to a charge made by the Court and an informal admission as to the guilt does not amount to a formal plea of guilty and such an admission has not the same binding effect as a plea of guilty.⁹ The plea of guilty must distinctly admit each and every fact necessary to constitute the offence. Thus where the accused merely admits that he beat his wife and that she died but does not admit that he had any intention of

1 (18) 5 AIR 1918 All 353 (354) 40 All 119 19 Cr L Jour 174 Ashbey Clarke Harris v Emperor.
186) E S Ch W D C 70 50 C - - C - E

Affairs, Bengal v Jiban Kumar De (An admission of guilt in proceedings under S 110 Cr P O, or in proceedings of a more informal nature does not amount to a plea of guilty)

Emperor

causing such bodily injury as was likely to cause death it is not a sufficient plea of guilty to the charge of murder.⁶ Similarly where an accused while admitting that he killed the deceased states that he was not in his right mind at the time⁷ or that he did it under grave and sudden provocation⁸ or that he was put to instant fear of death by the co-accused⁹ or that he did it while under epileptic fits¹⁰ or in a struggle arising from the fact of the deceased having first attacked him¹¹ he cannot be said to have pleaded guilty to the charge of murder. Likewise where an accused while admitting having presented a false petition states that he did so under the influence of certain persons mentioned,¹² or unthinkingly without the intention to injure¹³ he cannot be said to have pleaded guilty to the charge of intentionally giving a false complaint. Where the prisoner states that he is guilty but adds that he did not commit the offence with which he is charged, it does not amount to a plea of guilty.¹⁴ A prisoner accused of dacoity admitted having accompanied the dacoits for a short distance but stated that he turned back immediately and had nothing to do with the dacoity: it was held that it did not amount to a plea of guilty to the charge of dacoity.¹⁵

Where a native Indian subject charged with the murder of another native Indian subject in a foreign territory admitted the causing of death but stated that he was not punishable for the act as the act was committed outside British India it was held that the plea was really one of not guilty.¹⁶ After the accused has claimed to be tried on a confessional statement made by him at the end of the trial it is not a plea of guilty on which the Judge can convict him without taking the verdict of the jury.¹⁷ The use of expressions like 'Your honour will please pardon the fault in future no such thing will happen' is not itself an incriminating statement.¹⁸

A plea of guilty is not a *confession* such as is dealt with in the Evidence Act. The plea is a statement which if accepted by the Court amounts to a waiver on the part of the accused of trial in which alone a confession might be utilised in evidence.¹⁹

See also Note 5 on Section 255

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- 6 (81) 2 We r 336 (336-337) *In re Gurappa Marigad*
 (06) 3 Cri L Jour 337 (338) 8 Bom L R 240 *Emperor v Chinnabika Koli*
 (76) 25 Suth W R Cr 23 (78) *Queen v Sonaoollala*
 (70) 2 N W P H C R 479 (480) *Queen v Hursookh* (The accused was charged of murdering his brother)
 (90) 14 Bom 564 (566) *Queen Empress v Sakharan Ramji*
 [See also (89) 1 C P L R Cr 25 (26) *Empress v Mt Adhika* (Case of public nuisance — No proof of common injury — Acts admitted by the accused did not constitute any offence)]
 7 (73) 5 N W P H C R 110 (111) *Queen v Chit Ram*
 8 (85) 11 Suth W R Cr 33 (34) *Queen v Gopal Dhanuk*
 9 (81) 11 Suth W R Cr 53 (53) *Queen v Mittun Chowdhry*
 10 (67) 7 Suth W R Cr 39 (39) *Queen v Greedhary Maiesee*
 11 (83) 1883 Pun Re No 22 Cr p 49 (50) *Pakir v Empress*
 Also see S 272 Note 2
 12 (66) 2 We r 334 (335)
 (05) 2 Cri L Jour 609 (610) 7 Bom L R 731 *Emperor v Bai Nani* (Opinion of assessors was not taken)
 13 (81) 1 Cal 96 (97) 8 Cal L R p 471 *Empress v Gopal Dhanuk*
 14 (69) 11 Suth W R Cr 53 (53) *Queen v Mittun Chowdhry*
 15 (67) 7 Suth W R Cr 39 (39) *Queen v Greedhary Maiesee*
 16 (83) 1883 Pun Re No 22 Cr p 49 (50) *Pakir v Empress*
 Also see S 272 Note 2
 17 (66) 2 We r 334 (335)
 (05) 2 Cri L Jour 609 (610) 7 Bom L R 731 *Emperor v Bai Nani* (Opinion of assessors was not taken)
 18 (12) 13 Cri L Jour 67 (63) 13 Ind Cas 393 (Cal) *Jang Bahadur Lal v Emperor*
 19 (34) 21 AIR 1934 1st 330 (334) 35 Cri L Jour 1377 *Shyamal Charan v Emperor*

(Charge of grievous hurt))

8. Partial plea of guilty. — Where in a charge of intentionally giving false evidence in two alternate statements, the accused pleads guilty as to one it does not by any means follow that a verdict of not guilty is to be recorded in the alternative matter of the charge. That ought to be tried in the ordinary way.¹ Where the prisoner pleads not guilty to the graver offence charged but guilty to the minor offence charged, the Court should proceed to try him for the graver offence. It is not competent to the Public Prosecutor to withdraw the charge after the accused had been arraigned and pleaded not guilty. The prisoner is entitled to a trial and a clear verdict of the jury.²

9 "Claims to be tried" — A plea of "*not guilty*" is not recognised by the Code. The accused can plead *guilty* under this section; he can *claim to be tried* or he can refuse to plead which amounts to the same thing as claiming to be tried. A plea of *not guilty* amounts to a claim to be tried.¹ Where an accused claims to be tried or makes a plea which amounts to such a plea, the Court should regularly try the accused and cannot convict him on a confession before the committing Magistrate.² In such cases there should be a formal trial by the jury or with the aid of assessors.³ If the accused claiming to be tried, pleads that his act comes under any of the general exceptions in the Penal Code he must plead them specifically. In the absence of such a plea, the absence of such circumstances will be presumed under S 105 of the Evidence Act.⁴ But this does not mean that the accused must lead the evidence. If it is apparent from the evidence on the record, whether produced by prosecution or by the defence, that the general exception would apply, then the presumption is removed and it is open to the Court to consider whether the

Note 8

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Note 9

1 (14) 1 AIR 1914 Cal 901 (901) 41 Cal 1072 15 Cr L Jour 160 *Emperor v Normal*
(81) 18 AIR 1931 Cal 841 (343) 59 Cal 1214 32 Cr L Jour 867 *Md 1 usuf v Emperor*
Also see Note 1 and S 272, Note 2

2 (70) 2 N W P H C R 479 (480) *Queen v Hursloffe*

(86) 1886 All W N 22 (23) *Empress v Tika Ram*

3 (73) 5 N W P H C R 110 (112) *Queen v Chest Ram*

(90) 14 Bom 584 (586) *Queen Empress v Sakharan*

(88) 1888 Rat 410 (410 411) *Queen Empress v Mathari*

(04) 1 Cri L Jour 772 (773) 6 Dom L R 671 *Emperor v Mahmad*
 (03) 2 Cri L Jour 622 (619) 7 Dom L R 731 *Emperor v Beg Mah*

(77) 6 Cst. I. Jour 424 (425) 8 Rom. I. R. 1346 Emperor v. Samolles, Mathell.

4 (15) 2 AIR 1915 Cal 773 (778) 30 Ind Cas 113 (117) 16 Cr L Jour 561 (FD) *Emperor v Ugendranath Das* (Plea of grave and sudden provocation)

(16) 3 AIR 1916 Cal 633 (836) 16 Cr L Jour 721 *Emperor v Dwijendra Chandra* (Plea of accident taken by the accused)

(22) 9 AIR 1922 Lah 1 (20) 3 Lah 144 23 Cr L Jour 513 *Naram Das v Emperor* (Right of private defence of property set up)

(04) 1 Cr L Jour 427 (427-478) 1904 All W N 113 *Emperor v Gullu*

(10) 11 Cr T Tn = 274 (272-277) 20 2 125 27 20 2 20 2

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(18) 1 Cal L R 62 (65) *In re Jamsheer Sirdar*
Also see S 342 Note 23

in the exact words used by the accused⁴

It is also desirable that shorthand notes of proceedings of Sessions Courts should be maintained so as to ensure a full and accurate record of what happens in Court⁵

12 Plea of guilty — When may be accepted. — A plea of guilty may be accepted by the Court and the accused may be convicted thereon without the matter going before the assessors or the jury¹ But the Court is not bound to accept a plea of guilty in all cases On the other hand, the Court must carefully consider whether the accused has fully understood the nature of the charge to which he pleads guilty.² In cases where the natural sequence of accepting the plea of guilty would be a sentence of death, it is not in accordance with the usual practice to accept a plea of guilty.³ Murder is a mixed question of law and fact and unless the Court is satisfied that the accused knew exactly what was implied by his plea of guilty, the plea should not be accepted but the case should be tried, especially where the accused is an ignorant person.⁴ An accused person does not plead to a section of a criminal statute He pleads guilty or not guilty to the facts alleged that disclose an offence under that section. Sometimes a "plea of guilty" is an admission only of the facts alleged and not the offence, as when such facts do not in law constitute the offence⁵ So a plea of guilty cannot be accepted when the offence in question has not been committed in the eye of law⁶ A plea of guilty cannot be accepted when it is clear that the offence

4 (193) 5 Bom L R 999 (1000) *Emperor v. Abdul Hoosain*

5 (24) 11 AIR 1924 Cal 257 (288) 23 Cri L Jour 817 (FB), *Emperor v. Darendra Kumar*.

Also see S 356, Note 11

Note 12

1 (177) 8 S Ch W R Cr 1 91 (93) 22 Cr L Jour 112 (FB)

(68) 10 Suth W R Cr 43 (43) 2 Beng L R 23 (FB) *Queen v. Sree Kant*

Emperor

ror.

Sanghar v Emperor

Sanpat v Emperor

(22) 9 AIR 1922 All 233 (233) 23 Cri L Jour 283 *Dalla v Emperor*

(The accused was a

v Kasim

was not correctly stated to him.⁷ Each case depends, however, upon its own circumstances which should be examined to see whether the plea of guilty is one which should be acted upon.⁸ Where the prisoner has the services of a pleader and a plea of guilty is made advisedly the Court can certainly convict him on his plea.⁹ But where an accused, who is charged for an offence under s 302 Penal Code (for which there is a clear *prima facie* evidence), pleads guilty to an offence under section 301, Penal Code, the Court cannot accept the plea of guilty but should proceed to try him for the offence charged.¹⁰ There is no provision for an inquiry for the purpose of seeing if it is right and proper to convict the accused on his plea if any such enquiry is necessary it should take the form of a trial and be conducted as such.¹¹

Though the section provides for a conviction being based on the accused's plea of guilty entered at the commencement of the proceedings, this does not mean that if at any later stage the accused pleads guilty the Court is not entitled to record the plea and convict the accused on such plea.¹²

13 "Thereon" in sub-section (2).—The word "thereon" shows that the conviction is on the plea recorded before the Sessions Judge and has no reference to what has passed before the Magistrate in the preliminary enquiry. So, if the accused makes a plea which amounts to a claim to be tried before the Sessions Judge, he cannot be convicted on a confession made before the committing Magistrate.¹

Where an accused pleads guilty to the offence charged, he may either be convicted for the offence or, as has been seen in Note 12 the regular trial may be proceeded with. He must not be convicted of a different offence of which he did not plead guilty and for which he was not tried.² Thus, a person pleading guilty to a charge of murder cannot be convicted of culpable homicide not amounting to murder.³ Similarly, a person pleading guilty to a charge of culpable homicide not amounting to murder cannot be convicted of causing grievous hurt.⁴ In order that there may be a conviction on a plea of guilty, the plea must be in respect of the offence charged. Thus where an accused was charged of murder but the Court finding that there was no evidence under that charge, convicted her of an offence under s 318 of the Penal Code considered to have been admitted by the accused, the conviction is illegal.⁵

The fact that the accused, tired of a lengthy trial or impressed by the weight of the evidence against him, or partly the one and partly the other, decides to cut short proceedings in the hope that a lenient sentence would be passed on him, is not in itself a ground for departing from the ordinary tariff of punishment for the offence.⁶

14. Procedure where plea of guilty is not accepted.—Section 272 provides that where an accused person *refuses to or does not plead or claims to be tried*, the Court shall proceed to try the case. There is no specific provision enabling the Court to try the case where the accused *pleads guilty* and the Court does not accept the same, though sub s (2) of this section provides that he may be convicted on such plea. In England where

Note 13

1 (10) 2 N W P H C R 479 (480) *Queen v Hursookh* (This procedure seriously prejudiced the accused) (72 92) 1872 1892 Low Bur Rul 497 (497) *Aga Tha Maing v Queen Empress*. (Confess on before a Myook)

the Court does not think it expedient to act upon the accused's plea of guilty, the usual procedure is to advise him to withdraw his plea of guilty and to plead not guilty.¹ In this country, the general trend of opinion is that the accused may be treated in such cases as if he had pleaded not guilty, and that the trial may be proceeded with in the ordinary way.² The High Court of Calcutta has, however, in the undermentioned case,³ held that the discretion denoted by the word "may" is either to convict the accused, or in a suitable case, to leave the matter there and discharge him, but does not include the power to proceed with the trial against him. In this view it has further held therein that where a person has pleaded guilty, he ceases *ipso facto* to be an accused person. According to the Chief Court of Oudh the only course open to the Court where a plea of guilty is not accepted by it is to proceed to trial.⁴

As to the meaning of the word "conviction" in this sub-section, see the undermentioned case.⁵

15. Plea of guilty by a co-accused — Under s 30 of the Evidence Act, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. So the question arises whether in cases where one of several accused jointly tried pleads guilty to the charge, he can be said to be jointly tried within the meaning of s 30 of the Evidence Act so as to render his admissions receivable in evidence against the other accused. In the undermentioned case,¹ the High Court of Calcutta has held that where a person pleads guilty, the only course open to the Court (whether it accepts such plea or not) is either to convict him or discharge him and that he can no longer be said to be an accused person jointly tried with others. This view as has been seen in Note 14 in so far as it relates to cases where the plea is not accepted by the Court is against the general trend of opinion. In cases where the plea of guilty is accepted by the Court, a conviction should follow and the accused will, of course cease to be an accused person from that moment. Section 30 of the Evidence Act will not therefore apply.² In cases where the plea of guilty is not accepted by the Court and the Court

Note 14

1 (31) 13 AIR 1931 Cal 341 (343) 53 Cal 1214 32 Cri L Jour 667 *Mahammad Yusuf v Emperor*

(28) 15 AIR 1928 Cal 775 (776) 30 Cri L Jour 508 *Hasaruddin Mahommed v Emperor* (Such a plea should not be acted upon in a case where the natural sequence would be a sentence of death)

(70) 13 Suth W R Cr 55 (56) 4 Beng L R App 101, *Queen v Gobadur Bhooyan*

3 (31) 18 AIR 1931 Cal 341 (343) 53 Cal 1214 32 Cri L Jour 667 *Mahammad Yusuf v Emperor*

4 (17) 4 AIR 1917 Oudh 362 (366) 13 Cri L Jour 742 20 Oudh Cas 136 *Kesho Singh v Emperor*

5 (1900) 10 Mad L Jour 147 (158 159) (FB) *Subramania Aiyar v Queen Empress*

Note 15

1 (31) 18 AIR 1931 Cal 341 (343, 344) 53 Cal 1214 32 Cr L J 667, *Mohammad Yusuf v Emperor*

2. (99) 22 Mad 491 (493) 2 Weir 746, *Queen Empress v Lakshmayya Pandaram*

(95) 19 Bom 195 (197, 198), *Queen Empress v Pahuja*

(95) 17 All 524 (526) 1895 A W N 111 *Queen Empress v Pirbhiti*

(02) 25 Mad 61 (68) 28 1 A 257 11 M L J 283 3 Bom L R 540 5 C W N 866 8 Sar 160 (P C), *Subramanija Iyer v King Emperor*

(81)
(74)
(26)
(88) *v Emperor*

(1900) 1900 Pun Re No 11 Cr p 25 (27), *Piara Singh v Empress*

(84) 7 Mad 102 (103, 104) 2 Weir 740, *Venkataramy v Queen*

proceeds to trial against him the accused does not cease to be so until the end of the trial and all the accused can be treated as being tried jointly within the meaning of s 30³. But will this alone make the plea of guilty by one accused capable of being taken into consideration against the other accused under s 30? In other words can a plea of guilty made before a Court be treated as the same as a confession "proved" in a Court? See S. 342, Note 27 for this aspect of the question.

Where one of the accused pleads guilty and the Court accepts it, it should not defer his conviction in order that his confession may be considered against his co accused. Such a procedure is clearly against the spirit of the law.⁴ The accused should be convicted at once⁵ and should be removed from the dock in which case he can give evidence against his co accused.⁶ It is always desirable to pass a sentence completely before calling one accused who pleads guilty in a joint trial to give evidence against a co accused,⁷ so that the witness may give his evidence free of all corrupt influence which the fear of impending punishment and the desire to obtain immunity to himself at the expense of other prisoner might otherwise produce.⁸ But the admissibility of the evidence of such accused pleading guilty ought not to be decided on the narrow technical ground that he had not been convicted but on the broad ground that when he gave his evidence he was not in charge of jury and no issue remained to be tried between him and the Crown.⁹

Where, in a joint trial, A is charged with murder and B with being an accessory after the fact, the question whether the deceased was murdered by A is an issue between B and the Crown and hence, the counsel for B is entitled to insist on the proof of the murder and challenge the evidence of it even if A has pleaded guilty.¹⁰

See also Note 8 on Section 255

16. Appeal — Where an accused pleads guilty and he is convicted thereon he has no right of appeal except as to the extent or legality of the sentence. See s 412

Where the Court has recorded that the accused pleaded guilty, the High Court cannot in a case in which the accused appeared by a pleader admit the affidavit of the accused for the purpose of showing that he did not plead guilty. If there has been any mistake in the matter it is the vakil, and not the client, who ought to make an affidavit¹

- (01) 23 All 53 (51) 1900 All W N 192 *Queen v Paltua*
 (95) 2 Weir 493 (493) *In re Muggidi Krishna Moorthy*
 (11) 12 Cri L Jour 479 (479) 38 Cal 446 12 Ind Cas 87, *Emperor v Keramat Sirdar*
 (11) 12 Cri L Jour 605 (605, 606) 12 Ind Cas 981 1911 Pun Re No 15 Cr, *Kanhaya v Emperor*
 (01) 3 Bom L R 437 (439) *King-Emperor v Annaya*
 3 (01) 3 Bom L R 437 (438) *King Emperor v Annaya*
 (09) 10 Cri L Jour 484 (486) 4 Ind Cas 57 (Cal), *Sukdev Texara v Emperor* (Confessing accused
 not competent witness)
 (15) 2 AIR 1915 All 221 (224) 37 All 247 16 Cri L Jour 327, *Emperor v Dip Narain*
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- 4 (01) 23 AU 53 (54, 55) 1900 All W N 192 Queen v Pailua
Kheoraj
v Emperor

7 (92) 2 Weir 520 (520, 521) In re Varudasmuthu
8 (31) 18 All; 1931 Cal 341 (344) 58 Cal 1214 52 Cri L Jour 667, Mahomed Yusuf v Emperor
W N 866 8 Sar 160 (FC).

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Where an accused person has been convicted on his own plea of guilty he is not entitled on the notice being issued to him under S 439 sub s (2) of the Code for showing cause against enhancement of sentence to go behind the plea of guilty as a confession of the facts alleged or to withdraw the plea.² The High Court of Rangoon has however held that in such a case the accused is entitled to show cause against both his conviction and sentence notwithstanding his plea of guilty.³

272.* If the accused refuses to, or does not, plead, or if he claims Refusal to plead or claim to be tried to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case

Provided that, subject to the right of objection hereinafter mentioned Trial by same jury or as assessors of several offenders in succession the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit

Synopsis

1 Legislative changes

2 Refuses to or does not plead or if he claims to be tried

3 Trial by same jury or assessors of several offenders — Proviso

NOTE to the Synopsis See the Notes indicated for the following topics

Effect of the proviso See Note 3

Section inapplicable to cases and counter-cases See Note 3

No case against accused — Procedure See Note 2

Simultaneous trial of several persons illegal See Note 3

Plea of not guilty See Note 2

1 Legislative changes — The first paragraph of this section corresponds to s 203 of the Code of 1861 and s 233 of the Code of 1872. The proviso corresponds to s 347 of the Code of 1861 and s 265 of the Code of 1872.

2 "Refuses to, or does not, plead, or if he claims to be tried" — An accused person charged with an offence can either plead guilty or may claim to be tried. A plea of not guilty is not recognised by the Code¹ though such a plea if made will be considered as amounting to a claim to be tried. As a matter of practice however the expression not guilty is generally used and is taken as amounting to a claim to be tried.

Where an accused makes no answer to the question whether he is guilty an enquiry should be made whether he is obstinately mute or is dumb *ex visitatione dei*. In either case a plea of claiming to be tried should be recorded and the trial proceeded with.² Where in answer to a charge of murder the accused stated "I did not mean to kill him why should I kill my brother? Nor did I strike him so much that he should die" it was held that the statement amounted to a plea of not guilty.³ See also the undermentioned case.⁴

* 1882 S 272 1872 Ss 238 265 1861 Ss 347 363

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Section 272 — Note 2

1 (14) 1 AIR 1914 Cal 901 (904) 41 Cal 1072 15 Cal L Jour 460 *Firperor v Nirmal Kanta Roy*

4 (83) 1883 Pun Re No 27 Cr p 49 (50) *Fakir v Firperor* (Accused saying that he killed A but claiming that he was not liable to punishment as the Court had no jurisdiction over him — Plea is one of claiming to be tried)
Also see S 271 Note 7

Where an accused is put upon his trial and has pleaded "not guilty" to the charge or has claimed to be tried he is entitled to have the trial proceeded with⁵ as a protection against a future proceeding against him in respect of the same charge⁶. He cannot be released without trial on the ground that there is no case against him⁷. Nor can he be convicted without trial solely upon a confession before the committing Magistrate⁸. But according to the High Court of Bombay, it is open to the Sessions Judge, instead of proceeding to choose the jurors and trying the case, to refer the same to the High Court under s 433 if he is of opinion that the trial is not desirable⁹.

3. Trial by same jury or assessors of several offenders — Proviso. —

It has been seen in s 233 that where several charges are made against an accused person, the general rule is that each charge should be tried separately. The same principle will also apply where several persons are accused of offences in a case. The general rule is that they should be tried separately except in cases falling within s 232¹. This proviso enacts that in those cases in which several accused persons in a Sessions case are to be tried separately, it is not necessary to choose a fresh jury or a fresh set of assessors for each such separate trial, and that the same jury or assessors may act in all the trials, subject, of course, to the right of the accused provided in the Code to object to the jury or any one or more members of the jury².

But the same jury may try or the same assessors may aid in the trial of any number of accused persons in a case only one after the other and not simultaneously³. A simultaneous trial in such cases is an illegality which is not curable by s 537 of the Code⁴.

In the undermentioned case⁵ certain members of two opposing parties in a riot were sent up for trial under two distinct committals. After the close of the case for the prosecution in one of the cases, the Sessions Judge postponed the taking of the evidence for the defence and proceeded to examine the witnesses for the prosecution in the other case before the same jury. He then took the evidence of the witnesses for the defence in the first case and in the counter case in the order named and then summed up the facts in both the cases to the jury who returned a verdict in respect of all the accused. Princep, J., observed as follows:

"The law declares that the 'same jury may try as many accused persons successively as to the Court seems fit'. By this we understand that one trial is to follow the other, that is that on the conclusion of one trial, the same jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted piecemeal in such a manner that at their conclusion the jury shall be called upon to decide at one and the same time upon two distinct classes of evidence which, though they have points in common, require careful discrimination as bearing

5 (83) 12 Cal L Rep 120 (121) *Empress v Sagambur*
 (68) 10 Suth W R Cr 43 (43) 2 Beng L R 23 (FD), *Queen v Srikanth Charal*
 (04) 1 Cri L Jour 772 (773) 6 Bom L R 671 *Emperor v Mohamed Ismail* (Judge considering that

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if (A Sessions Court has no authority to

already tried and acquitted in regard to same matter) v Anant Narayan (Accused

Note 3

1 (87) 9 All 452 (457) 1887 All W N 111, *Queen Empress v Abdul Kadir*
 2 (26) 13 AIR 1926 All 334 (335 336) 49 All 325 27 Cri L Jour 445 *Rafiu-saman Khan v Chhotey Lal*
 (31) 18 AIR 1931 Cal 709 (709) 32 Cri L Jour 1933, *Pajatulya v Khuda Karigar*
 3 (31) 18 AIR 1931 Cal 709 (709, 710) 32 Cri L Jour 1233, *Pajatulya v Khuda Karigar*
 4 (21) 8 AIR 1921 Low Bur 51 (55) 11 Low Bur Bal 73 23 Cri L Jour 49, *Eusoo v Emperor*
 5 (81) 6 Cal 96 (96) 6 Cal L Rep 521 3 Scheme L R Cr 33, *Hoochin Duksh v Empress*

273.* (1) In trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an order to that effect

High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion of any charge is wholly or partly unsustainable, the Judge may make on the charge an order that the charge be withdrawn.

Effect of entry

1. **Object and applicability of the section.**—The section is intended to be a short and effective way by which charges which have no merits may be disposed of. This special power is, however, only conferred on the High Courts² and cannot be exercised by Sessions Judges.³

Applications under this section should be disposed of by the High Court in the exercise of its ordinary original criminal jurisdiction.⁴

2. "The Judge may make on the charge an entry to that effect"—
 Section (1) — Where the Court is of opinion that no offence is made out it is its duty to make an order under this section and stay proceedings.¹ But the charge must be found to be unsustainable, otherwise the Judge should not take into his own hands the functions of a jury.² Where in a trial before the High Court it appeared that the mode of taking evidence in the preliminary inquiry was entirely erroneous, it was held that an entry under Section (1) should be made and the prisoner sent back before the Magistrate for the evidence to be taken afresh.³

3. Effect of the entry—Sub-section (2) — An entry made under this section has no effect of an acquittal. The accused may again be tried for the same offence.¹ Sub-section (2) has no application to an entry made under this section. See sub-s. (1) of that section. For stay of proceedings under other sections, see s. 145, sub s. (5), s. 210; s. 464, sub s. (2), and s. 465, sub s. (1).

* 1882 S 273, 1872 and 1861 Nil

Section 273 — Note 1

I / 901 16 ATR 1099 Cal 756 17F01 17 Cal 1012 21 C T V - 500 mm 2 . 2 5 =

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no evidence that accused has committed offence is that it may direct jury to return verdict of not guilty but it is not to be taken as a direction to return a verdict of not guilty.

) [X] of 1873)

Note 2

1 (42) 29 AIR 1942 Bom 212 (213 214) 43 Cr L Jour 773 11LR (1942) Bom 534 201 Ind Cas 735
Emperor v Hussaini Velayatalli (It is for the Court to make the entry under this section — The
 Clerk of the Crown cannot withdraw the charge on the ground that there is no evidence to go to the

preliminary investigation erroneous—Note must be made) (Beware of taking the evidence in the

Note 3

1 (32) 19 AIR 1932 Sind 157 (159) 26 Sind L R 407 34 Cr L Jour 14, *Maniram v Emperor*.
Also see S 403, Explanation

C — Choosing a Jury.

274.* (1) In trials before the High Court the jury shall consist of
Number of jury nine persons

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than five or more than nine, as the [Provincial Government], by order applicable to any particular district or to any particular class of offences in that district, may direct

Provided that, where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if practicable, of nine persons

a Substituted by A O for Local Government

1 Legislative changes

Difference between the Code of 1861 and the Code of 1872 —

The number of which a jury was to consist, under the Code of 1861, was *five* or an uneven number not less than five and not more than nine. This number was reduced to *three* in the Code of 1872. Both s 327 of the Code of 1861 and s 236 of the Code of 1872 however, dealt with the number of jury in *Sessions Courts* only

Difference between the Codes of 1872 and 1882 —

The provision as to the number of jury in the High Courts was newly added to the section in 1882

Difference between the Codes of 1882 and 1898 —

There was no change effected in the Code of 1898, but by the Criminal Law Amendment Act, 12 [XII] of 1923, the word "five" in sub s. (2) of the section was substituted for the word "three" which occurred in the second paragraph of the old section. The proviso to the section was also newly added by the said Act of 1923

2 Non-compliance with the section — Effect of — A trial by a jury consisting of a larger number of men than is authorized by the section is a nullity¹. Similarly, a trial by a jury consisting of a smaller number of men than that required by law is without jurisdiction²

3 "Jury," meaning of — See Section 267, Note 1

4 Jury in cases of offences punishable with death — Proviso. — As has been seen in s 263, the Provincial Government may direct that the trial of certain offences shall be by jury in any district. Where an offence punishable with death is so declared to be triable by jury, this proviso will apply, and the jury should consist of *nine* persons unless it is impracticable to get that number, in which case the number should be at least seven. Under s 326, the number of jurors to be summoned is to be double the number required for the trial. Where a lesser number of persons is summoned, and some of them do not attend, with the result that seven persons are empanelled, it cannot be said that it is *impracticable* to get a jury of nine, and consequently the tribunal is not one legally constituted¹. Where only fourteen persons were summoned but eleven of them were

* 1882 S 274, 1872 S 236, 1861 S 327

Section 274 — Note 2

1 (1882) 31 All 1014

Emperor v. Kishore Khanna (Murder trial — Jury of seven empanelled though it was not impracticable to empanel jury of nine—Trial illegal)

Note 4

1 (28) 15 All 1928 Cal 645 (645 646) 55 Cal 794 29 Cri L Jour 927 *Serajul Islam v. Emperor* (Twelve persons only summoned)

present out of whom, however, only seven were empanelled and it was not shown that it was not practicable to get nine persons, it was held that the jury was illegally constituted and the trial bad.²

But where eighteen persons were summoned out of whom only eight attended and consequently only a jury of seven was empanelled, it was held that the proceedings were not vitiated.³ Where, however, out of eighteen persons summoned only nine were present and the Judge chose seven jurors by lot and did not attempt to empanel the remaining two although no objection was taken to them, it was held that the trial was vitiated *ab initio*.⁴

Where there is nothing on the record to show whether the trial Court considered the practicability of having nine jurors, the High Court on appeal ought to proceed on the assumption that the trial in the lower Court took place in full accordance with the requirements of sub s (2) of this section.⁵

As to when an objection as to the constitution of the jury can be taken, see Note 6 on Section 276

***275. (1)** In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such

Jury for trial of European and Indian British subjects and others.

* Code of 1898, original S 275

Jury for trial of persons not Europeans or Americans before Court of Session

275. In a trial by jury before the Court of Session of a person not being an European or an American, a majority of the jury shall, if he so desires, consist of persons who are neither Europeans nor Americans.

1882 S 275, 1872 S 241, 1861 S 325

that it was the duty of the Judge to consider whether it was practicable to have nine jurors and that

person before the first juror is called and accepted so requires, consist, in the case of an European British subject, of persons who are Europeans or Americans and, in the case of an Indian British subject, of Indians.

(2) In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, a majority of the jury shall, if practicable and if such European or American before the first juror is called and accepted so requires, consist of persons who are Europeans or Americans.

a This section was substituted for the original section by the Criminal Law Amendment Act, 12 [XII] of 1923

Synopsis

1. Scope of the section
2. Right to be tried by majority of jurors of the nationality of the accused
3. Privileges of Europeans other than British subjects
4. 'Who has been found. Indian British subjects'
5. 'European'

1. Scope of the section. — Section 275, as it stood before 1923, provided that, in a trial by jury of a person not an European or American, a majority of the jury should consist of persons who were neither Europeans nor Americans. Section 450, now repealed, provided that in all trials of European *British subjects* before the High Court or the Court of Session the accused may claim to be tried by jury, *half* the number of which should be Europeans or Americans, provided, in cases triable with the aid of assessors, he may, instead of claiming to be tried by jury, claim that *half* the number of assessors should be Europeans or Americans. Section 460, also now repealed, provided that in the case of an European *not being a British subject* or an American, *half* the number of the jury or assessors, as the case may be, should, if practicable, consist of Europeans or Americans.¹ This section and S 284A together deal with the matter dealt with by the said ss 275, 450 and 460, but with the following important changes.

In trials by jury —

If the accused is an European *British subject*, he may claim that the *majority* of the jury shall be Europeans or Americans. If the accused is an Indian British subject, he may claim that the *majority* of the jury shall consist of Indians. If he is an European *not being a British subject*, or an American, he may claim that a majority of the jury shall consist of Europeans or Americans and this will be allowed only where it is *practicable*

In trials with the aid of assessors —

If the accused is an European *British subject*, he may claim that *all* the assessors should be Europeans or Americans. If he is an Indian British subject, he may claim that *all* the assessors should be Indians. If he is an European *not being a British subject* or an American, he may claim that all the assessors shall be Europeans or Americans and this will be allowed where it is *practicable* to do so.

The claim to be tried as an European or Indian British subject mentioned in Ss. 528A and 528B is a different and distinct one from the claim to be tried by a majority of European or Indian jury as mentioned in this section, though it can only be put forward by a person who has, in the language of the section, been found under the provisions of the Code to be an European or an Indian British subject.²

A claim to be tried under this section can validly be made whether the complainant and the accused are both European or Indian British subjects, or one is an European and

Section 275 — Note 1

1 See also (1865) 3 Suth W R Cr 14 (14) *Empress v John Lokley* (Case under S 323 of the Code of 1861)

2. (25) 12 AIR 1925 Cal 384 (387) 51 Cal 980 - 26 Cri L Jour 393 *Emperor v Hareendra*

the other an Indian British subject³

2. Right to be tried by majority of jurors of the nationality of the accused. — Under the High Court Criminal Procedure Act, 1875, a person who was not an European British subject was not entitled to be tried by a jury consisting of a majority of persons who were neither Europeans nor Americans.¹ Such a right was first recognised by the Code of 1882. There is, however, no provision that the jurors should be *co religionists* with the accused²

3. Privileges of Europeans other than British subjects. — Europeans other than European British subjects or Americans have, under sub s (2) of this section, a right that a majority of the jury shall, if practicable, consist of persons who are Europeans or Americans, and, under S 235A, in the case of trials with the aid of assessors, all the assessors shall, if practicable, be persons who are Europeans or Americans. They have no other special privileges¹

4. "Who has been found . . . Indian British subject." — It is not sufficient for the accused to merely *assert* that he is an European or Indian British subject. He should have been *found under the provisions of this Code* to belong to the particular nationality¹. As to such provisions, see Ss 413, 523A and 523B

5. "European" — An "Anglo Indian" is not an European within the meaning of this section¹

276. The jurors shall be chosen by lot from the persons summoned

Jurors to be chosen by lot to act as such in such manner as the High Court may from time to time by rule direct:

Provided that —

first, pending the issue under this section of rules for any Court the Existing practice maintained practice now prevailing in such Court in respect to the choosing of jurors shall be followed;

secondly, in case of a deficiency of persons summoned, the number persons not summoned when eligible, of jurors required may, with the leave of the Court, be chosen from such other persons as may be present,

trials before special jurors *thirdly*, in a trial before any High Court in the town which is the usual place of sitting of such

High Court —

(a) if the accused person is charged with having committed an offence punishable with death, or

* 1882 S. 276, 1872 S 240, 1861 S 342

3 (35) 22 AIR 1935 Rang 67 (68) 13 Rang 104 35 Cn L Jour 595 (FL) *Scott v Emperor*

1 (75) 1 Bom 232 (236) *Reg v Lala Bhas Gopal Das* Note 2

2 (1865) 1 Suth W R Cr 2 (2) *In re Bharat Chandra Christian*

1 (33) 20 AIR 1933 Nag 136 (147) 31 Cn L Jour 505 Note 3

1 (33) 20 AIR 1933 Nag 136 (147) 31 Cn L Jour 505 29 Nag L R 251 *Reg v Emperor* Note 4

under this section is maintainable before first juror is empanelled))

Note 5

1 (14) 21 AIR 1934 Pat 200 (201) 13 Pat 177 35 Cn L Jour 827, *Guthrie v. Emperor*

(b) if in any other case a Judge of the High Court so directs, the jurors shall be chosen from the special jury list hereinafter prescribed, and

fourthly, in any district for which the "[Provincial Government] has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in section 325.

a Substituted by A O for 'Local Government'

Synopsis

- | | |
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| 1 Legislative changes
2 Scope of the section
3 'Shall be chosen by lot from the persons summoned to act' | 4 Deficiency of persons — Second proviso
5 Special jury
6 Defect in selecting jurors by lot.
7 High Court rules as to balloting |
|--|--|

1. **Legislative changes.** — There was no material difference between S 312 of the Code of 1861 and S 210 of the Code of 1872 corresponding to this section

Difference between the Codes of 1872 and 1882 —

A proviso corresponding to the proviso *first*, *second* and *third* of this section was added in S 276 of the Code of 1882

The words "in such manner as the High Court may from time to time by rule direct" were newly added

Difference between the Codes of 1882 and 1898 —

The last paragraph of the proviso was newly added in 1898

Amendment in 1923 —

The words "in the Presidency Towns" were substituted by the words 'in a trial before any High Court in the town which is the usual place of sitting of such High Court,' in proviso *thirdly* by the Code of Criminal Procedure (Amendment) Act 18 (XVIII) of 1923

2 **Scope of the section.** — Section 326 provides that the names of those who are to be summoned to act as jurors should be drawn by lot from among the whole body of persons who are in the list of jurors. This section provides that those again who are to try a particular case are to be similarly chosen by lot from among the persons so summoned, or, where there is a deficiency, from amongst such other persons as might be present in Court. Where a Judge fails to obtain a panel in this manner, it is his duty to postpone the trial until the requisite number of jurors has been obtained in the manner provided by law¹. The object of these provisions is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case and an accused person has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided therein to secure perfect impartiality².

This section and the following ss 277, 278 and 279 must be read together as prescribing the procedure for empanelling jurors³ the former, with all its provisos, being a

Section 276 — Note 2

870 Suba v Emperor
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 jury)

(Overruled on another

emperor (Procedure pre-

SECTION 326 IS IMPERATIVE AND IT MUST BE FOLLOWED]

Also see S 279 Note 2 and S 326 Note 5

3 (31) 18 AIR 1931 Cal 793 (794) 58 Cal 1272 33 Cri L Jour 129 Sahbai's Sheikh v Emperor,
 (33) 20 AIR 1933 All 941 (946) 56 All 210 35 Cal L Jour 669 Lala v Emperor

general section dealing with the general nature of the procedure, the details of that procedure being given in the latter.⁴ The procedure to be adopted is as follows. In the first instance a ballot should be taken from among the persons summoned under s. 32,⁵ without any preliminary enquiry as to how many of them are present, i.e., the names of the persons summoned should be drawn from the box, one by one, each after another, and called aloud as each is drawn and the accused asked whether he has any objection to such juror. If he objects, the objection should be decided and the juror either retained or rejected as the case may be. When all the names have been so drawn and a number of persons have answered to their names and accepted without objection, a deficiency in the number of persons required, if any, will become manifest. The deficiency will be the number by which the number of persons answering their names and empanelled falls short of the number of persons of which the jury should consist. At this stage, the second proviso to the section begins to operate and the Court has to exercise a discretion whether to allow persons to be chosen from among those present in Court in sufficient number to supply the deficiency, or whether to adjourn the case for a fresh jury to be summoned. If the Court decides to choose from among the persons present, the accused should be asked as each such person is chosen, whether he objects to him and after deciding the objection should proceed to choose other persons present in the same manner until the deficiency is made up.⁶

A jury not empanelled in accordance with these principles is not one constituted in accordance with the law.⁷

3. "Shall be chosen by lot from the persons summoned to act" — Sub section (2) of s. 279 indicates that the manner of choosing *by lot* provided by this section applies only to jurors attending in obedience to summons and not to persons selected from those present in Court.⁸

The Judge is not required before he draws lots to ascertain how many of the persons summoned to serve as jurors are present. If by drawing the names one by one he is able to empanel a jury of 9 in a murder case then he has done all that the law requires him to do. It does not matter that only 9 persons out of 18 summoned were present. Choosing by lot does not mean that a smaller number must be chosen from a larger number.⁹

It is desirable, if not necessary, that the Judge should, where all the jurors have been chosen by lot, specifically state that they have been so chosen by lot.¹⁰ Where one of

4 (28) 15 AIR 1928 Cal 83 (87) 55 Cal 371. 29 Cri L Jour 437 (FB), *Kedarnath v Emperor* (Per Mukerji, J.)

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(A) Also see s. 279, Note 4.

7

arnath v Emperor overruled)

401 (FB)]

(29) 16 AIR 1929 Cal 92 (93) 30 Cri L Jour 484 *Intas Mandal v Emperor*.

Note 3

1 (28) 15 AIR 1928 Pat 1 (2) 28 Cri L Jour 891 7 Pat 61, *Akbar Ali v Emperor*

(17) 4 AIR 1917 Mad 770 (771) 18 Cri L Jour 15 (16), *In re Anup Palladu* (Dissenting from 33 AIR 385 12 Cri L Jour 46)

(25) 12 AIR 1925 Cal 798 (799) 26 Cri L Jour 819, *Government of Bengal v Muchu Khan*

[See also (28) 15 AIR 1928 Cal 83 (86) 55 Cal 371 29 Cri L Jour 437 (FB), *Kedarnath v Emperor*]

Also see s. 279, Note 4.

2 (43) 30 AIR 1913 Cal 515 (519) ILR (1913) 1 Cal 522 44 Cri L Jour 483 206 Ind Cas 26 (DB).

Emperor v Kishore Khanra

3 (27) 14 AIR 1927 Nag 117 (117) 28 Cri L Jour 177, *Sonia Koshit v Emperor*

the jurors was a person who was not entitled to sit on the jury, having not been summoned, it was held that the Court was not properly constituted⁴

Where, out of the persons summoned the Court asked those who knew English to sit apart and from out of such persons chose the number required by lot, and this procedure was consented to by the Public Prosecutor and by the counsel for the accused in view of the fact that there were in the case certain documents in English and identity of handwriting was a fact in issue, it was held that the choosing having been done by lot the action of the Court in making the choice from amongst those who knew English was well within its inherent powers of ensuring a fair trial⁵

4. Deficiency of persons — Second proviso. — The word "juror" in the second proviso to the section is a general term meaning both *special* and *common* jurors and, therefore, the procedure provided therein for making up any deficiency in the number of persons summoned applies both to common as well as to special jurors called under the third and fourth provisos to the section¹ Thus, where eighteen special jurors were summoned but only five were present, it was held that it was open to the Judge to supplement the five special jurors with persons who happened to be present though they were not in the special jury list²

Where the jury, at the end of the billot, were found to be four short and four gentlemen fit to be jurors were chosen from among the by standers, it was held that the procedure adopted was correct³

As has been seen in Note 2 above, the Court has a *discretion* in case of a deficiency in the number of persons summoned, either to choose the number of jurors required from among those present and proceed with the trial, or to adjourn the trial⁴ But the persons from amongst whom the deficiency is made up must be *present in Court* Persons who are not present in Court cannot be *sent for*, for the purpose of being called as jurors and then chosen A trial with a jury consisting of persons so chosen is not a trial by a jury empanelled according to law⁵

A person is *present* within the meaning of the section if he is in the precincts of the Court building either because he has been summoned for other cases or by mere chance. It is not necessary that he should be present within the four walls of the actual court room in which the proceedings are being conducted. The intention of the Legislature is only to prevent the summoning of the individuals from the *locality* where a deficiency occurs in the number of persons summoned⁶

4 (27) 14 AIR 1927 Cal 820 (820): 29 Cr L Jour 874, *Emperor v Irjan* (The High Court did not, however, order a retrial as the verdict was in accordance with the facts of the case)

5 (30) 17 AIR 1930 Cal 437 (440): 32 Cr L Jour 455, *Mohiuddin v Emperor*.

Note 4

1 (31) 18 AIR 1931 Cal 793 (794, 795): 58 Cal 1272: 33 Cr L Jour 129, *Sahabul v Emperor*

(33) 20 AIR 1933 Cal 638 (639): 60 Cal 725: 34 Cr L Jour 1098, *Manir Sheikh v Emperor*.

[See (39) 26 A I R 1939 Sind 209 (219): 41 Cr L Jour 28: 1 L R (1940) Kar 249, *Shewaram v. Emperor*]

2. (33) 20 AIR 1933 Cal 638 (639): 60 Cal 725: 34 Cr L Jour 1098, *Manir Sheikh v Emperor*.

3 (31) 18 AIR 1931 Cal 178 (179): 32 Cr L Jour 190 (FD), *Emperor v Panchu*.

4 (28) 15 AIR 1928 Cal 83 (86): 55 Cal 371: 29 Cr L Jour 437 (FB), *Kedarnath v Emperor*

(31) 18 AIR 1931 Cal 178 (179): 32 Cr L Jour 190 (FB), *Emperor v Panchu Sheikh*

5 (39) 26 AIR 1939 Sind 209 (219): 41 Cr L Jour 28: 1 L R (1940) Kar 249, *Shewaram v. Emperor*.

(The actual presence of the potential juror in the Court is the condition of his eligibility—The fact that the person subsequently summoned may be on the special jury list is no substitute for the fact that he was not present)

(37) 24 AIR 1937 Cal 349 (390): 1 L R (1937) 2 Cal 482: 33 Cr L Jour 870, *Suba v Emperor*. (Court cannot summon jurors from town and fill up deficiency from amongst them)

(29) 16 AIR 1929 Cal 729 (729): 56 Cal 835: 31 Cr L Jour 251, *Abdali v Emperor*

(28) 15 AIR 1928 Cal 551 (552): 30 Cr L Jour 120, *Md Saghiruddin v. Emperor*

(29) 30 Cr L Jour 136 (137): 113 Ind Cas 329 (Cal), *Sadarat v Emperor*.

6. (32) 19 AIR 1932 Cal 536 (537): 59 Cal 1123: 33 Cr L Jour 694, *Israel v. Emperor*.

There is no provision in the Code by which the Court is to ascertain beforehand how many of the persons summoned to serve as jurors have attended and thus to determine the deficiency which has to be supplied. The stage at which it should be ascertained whether the persons summoned have attended or not is not reached until their names are called out for the purpose of empanelling a jury.⁷

The deficiency mentioned in the proviso refers to the deficiency in the number required to make up the quorum under S 274 and not to the deficiency in the minimum number required for drawing lots.⁸

The word 'chosen' in the proviso simply means "selected" and not "chosen by lot".⁹

5 Special jury — Provisos 3 and 4 deal with cases in which a special jury may be summoned.¹ A special juror is a person whose name has been entered in a special list of persons prepared under ss 313 and 325 such persons having been selected by reason of their possessing superior qualifications in respect of property, character or education which make them fit to serve as special jurors. Where the accused is charged with an offence punishable with death, a trial before the High Court should invariably be by a special jury. In other trials before the High Court if the Judge so directs the jurors may be chosen from the special jury list. In the undermentioned case² in which the accused was charged with an offence under section 121A of the Penal Code, the High Court allowed a special jury.

The Sind Judicial Commissioners Court (now the Chief Court of Sindh) is a High Court within the meaning of proviso 3 to this section, and a Judge of that Court exercising jurisdiction as a Sessions Court has power to direct a special jury to be empanelled under clause (h) of the proviso.³

The word "chosen" in provisos 3 and 4 means "chosen by lot" as in the substantive part of this section.⁴

6 Defect in selecting jurors by lot — There is a conflict of opinion on the question whether a defect or irregularity in the constitution of the jury, as for example in not selecting jury men by lot, is one curable by the application of S 537. On the one hand, it has been held by the High Courts of Madras¹ Nagpur² and Patna³ and the Chief Court of Oudh⁴ that it is curable under S 537. On the other hand, the High Courts of

7 (39) 26 AIR 1939 Sind 209 (219) 41 Cri L Jour 28 ILR (1940) Kar 249, *Shewaram v Emperor* (A deficiency is only apparent after names of all those summoned and present have been exhausted by chances of lottery and challenge)

(33) 20 AIR 1933 All 941 (946) 56 All 210 35 Cri L Jour 668 *Lala v Emperor*

8 (33) 20 AIR 1933 All 941 (946 947) 56 All 210 35 Cri L Jour 668 *Lala v Emperor*

9 (33) 20 AIR 1933 All 941 (947) 56 All 210 35 Cri L Jour 668 *Lala v Emperor*

(17) 4 AIR 1917 Mad 770 (771) 18 Cri L Jour 15 *In re Anape Palladu*

Note 5

1 (08) 8 Cri L Jour 281 (297) 10 Bom L R 848 *Emperor v Bal Gangadhar Tilak*

2 (28) 15 AIR 1928 Bom 74 (74) 29 Cri L Jour 411 *Emperor v Phillip Spratt*

3 (39) 26 AIR 1939 Sind 209 (218) 41 Cri L Jour 28 I L R (1940) Kar 249 *Shewaram v Emperor* (Reference to S 276 in S 266 is to the substantive part of S 276 and not to the provisos)

4 (39) 26 AIR 1939 Sind 209 (219) 41 Cri L Jour 28 I L R (1940) Kar 249 *Shewaram v Emperor*

Note 6

1 (17) 4 AIR 1917 Mad 770 (771) 18 Cri L Jour 15 *In re Anape Palladu*

2 (27) 14 AIR 1927 Nag 117 (117) 28 Cri L Jour 177 *Sonia Kishit v Emperor*

3 (28) 15 AIR 1928 Pat 1 (2) 28 Cri L Jour 881 7 Pat 61 *Albar Ali v Emperor*

[See also (41) 28 AIR 1941 Pat 362 (364 365) 195 Ind Cas 107 *Bakhori Gope v Abdul Halim* (When the procedure of choosing the jury has been in accordance with the statute the manner in which the jury were constituted will not be a ground for interference in revision Court having discretion to summon fresh set of jurors — His not doing so is no ground for revision)]

[But see (28) 15 AIR 1928 Pat 31 (34) 28 Cri L Jour 843 7 Pat 50 *Tajali Mian v Emperor*]

4 (29) 16 AIR 1929 Oudh 154 (155) 30 Cri L Jour 384 *Ram Adhin v Emperor*

Allahabad⁵ and Calcutta⁶ and the Judicial Commissioner's Court of Sind⁷ have taken a contrary view on the ground that an irregularity in the constitution of the jury affects the constitution of the Court and its competence. It is submitted that the latter view is preferable.

It has been held that an objection as to the constitution of the jury under S 274⁸ or as to any defect or irregularity in the constitution of the jury under this section⁹ cannot be taken for the first time in appeal. It is submitted that this view is open to criticism. If the objection is one which affects the very constitution of the Court, it must be one affecting the jurisdiction of the Court itself, and, under general principles of law, can be raised at any time.¹⁰

The Calcutta High Court¹¹ has held that in a murder case the proper time for taking objection that it is practicable to obtain nine persons for the jury is at the time when the jury is being empanelled. If the accused desires to make a substantial objection on this ground in appeal, his petition should indicate that at least there are materials to substantiate his case that it was so practicable. It is also desirable that the attention of the Court should be drawn to this matter when the application for admission of appeal is moved in order that if necessary an explanation may be obtained from the trial Judge.

7 High Court rules as to balloting — See the undermentioned case¹

277.* (1) As each juror is chosen, his name shall be called aloud, and upon his appearance, the accused shall be asked if he objects to be tried by such juror

Names of jurors
to be called

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated

Objection without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged

* 1882 S 277, 1872 S 243, 1861 S 343

- 5 (11) 33 All 395 (397) 9 Ind Cas 278 12 Cri L Jour 46 *Bradshaw v Emperor*
6 (37) 24 AIR 1937 Cal 399 (390) 1 L R (1937) 2 Cal 492 38 Cri L Jour 870 *Suba v Emperor* (High Court in appeal ordered retrial)
7 (27) 14 AIR 1927 Cal 212 (243) 28 Cri L Jour 194 *Bholanath v Emperor* (Overruled on another point in AIR 1928 Cal 83 55 Cal 371 29 Cri L Jour 437 (FD))
[See (29) 16 AIR 1929 Cal 728 (729) 56 Cal 835 31 Cri L Jour 291 *Emperor v Abodal Fakir* (Retrial was ordered)]
[See also (43) 30 AIR 1943 Cal 515 (519) 44 Cri L Jour 493 1 L R (1943) 1 Cal 522 206 Ind Cas 26 (DB) *Emperor v Kishore Khanra* (Empanelling jury of seven persons in murder case when it was practicable to empanel jury of nine)]
[But see (82) 8 Cal 739 (747) 12 Cal L Rep 233 *Empress v Jhubboo Walton*]
7 (39) 26 AIR 1939 Sind 209 (220) 41 Cri L Jour 29 1 L R (1940) Ear 219 *Shewaram v Emperor*
8 (32) 19 AIR 1932 Cal 750 (751) 33 Cri L Jour 869 *Superintendent and Remembrancer of Legal Affairs Bengal v Ajit Munshi*
(30) 17 AIR 1930 Cal 91 (91) 57 Cal 1062 *Superintendent and Remembrancer of Legal Affairs*

Pat 61 Akbar Ali v Emperor
re Anpe Palladu

1 L R (1913) 1 Cal 512 206 Ind Cas 16 (DB)

Emperor v Kishore Khanra

[See (29) 16 AIR 1929 Cal 92 (93) 30 Cri L Jour 484 *Intas Mandal v Emperor*]

11 (45) 32 AIR 1945 Cal 467 (469) 1 L R (1944) 2 Cal 30 (DB) *Asgar Ali v Emperor*

Note 7

1. (76) 1 Bom 462 (465) *Peg v Nath Das* (Case under S 33 of Act 10 of 1870)

1 Legislative changes (*Omitted*)

2 Scope of the section — The names of the jurors chosen should be called out and the objection of the accused to such persons taken. The Court cannot before the names are so called send away the persons summoned merely on their own representation that they were relations of the accused¹

3 Failure to object — Effect of — See Note 1 on Section 28

4 Defect in choosing jury — See Note 6 on Section 276

278.* Any objection taken to a juror on any of the following grounds if made out to the satisfaction of the Court shall be allowed —

- (a) some presumed or actual partiality in the juror,
- (b) some personal ground, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty one or above the age of sixty years,
- (c) his having by habit or religious vows relinquished all care of worldly affairs,
- (d) his holding any office in or under the Court,
- (e) his executing any duties of police or being entrusted with police duties,
- (f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury,
- (g) his inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted,
- (h) any other circumstance which, in the opinion of the Court, renders him improper as a juror

Synopsis

1 Legislative changes

2 Objection as to partiality — Clause (a)

3 Inability to understand language — Clause (g)

4 Failure to object — Effect of

1 Legislative changes (*Omitted*)

2 Objection as to partiality — Clause (a) — Where a juror who was the head master of a school of one X was alleged to be an acquaintance of the Public Prosecutor who was alleged to be the retained pleader of the estate of the said X the accused himself having nothing to do with X it was held that that fact was not a valid ground of objection within the meaning of this section.¹ But where it appeared that there was litigation pending between the accused's master and another person whose agent the juror was it was held that the facts gave a ground for presumed partiality in the juror.²

3 Inability to understand language — Clause (g) — Inability to understand the language in which the evidence is given or when such evidence is interpreted the language in which it is interpreted is a valid ground of objection. The effect of the incompetence of

* 1882 S 278 1872 Ss 244 245 405 1861 Ss 334 344 345

the juror on this ground is to deny to the accused an essential part of the protection accorded to him by law¹ See also S 237, Note 16

4 Failure to object — Effect of. — The objection to each juror must be raised upon his appearance in obedience to the call made under s 277. A failure to object to a juror at that time would amount to a waiver² and if the trial proceeds the constitution of the jury cannot be assailed later on³

In *Ras Behari Lal v Emperor*,⁴ a juror had been empanelled and joined in a verdict of guilty who could not understand the language in which the evidence was given. Such inability was unknown to the accused until after the event. In these circumstances, their Lordships of the Privy Council held that there was a grave injustice or a "scandal and perversion of justice". Accordingly the conviction was set aside and the Crown was left to take such course as to a new trial as the law would allow. In *Alexander Kennedy v The King*⁵ an objection was raised to certain members of the jury on the ground of actual or presumed partiality, but the objection was not raised at the time when the jury was empanelled because the accused was not aware of the facts at that time. It was contended on the authority of *Ras Behari Lal's case* that in such cases the objection should be given effect to and that the conviction should be quashed. This contention was rejected by the Privy Council which observed as follows:

'Their Lordships see nothing in that decision (*Ras Behari Lal's case*) to warrant the wide proposition contended for that in every case in which there was material for a successful challenge and it was not made for excusable reasons an adverse verdict should be set aside

Decision on objection **279. (1)** Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons against whom objections and chosen in manner provided by section 276, or object on allowed if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury

Provided that no objection to such juror or other person is taken under section 278 and allowed

Synopsis

- 1 Legislative changes
- 2 Scope and object of the section
- 3 Objection to a juror — Decision on
- 4 Procedure on allowing objection to juror — Sub-section (2)

* 1882 S 279, 1872 S 243 1861 S 342

Note 3

1 (37) 24 AIR 1937 P C 108 (113) 38 Cr L Jour 503 (P C), *Alexander v The King*
(33) 20 AIR 1933 P C 204 (209) 34 Cr L Jour 813 (814) 12 Pat 811 60 Ind App 354 (PC) *Ras Behari Lal v Emperor* (In this case one of the jurors did not know sufficient English to follow the address of the lawyers and Judge's charge or the English evidence — Held there was miscarriage of justice)

Note 4

1 (17) 4 AIR 1917 Mad 770 (770 771) 18 Cr L Jour 15 (15 16) *In re Anisip Palladu*
2 (20) 10 AIR 1902 Cal 100 (100 101) *Jitendra Mohan Emperor*

60 I A 304 (1 C) (Reversing AIR

4 (37) 24 AIR 1937 P C 108 (113) 38 Cr L Jour 503 (P C)

1 **Legislative changes** — The word recorded in sub-s. (1) of the section was not present in the Code of 1861 or of 1872. It was introduced in S 279 of the Code of 1892.

2 **Scope and object of the section** — As has been seen in the Notes on S 276 the object of ss. 276 to 279 is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case¹.

Section 276 is a general section dealing with the general nature of the procedure. The details of that procedure are given in ss. 277 to 279². Sub-section (2) of this section deals with a case where there is no effective lot owing to absence or objection or both and it provides how the number is to be completed³. It contemplates the possibility of a person not in the jury list being chosen to serve on the jury in case of emergency⁴.

3 **Objection to a juror — Decision on** — Every objection taken to a juror must be *decided* by the Court and it should make a *record* of such decision¹. Where an objection on any of the grounds (a) to (g) of S 278 is made out to the satisfaction of the Court it shall be allowed. An objection on the ground of *any other circumstance* will be allowed only when *in the opinion of the Court* such circumstance renders the juror improper to act as such². The Court has a wide discretion in the matter of accepting or overruling objections and in this respect its decision is final³. Thus where an objection being taken as to the presumed or actual partiality in a juror the Court decides that no such partiality has been made out that decision is absolutely final and cannot be challenged on appeal⁴. If however the Court finds that such partiality has been made out but in spite of that finding the Court overrules the objection the decision may, according to the undermentioned case⁵, perhaps be challenged in appeal.

4 **Procedure on allowing objection to juror** — Sub-section (2) — Where an objection to a juror is allowed his place should be supplied by any other juror attending in obedience to a summons and chosen in the manner provided by S 276 i.e. *by lot*. If no such juror is present his place should be supplied by any other person present in Court whose name is on the jury list or whom the Court considers a proper person to serve on the jury subject to a successful objection as stated in the proviso¹. This latter selection need not, as has been seen in the Notes on S 26 be *by lot*² though it must only

Section 279 — Note 2

1 (193) 7 Cal W N 188 (19) *Brojendra Lal Sarkar v Emperor*

(27) 14 AIR 1907 Cal 787 (790) 28 Cr L Jour 889 *Rosonali v Emperor*

Also see S 276 Note 2 and S 36 Note 5

2 (28) 15 AIR 1908 Cal 83 (87) 55 Cal 371 29 Cr L Jour 437 (FB) *Kedarnath Mahlo v Emperor*

3 (28) 15 AIR 1908 Pat 1 (2) 6) 7 Pat 61 28 Cr L Jour 881 *Albar Ali v Emperor*

4 (25) 12 AIR 1925 Cal 798 (799) 26 Cr L Jour 819 *Gout of Bengal v Muelu Khan*

Note 3

1 (1865) 3 South W R Cr Cr 1 (1) (The name of objector and nature of object on also should be recorded)

2 (71) 16 South W R Cr 56 (56) *Empress v Krishnachuran* (Objection under cl 3 of S 344 of the Code of 1861)

(81) 7 Cal 49 (46) 8 Cal L Rep 273 *In the matter of Rochva Molato* (Being a clerk in magistrate's office — No disqualification on for sitting as a juror)

3 (38) 25 AIR 1938 Nag 398 (334) 1 L R (1938) Nag 516 39 Cr L Jour 818 *In re Surajpalsingh*

(An objection that a juror is not an European British subject is an objection under S 278 Cr P C

79 (1))

1 (192) 15 AIR 1908 Cal 182 (85) 55 Cal 371

Emperor
ngh

be from among the persons *present*³ A requisition of persons from outside for the purpose of choosing jurors is not legal⁴ See also Notes on Section 276

280. (1) When the jurors have been chosen, they shall appoint Foreman of jury one of their number to be foreman.

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court

1 Legislative changes (*Omitted*)

2 Foreman — To deliver the verdict of the jury — Where, in a trial by jury, some of the accused were acquitted and some convicted and it was found that the foreman of the jury had taken a bribe in connexion with the same trial it was held that the verdict of the jury could not be sustained and that the conviction should be set aside¹

It has been held that where the verdict has been set aside on appeal and the case remanded for retrial and the jury empanelled on the second occasion has included the foreman of the jury at the former trial the case should not proceed by simply discharging this juror and substituting in his place another person The proceedings should be held before an entirely new jury²

281.† When the foreman has been appointed, the jurors shall be Swearing of jurors sworn under the Indian Oaths Act, 1873.

1. Legislative changes — There was no provision for swearing the jury in the Code of 1861 or of 1872¹ It was first introduced in the Code of 1882

2. Indian Oaths Act, 1873 — Omission of jury to be sworn — Section 5, clause (c) of the Oaths Act, 1873, enacts that oaths and affirmations shall be made by jurors But an omission on the part of a juror to do so would not invalidate the proceedings¹ See section 13 of that Act

3 Form of oath. — The form of oath is prescribed by the several High Courts under Section 7 of the Oaths Act 1873

* 1882 S 280, 1872 S 246 1861 S 346

† 1882 S 281, 1872 and 1861 — Nil

(27) 14 AIR 1927 Cal 787 (791) 28 Cri L Jour 889 *Rosonath v Emperor* (Overruled on another point in AIR 1928 Cal 83 55 Cal 371 29 Cri L Jour 437 (FB))

(28) 15 AIR 1928 Cal 83 (85 87) 55 Cal 371 29 Cri L Jour 437 (1 B) *Kedarnath Mahto v Emperor*

(17) 4 AIR 1917 Mad 770 (771) 18 Cri L Jour 15 (16) *In re Aniso Palladu*

3 (39) 26 AIR 1937 Sind 203 (219 220) 41 Cri L Jour 28 1 L R (1940) Kar 249, *Shewaram v Emperor* (Sub-section (2) especially provides for the selection of a person on the jury list not summoned but present)

4 (29) 16 AIR 1929 Cal 728 (729) 56 Cal 835 31 Cri L Jour 261 *Abdali Fahir v Emperor* (Retrial ordered where person in special jury list was requisitioned)

Section 280 — Note 2

1. (33) 20 AIR 1933 Cal 639 (640) 60 Cal 751 34 Cri L Jour 1072 *Hafis Molla v Emperor*

2. (41) 29 AIR 1911 Cal 323 (329) 42 Cri L Jour 674 195 Ind Cas 117 (DB) *Salamatullah v Emperor*

Section 281 — Note 1

1 (1864) 3 Bom H C R Cr Cas 56 (57) *Leg v Lakshman I amchandra*

Note 2

1. (73) 20 Satb W R Cr 19 (20) *Queen v Iamsodoy Chuckerbutty*

282.* (1) If, in the course of a trial by jury at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

(2) In each of such cases the trial shall commence anew.

Synopsis

1. Legislative changes.
- 1a Scope of the section
- 2 Inherent power of Court to discharge jury.
3. "Is prevented from attending throughout the trial"
- 4 "The trial shall commence anew."

NOTE to the Synopsis See the Notes indicated for the following topics :

Postponement or discharge of jury—Discretion See Note 3

"Sufficient cause"—

Misconduct of jury See Note 2.

Non-appearance of witness, See Note 2

Subsequent discovery of deafness or dumbness of juror See Note 4

Expression of views beforehand See Note 2

1. Legislative changes. — The provision as to the adding of a new juror when "any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted" did not exist in the corresponding sections of the Codes of 1861 and 1872 but was newly added in the Code of 1882

1a. Scope of the section. — This section is limited to cases where a jury has been properly empanelled at the outset and one or more of the casualties which are bound to occur sometimes in human lives has in fact occurred. Sub section (2) of this section also contemplates the addition of a juror after the trial of the case has begun and not before¹

2. Inherent power of Court to discharge jury.—The Code provides for the discharge of the jury only in the following cases

- (1) Under this section when in the course of the trial a juror is absent, or is unable to attend, or does not understand the language of the proceedings.
- (2) Under s 283 when the prisoner becomes incapable of remaining at the bar
- (3) Under s 305 where, in trials before the High Court, the Judge disagrees with the opinion of the majority of the jury

But the said sections are not exhaustive of all the circumstances under which a jury may be discharged. In a case which obviously demands interference but which is not within those for which the Code specifically provides, the Court has an *inherent power* to make such order as the ends of justice require¹. Thus, a Judge may discharge a jury on

¹ 1882 : S 282, 1872 S 254, 1861 : S 350

Section 282 — Note 1a

1 ('39) 26 AIR 1939 Sind 209 (220) : 41 Cr L Jour 28 ILR (1940) Kar 219, *Sheuaram v Emperor*

Note 2

juror that

Emperor (Suspicion

the ground that a juror has *misconducted* himself during the trial,² or on the ground that the Judge finds reason for doubting the impartiality of the jury.³ The power should not, however, be exercised lightly nor until the Judge has satisfied himself by judicial inquiry that reasonable grounds exist for exercising such a right.⁴ But the Judge is not bound to hold an inquiry whenever a juror is alleged to have misconducted himself. The question whether the Judge should or should not hold an inquiry is a matter within his discretion.⁵ The Judge has undoubted jurisdiction for the purposes of such inquiry to call upon persons to appear before him to administer oath to them and to require them to give evidence.⁶ A juror may be guilty of misconduct where he is found talking to the Court Inspector when the case is called on for hearing⁷ or where during the progress of the trial he talks to persons connected with the accused or discusses the case which is being tried before him.⁸ A mere expression of opinion to a friend in a private conversation will not, however, be a ground for discharging the jury.⁹ Nor can the jury be discharged merely because a witness for the defence does not attend and a postponement of the case is asked for.¹⁰

Where the foreman of the jury gave out the verdict in Court after the prosecution evidence was over and before the defence evidence was let in it was held in the under mentioned case¹¹ that the Judge had no power to discharge the jury and that he should have proceeded with the trial after explaining to the jury their error in not waiting until all the evidence was over. In a somewhat similar case in the Calcutta High Court, the Advocate General was allowed to enter a *nolle prosequi* under s 333 and the difficulty was thus got over.¹²

Where a juror is found guilty of misconduct during trial the Judge is, however, not bound to discharge the whole jury. He may deal with the matter on the analogy of

- 2 (23) 10 AIR 1973 Cal 724 (724) 50 Cal 573 21 Cri L Jour 677 *Rahim Sheikh v King Emperor* (Jury may be discharged on the ground of necessity also)
 (37) 24 AIR 1937 Pat 369 (371) 16 Pat 8 38 Cri L Jour 777 *Bipat Gope v Emperor*
 (24) 11 AIR 1924 Cal 323 (326) 51 Cal 418 25 Cri L Jour 776 *Mamfru v Emperor* (Obiter)
 (34) 21 AIR 1934 Cal 428 (429) 61 Cal 498 35 Cri L Jour 941 *Nagan Kundu v Emperor* (There is inherent power to discharge for other similar sufficient cause also)
 3 (37) 24 AIR 1937 Pat 369 (372) 16 Pat 8 38 Cri L Jour 777 *Bipat Gope v Emperor* (Inherent power of Sessions Judge to discharge jury is not confined to cases of misconduct only)
 4 (23) 10 AIR 1973 Cal 724 (724) 50 Cal 872 24 Cri L Jour 877 *Rahim Sheikh v King Emperor*
 (24) 11 AIR 1924 Cal 323 (327) 51 Cal 418 25 Cri L Jour 778 *Mamfru v Emperor* (Misconduct must be established by what is regarded as evidence in the eye of the law)
 (29) 16 AIR 1929 Cal 343 (345) 56 Cal 1039 31 Cri L Jour 366 *Abdur Rashid v Emperor*
 [See also (25) 12 AIR 1925 Cal 729 (731) 28 Cri L Jour 1009 *Jessarai v Emperor* (No reasonable grounds proved—Court refused to discharge jury)]
 5 (36) 23 AIR 1936 Oudh 268 (269) 37 Cri L Jour 749 12 Luck 170 *Bindeshi v Emperor* (Vague allegations against juror unsupported by affidavit—Contents of application making allegations found not true—Refusal to hold inquiry—Held Judge exercised proper discretion in refusing inquiry)
 6 (27) 14 AIR 1917 Cal 678 (629) 5 Cal 279 28 Cri L Jour 783 *Bhuban v Emperor*
 7 (29) 16 AIR 1929 Cal 343 (345) 56 Cal 1039 31 Cri L Jour 366 *Abdur Rashid v Emperor* (Fore-

expressing out
 and in full and

- [See (36) 23 AIR 1936 Oudh 268 (269) 37 Cri L Jour 749 12 Luck 170 *Bindeshi v Emperor* (If an accused person before the jury is found in discharge of the jury

9 and Foreman/Recorder of Legal stage but was detected and

(Verdict was returned in reply to the question put

282.* (1) If, in the course of a trial by jury at any time before the return of the verdict, any juror, from any sufficient cause is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance or if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added or the jury shall be discharged and a new jury chosen

(2) In each of such cases the trial shall commence anew

Synopsis

1 Legislative changes

1a Scope of the section

2 Inherent power of Court to discharge jury

3 Is prevented from attending throughout the trial

4 The trial shall commence anew

NOTE to the Synopsis See the Notes indicated for the following topics

Postponement or discharge of jury—Discretion See Note 3

Sufficient cause —

Misconduct of jury See Note 2

Non-appearance of witness See Note 2

Subsequent discovery of deafness or dumbness of juror See Note 4

Expression of views beforehand See Note 2

1 Legislative changes — The provision as to the adding of a new juror when any juror is unable to understand the language in which the evidence is given or when such evidence is interpreted the language in which it is interpreted did not exist in the corresponding sections of the Codes of 1861 and 1872 but was newly added in the Code of 1882.

1a Scope of the section — This section is limited to cases where a jury has been properly empanelled at the outset and one or more of the casualties which are bound to occur sometimes in human lives has in fact occurred. Sub-section (2) of this section also contemplates the addition of a juror after the trial of the case has begun and not before.¹

2 Inherent power of Court to discharge jury — The Code provides for the discharge of the jury only in the following cases

(1) Under this section when in the course of the trial a juror is absent or is unable to attend or does not understand the language of the proceedings

(2) Under s 283 when the prisoner becomes incapable of remaining at the bar

(3) Under s 305 where in trials before the High Court the Judge disagrees with the opinion of the majority of the jury

But the said sections are not exhaustive of all the circumstances under which a jury may be discharged. In a case which obviously demands interference but which is not within those for which the Code specifically provides the Court has an *inherent power* to make such order as the ends of justice require.¹ Thus a Judge may discharge a jury on

* 1882 S 282 1872 S 254 1861 S 350

Section 282 — Note 1a

1 (39) 26 AIR 1939 Sind 709 (1939) 41 Cr L Jour 28 ILR (1910) Ear 719 *Sivaram v Emperor*

Note 2

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the ground that a juror has *misconducted* himself during the trial² or on the ground that the Judge finds reason for doubting the impartiality of the jury³. The power should not however be exercised lightly nor until the Judge has satisfied himself by judicial inquiry that reasonable grounds exist for exercising such a right⁴. But the Judge is not bound to hold an inquiry whenever a juror is alleged to have misconducted himself. The question whether the Judge should or should not hold an inquiry is a matter within his discretion⁵. The Judge has undoubted jurisdiction for the purposes of such inquiry to call upon persons to appear before him to administer oath to them and to require them to give evidence⁶. A juror may be guilty of misconduct where he is found talking to the Court Inspector when the case is called on for hearing⁷ or where during the progress of the trial he talks to persons connected with the accused or discusses the case while it is being tried before him⁸. A mere expression of opinion to a friend in a private conversation will not however be a ground for discharging the jury⁹. Nor can the jury be discharged merely because a witness for the defence does not attend and a postponement of the case is asked for¹⁰.

Where the foreman of the jury gave out the verdict in Court after the prosecution evidence was over and before the defence evidence was let in it was held in the under mentioned case¹¹ that the Judge had no power to discharge the jury and that he should have proceeded with the trial after explaining to the jury their error in not waiting until all the evidence was over. In a somewhat similar case in the Calcutta High Court the Advocate General was allowed to enter a *nolle prosequi* under S 333 and the difficulty was thus got over¹².

Where a juror is found guilty of misconduct during trial the Judge is however not bound to discharge the *whole* jury. He may deal with the matter on the analogy of

- 2 (33) 10 AIR 1923 Cal 724 (724) 50 Cal 872 24 Cr L Jour 677 *Pahim Sleikh v King Emperor* (Jury may be discharged on the ground of necessity also)
- (37) 24 AIR 1937 Pat 369 (371) 16 Pat 8 38 Cr L Jour 777 *Bipat Gope v Emperor*
- (24) 11 AIR 1924 Cal 323 (326) 51 Cal 418 25 Cr L Jour 776 *Mamfru v Emperor* (Obter)
- (34) 21 AIR 1934 Cal 498 (499) 51 Cal 498 35 Cr L Jour 941 *Nagan Kundu v Emperor* (There is inherent power to discharge for other similar sufficient cause also)
- 3 (37) 24 AIR 1937 Pat 369 (372) 16 Pat 6 38 Cr L Jour 777 *Bipat Gope v Emperor* (Inherent power of Sessions Judge to discharge jury is not confined to cases of misconduct only)
- 4 (33) 10 AIR 1923 Cal 724 (724) 50 Cal 872 24 Cr L Jour 677 *Pahim Sleikh v King Emperor*
- (34) 11 AIR 1924 Cal 323 (327) 51 Cal 418 25 Cr L Jour 776 *Mamfru v Emperor* (Misconduct must be established by what is regarded as evidence in the eye of the law)
- (29) 16 AIR 1929 Cal 343 (345) 56 Cal 1032 31 Cr L Jour 366 *Abdur Pashid v Emperor* [See also (20) 12 AIR 1925 Cal 729 (731) 26 Cr L Jour 1009 *Jessarat v Emperor* (No reasonable grounds proved—Court refused to discharge jury)]
- 5 (36) 23 AIR 1936 Oudh 268 (269) 37 Cr L Jour 749 12 Luck 170 *Dundesht v Emperor* (Vague allegations against juror unsupported by affidavit—Contents of application on making allegations found not true—Refusal to hold inquiry—Held Judge exercised proper discretion in refusing inquiry)
- 6 (27) 14 AIR 1917 Cal 628 (629) 55 Cal 279 29 Cr L Jour 783 *Bhuban v Emperor* (Foreman v Emperor (Foreman expressed opinion out of Court in full and in presence of the accused person before the jury was used in discharging the jury)
- 7 *Remembrancer of Legal*
- 8 *stage but was detected and*
- 9 *brought to the notice of Court at the end of trial)*
- 10 *was returned in reply to the question put*

282.* (1) If, in the course of a trial by jury at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

(2) In each of such cases the trial shall commence anew.

Synopsis

1. Legislative changes.
- 1a Scope of the section.
- 2 Inherent power of Court to discharge jury.
- 3 "Is prevented from attending throughout the trial"
- 4 "The trial shall commence anew."

NOTE to the Synopsis. See the Notes indicated for the following topics:

Postponement or discharge of jury.—Discretion See Note 3

"Sufficient cause"—

Misconduct of jury See Note 2.

Non-appearance of witnesses. See Note 2

Subsequent discovery of deafness or dumbness of juror See Note 4

Expression of views beforehand See Note 2

1. Legislative changes. — The provision as to the adding of a new juror when "any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted" did not exist in the corresponding sections of the Codes of 1861 and 1872 but was newly added in the Code of 1882.

1a. Scope of the section. — This section is limited to cases where a jury has been properly empanelled at the outset and one or more of the casualties which are bound to occur sometimes in human lives has in fact occurred. Sub section (2) of this section also contemplates the addition of a juror after the trial of the case has begun and not before.¹

2. Inherent power of Court to discharge jury.—The Code provides for the discharge of the jury only in the following cases

- (1) Under this section when in the course of the trial a juror is absent, or is unable to attend, or does not understand the language of the proceedings.
- (2) Under s 283 when the prisoner becomes incapable of remaining at the bar
- (3) Under s 305 where, in trials before the High Court, the Judge disagrees with the opinion of the majority of the jury

But the said sections are not exhaustive of all the circumstances under which a jury may be discharged. In a case which obviously demands interference but which is not within those for which the Code specifically provides, the Court has an *inherent power* to make such order as the ends of justice require.¹ Thus, a Judge may discharge a jury on

¹ 1882 : S 282, 1872 S 254, 1861 : S 350.

Section 282 — Note 1a

1. (1939) 26 AIR 1939 Sind 209 (220) 41 Cr L Jour 28 ILR (1940) Kar 219, *Shewaram v Emperor*

Note 2

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ark by juror that
peror. (Suspension

in the mind of Public Prosecutor against some of the jurors is no ground for discharge)

the ground that a juror has *misconducted* himself during the trial² or on the ground that the Judge finds reason for doubting the impartiality of the jury³ The power should not, however, be exercised lightly nor until the Judge has satisfied himself by judicial *inquiry* that reasonable grounds exist for exercising such a right⁴ But the Judge is not bound to hold an inquiry whenever a juror is alleged to have misconducted himself The question whether the Judge should or should not hold an inquiry is a matter within his discretion⁵ The Judge has undoubted jurisdiction for the purposes of such inquiry to call upon persons to appear before him to administer oath to them and to require them to give evidence⁶ A juror may be guilty of misconduct where he is found talking to the Court Inspector when the case is called on for hearing⁷ or where during the progress of the trial he talks to persons connected with the accused or discusses the case which is being tried before him⁸ A mere expression of opinion to a friend in a private conversation will not however be a ground for discharging the jury⁹ Nor can the jury be discharged merely because a witness for the defence does not attend and a postponement of the case is asked for¹⁰

Where the foreman of the jury gave out the verdict in Court after the prosecution evidence was over and before the defence evidence was let in it was held in the under mentioned case¹¹ that the Judge had no power to discharge the jury and that he should have proceeded with the trial after explaining to the jury their error in not waiting until all the evidence was over In a somewhat similar case in the Calcutta High Court, the Advocate General was allowed to enter a *nolle prosequi* under S 833 and the difficulty was thus got over¹²

Where a juror is found guilty of misconduct during trial the Judge is, however, not bound to discharge the *whole* jury He may deal with the matter on the analogy of

2 (23) 10 AIR 1913 Cal 724 (724) 50 Cal 872 21 Cri L Jour 677 *Rahim Sheikh v King Emperor* (Jury may be discharged on the ground of necessity also)

(37) 24 AIR 1937 Pat 369 (371) 18 Pat 8 39 Cri L Jour 777 *Dyap Gope v Emperor*

(24) 11 AIR 1924 Cal 323 (326) 51 Cal 418 25 Cri L Jour 778, *Mamfru v Emperor* (Obiter)

(34) 21 AIR 1931 Cal 428 (429) 61 Cal 498 35 Cri L Jour 931 *Nagan Kundu v Emperor* (There is inherent power to discharge for other similar sufficient cause also)

3 (37) 24 AIR 1937 Pat 369 (372) 18 Pat 8 38 Cri L Jour 777 *Dyap Gope v Emperor* (Inherent power of Sessions Judge to discharge jury is not confined to cases of misconduct only)

4 (23) 10 AIR 1923 Cal 724 (724) 50 Cal 872 24 Cri L Jour 677 *Rahim Sheikh v King Emperor*

(24) 11 AIR 1924 Cal 323 (327) 51 Cal 418 25 Cri L Jour 776 *Mamfru v Emperor* (Misconduct must be established by what is regarded as evidence in the eye of the law)

(29) 16 AIR 1909 Cal 343 (345) 56 Cal 1032 31 Cri L Jour 366 *Abdur Fashid v Emperor*

[See also (25) 12 AIR 1905 Cal 729 (731) 26 Cri L Jour 1009, *Jessarat v Emperor* (No reasonable grounds proved—Court refused to discharge jury)]

5 (36) 23 AIR 1936 Oudh 268 (269) 37 Cri L Jour 749 12 Luck 170 *Dindeshi v Emperor* (Vague allegations against juror unsupported by affidavit—Contents of application making allegations found not true—Refusal to hold inquiry—Held Judge exercised proper discretion in refusing inquiry)

6 (27) 14 AIR 1927 Cal 628 (629) 55 Cal 279 28 Cri L Jour 783 *Bhuban v Emperor*

7 (29) 16 AIR 1929 Cal 57 (58) 56 Cal 150 30 Cri L Jour 433 *Rebali Mohan v Emperor* (Foreman of the jury)

8 (27) 14 AIR 1927 Cal 628 (629) 55 Cal 279 28 Cri L Jour 783 *Bhuban v Emperor*

(21) 8 AIR 1911 Cal 631 (631) 23 Cri L Jour 510 *Emperor v Nasar Ali Beg* (Juror expressing out side the Court his opinion as to the guilt of the accused before the defence had been heard in full and before the case had been summed up to the jury—*De novo* trial before fresh jury ordered)

[See (36) 23 AIR 1936 Oudh 268 (269) 37 Cri L Jour 749 12 Luck 170, *Dindeshi v Emperor* (If a juror expresses his opinion clearly regarding the guilt or innocence of an accused person before the charge is delivered—*See*—*used in discharging the jury*)]

9 brought to the notice of Court at the end of trial) and remembrance of Legal stage but was detected and

10 (02) 4 Bom L R 939 (940) *In re Pularwama*

returned in reply to the question put

this section and add a new juror in place of the juror removed by choosing him from among the persons present in Court¹³

A jury can be discharged by the Judge in the exercise of his inherent power even after the verdict has been recorded¹⁴

Where an order discharging a jury in the exercise of the inherent power of a Sessions Judge is found to be unjustified the only relief that the High Court can give is to order a fresh trial before another jury¹⁵

See also Sections 296 and 300 and Notes thereon

3 "Is prevented from attending throughout the trial" — Whether a juror is prevented from attending *throughout the trial* depends, among other things, on the days during which the trial is going to take place, and whether an adjournment should be given for any length of time. There is a discretion in the Judge whether to postpone the trial to a date on which the juror should be able to attend or to discharge the jury. If the juror is able to attend in a very short time it is a wrong exercise of discretion to discharge the jury¹

4 "The trial shall commence anew" — Where a new juror is added or the jury is discharged under this section the trial must commence anew and cannot be continued from the stage at which the juror or the jury was discharged. Thus, where after the examination of some witnesses in the case a juror was found to be deaf and was consequently discharged and a new juror added it was held that the trial should have commenced anew². Similarly where in the course of a trial it appears that any juror is unable to understand the language in which evidence is given or, when such evidence is interpreted the language in which it is interpreted a new juror should be added or the jury should be discharged and a fresh jury empanelled and the trial must commence anew³

Discharge of jury in case of sickness of prisoner

283.* The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

1 Legislative changes — This provision of law was first incorporated in the Code of 1872

2 Scope of the section — See Note 2 on Section 280

D — Choosing Assessors

284.† When the trial is to be held with the aid of assessors, not less than three and, if practicable, four shall be chosen from the persons summoned to act as such

* 1882 S 283, 1872 and 1861 — Nil

† Code of 1893, original S 284

284 When the trial is to be held with the aid of assessors two or more shall be chosen, as the Assessors how chosen Judge thinks fit from the persons summoned to act as such

1882 S 284, 1872 S 239 1861 S 342

13 (29) 16 AIR 1929 Cal 57 (58) 56 Cal 150 30 Cr L Jour 435 *Rebati Mohan v Emperor* (None of the summoned jurors was present)

14 (34) 21 AIR 1934 Cal 428 (429) 61 Cal 498 35 Cr L Jour 941 *Nagen Kundu v Emperor* (Rule of English law followed as embodying a principle of justice)

15 (37) 24 AIR 1937 Pat 369 (371) 16 Pat 8 34 Cr L Jour 777 *Dipat Gope v Emperor*

Note 3

1 (27) 14 AIR 1927 Cal 199 (199 200) 28 Cr L Jour 141 *Emperor v Monmothanath*

Note 4

1 (14) 1 AIR 1914 All 91 (92) 36 All 481 15 Cr L Jour 538 *Emperor v Naram* (Although in this case statements of witnesses previously examined were read over and their admission secured)

2 (38) 25 AIR 1938 Pat 60 (62) 39 Cr L Jour 302 *Ram Babu v Emperor*

Synopsis

- | | |
|---|---|
| 1 Legislative changes
2 "Not less than three"
3 "And if practicable, four"
4 "Shall be chosen," meaning of
5 "From the persons summoned to act as such" | 6 Objections as to assessors
7 Procedure when an assessor is discovered subsequently to be interested in the case See S 245 N 1 to 6
8 Power of Appellate Court to appoint assessors
9 Effect of non-compliance with the section |
|---|---|

NOTE to the Synopsis. See the Notes indicated for the following topics

Commencement of trial with assessors. See Note 4

Qualifications of assessors. See Note 4

Record of reasons for not having four assessors. See Note 3

1 Legislative changes.

- 1 The words "two or more persons" which occurred in S 312 of the Code of 1861 were omitted in S 213 of the Code of 1872 but were re-introduced in S 281 of the Code of 1882

2 Amendment by Act 13 [XII] of 1923 —

(a) The words "not less than three and if practicable, four" have been substituted for the words "two or more"

(b) The words "as the Judge thinks fit" have been omitted.

2. "Not less than three." — Under the present section as amended in 1923, there should at least be *three* assessors. Prior to this amendment, the minimum number required was *two*. The section is imperative, and where at least the minimum number of assessors do not attend, the Court is not properly constituted and has no jurisdiction to try the case¹

3. "And if practicable, four." — Where a lesser number of assessors than four is chosen the Court should give reasons to explain the impracticability of having four. But a trial with three assessors without a record of these reasons is not irregular and does not offend against the provisions of this section¹

4. "Shall be chosen," meaning of. — This section, unlike S 276, does not prescribe that the assessors are to be chosen by lot. In fact it does not say that they ought to be chosen in any particular manner. It is not the law that the assessors must be chosen by lot. The word "chosen" does not necessarily imply that there ought to be a selection from a larger number than required for the trial¹

A mere *choosing* of assessors is not enough. They must *function* as assessors at the trial. It is only when proceedings are commenced at which assessors can give their aid, that the trial with their aid as contemplated under S 268 and this section can be said to have commenced. So where, though the required number of assessors is chosen as required by this section, some of them are discharged on some ground or other *before the trial actually starts*, and the same goes on with less than the required number of assessors, the requirements of this section are not satisfied²

Section 284 — Note 2

1 (24) 11 AIR 1924 Oudh 417 (417), *Prags v Emperor*. (Trial with two assessors after 1923, held illegal)

(24) 11 AIR 1924 Nag 287 (287). 20 Nag L R 129. 25 Cri L Jour 459, *Jairam v Emperor* (Do)
 (01) 25 Bom 694 (696). 3 Bom L R 274, *King-Emperor v* (Trial with one assessor when the minimum number required was two)

Note 3

1. (25) 12 AIR 1925 Pat 381 (382); 26 Cri L Jour

Also see Note 9

Note 4

1 (38) 25 AIR 1933 Pat 60 (62). 39 Cal

2. (91) 15 Bom 514 (515), *Queen-Er.*

5 "From the persons summoned to act as such" — As to the summoning
of assessors, see §§ 326 and 327

Where the assessors with whose aid the case was tried were chosen from the persons summoned to act as *jurors*, it was held that the trial was illegal.⁶

3 (75) 23 Suth W R Cr 35 (39) *Empress v Ram Dutt Chowdhry*
Note 5

(13) 14 Cr L Jour 654 (654) 35 All 570 21 Ind Cas 894 *Man Singh v Emperor* (Trial with the

(18) 5 AIR 1918 Pat 420 (120) 3 Pat L J 141 19 Cr L Jour 363 *Balak v Emperor*
Also see Note 9 and S 326 Note 4

1 11 2 173 21 2 2 Note 6

33 219 Ind Cas 337,

13 *Ramsiddh Rao*
219 Ind Cas 337

(92) TO ALL THE Dots THE / 110 0 3 0 - -

19 Ind Cas 510
and discharged

during examination of first witness on ground of having personal knowledge. -Owing to his disqualification it must be deemed that trial did not commence with minimum number of assessors required.)

There is no provision in the case of assessors corresponding to S 282 as in the case of jurors. Even if the principle of that section applies the fact that an assessor (who understands the language of the Court) does not understand English will not invalidate a trial unless there has been a failure to interpret in the court language evidence which had been given in English. Similarly the fact that some documents are in English which the assessor is unable to understand will not go against the competency of the assessor or the lawful constitution of the Court.³

7 Procedure when an assessor is discovered subsequently to be interested in the case

— See Section 283, Note 6

8 Power of appellate Court to appoint assessors — An appellate Court has no power to appoint the assessors for the purposes of appeal.⁴

9 Effect of non compliance with the section — The provisions of this section are *mandatory* so where a trial commences and proceeds with less than minimum number of assessors¹ or where some of the required number of assessors are appointed out of persons not summoned to act as such,² the Court is not properly constituted and the whole trial is illegal. But where an assessor summoned to appear on a particular date for the purpose of any particular case appears, only on a different date, and a different case is started with him as one of the assessors³ or where only three assessors are chosen without giving reasons for not choosing four (after the amendment in 1923)⁴ the trial is not illegal. Where a trial for murder commenced with three assessors and one of them was discharged by the Judge during the examination of the very first witness on the ground of the assessor having personal knowledge of the case, it was held that owing to this disqualification of one of the assessors the trial must be deemed to have commenced, in substance though not in fact with only two assessors.⁵

3 (38) 25 AIR 1938 Pat 60 (62-63) 39 Cri L Jour 30, *Ram Dabu v Emperor*

Note 8

1 (68) 1868 Pua Re No 17 Cr p 49, *Crow v Syed Ahmad*

Also see S 423 Note 12

Note 9

1 (24) 11 AIR 1924 Oudh 417 (417) *Pragi v Emperor* (Trial with two assessors after 1923)

(25) 12 AIR 1913 Oudh 110 (110) 27 Oudh Cas 213 26 Cri L Jour 309 *Ram Narain v Emperor* (Do)

(01) 25 Bom 694 (694) 3 Bom L R 274 *King Emperor v Jayram* (Trial with one assessor where minimum number required was two — Irregularity not cured by S 537)

r v Tirumala Reddi (Trial

o)

(91) 15 Bom 514 (515) *Queen Empress v Bastiana Alexander* (Trial with one assessor after the other though summoned has been discharged before the commencement of trial)

2 (94) 1894 All W N 207 (207) *Queen Empress v Badri* (Section 537 held inapplicable to such a case)

v Emperor

Emperor

Also see S 423 Note 4

3 (16) 3 AIR 1916 All 54 (56) 17 Cri L Jour 17 (18) *Chutla v Emperor*

4 (25) 12 AIR 1925 Pat 391 (389) 26 Cri L Jour 713 *Jamal Moaim v Emperor*

Also see Note 3

5 (42) 29 AIR 1914 All 140 (140) 43 Cri L Jour 436 I L R (1914) All 182 199 Ind Cas 510 (DB) *Sipattar Singh v Emperor* (Trial was bad)

284A. (1) In a trial with the aid of assessors of a person who has

Assessors for trial of European and Indian British subjects and others
 been found under the provisions of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or where there are several European British subjects accused or several Indian British subjects accused, all of them jointly, before the first assessor is chosen so require, all the assessors shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians

(2) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires be persons who are Europeans or Americans

a This section was newly inserted by the Criminal Law Amendment Act 12 [XII] of 1923

1 Scope of the section — See Note 1 on section 275

2. Failure to claim privilege. — See section 529B

285.† (1) If in the course of a trial with the aid of assessors, at any

Procedure when assessor is unable to attend
 time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors

(2) If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors

Synopsis

1 Legislative changes

2 Scope and applicability of the section

3 'Prevented from attending or absent themselves' — Sub section (2)

4 'Shall proceed with the aid of the other assessor or assessors'

5 All assessors absent — Sub section (2)

6 If assessor is an interested person — Procedure

NOTE to the Synopsis See the Notes indicated for the following topics

Ab entee assessor resuming See Note 4

Address after discharge of assessors See Note 5

At least one assessor to be present throughout See Note 2

Evidence after discharge of assessors See Note 5

Irregularities curable See Note 4

Irregularities not curable See Note 5

Section applies to defects after trial is begun See Note 2

Subsequent discovery of incapacity See Note 6

'Sufficient cause' See Note 6

1 Legislative changes

(1) There is no material difference between the corresponding sections of the Codes of 1861 and 1872

(2) The words prevented from attending throughout the trial which occurred in S 259 of the Code of 1872 have been substituted by the words prevented from attendance in the Codes of 1882 and 1898

* Code of 1898 S 460

460. In every case triable by jury or with the aid of assessors in which an European (not being a British subject) or an American is the accused person or one of the accused persons not less than half the number of jurors or assessors shall if practicable and if such European or American so claims be Europeans or Americans

† 1882 S 285, 1872 S 259, 1861 S 353

Jury for trial of Europeans or Americans

2 Scope and applicability of the section — This section applies only where, *in the course of a trial* an assessor is unable to attend. It contemplates the case of a trial which has commenced with the requisite number of assessors who at the commencement of the trial were capable of acting as competent assessors. It has no application to trials conducted from the start with less than the requisite number of competent assessors.¹

There must be at least one assessor attending throughout the proceedings² and this requirement is a condition precedent to the exercise of jurisdiction by the Court.³

This section constitutes an exception to S 251 and is confined in its operation to cases where the assessor himself is prevented from attending the trial by reason of infirmity or some other physical disability. It does not contemplate a case where the trial Judge himself discharges one of the assessors on the ground that he is disqualified from acting as an assessor.⁴

3 "Prevented from attending, or absent themselves" — Sub section (2) — The words "prevented from attending or absent themselves" in sub s (2) of this section should be read with sub s (1) and should be understood to mean "prevented from attending throughout the trial or absent themselves".¹

4 "Shall proceed with the aid of the other assessor or assessors" — This procedure has to be adopted only when it is *not practicable* to enforce the attendance of the absentee assessor. Where the Judge allowed one of two assessors to absent himself for one of the days of the trial and proceeded to try the case with the other assessor it was held that the Judge ought not to have proceeded with the trial but should have adjourned the trial till a day when both assessors could attend.² Where an assessor absents himself he should not be allowed to return and take part in the proceedings at a later stage.³ The reason is that when once the trial is resumed by the Judge in the absence of an assessor such assessor ceases to occupy the position of an assessor aiding at the trial.⁴ If consequently he is allowed to return and take part in the proceedings and give his opinion the procedure is not in accordance with law⁵ and is contrary to the intentions of this section and S 255.⁶ The procedure is however only an irregularity which is cured

Section 285 — Note 2

I (98) 91 All 106 (107) 1898 All W N 180 *Empress v Babu Lal* (Three assessors chosen — One found to be deaf — Trial proceeded with two — One more found to be deaf after prosecution evidence was over — Trial however proceeded — Illegal)

(91) 15 Bom 514 (515) *Queen Empress v Bastiano*

(94) 1894 All W N 207 (207) *Queen Empress v Ladri*

(01) 25 Bom 694 (696) 3 Bom I R 274 *King Emperor v Jayram*

(18) 5 AIR 1918 1st 470 (420) 3 Pat L Jour 141 19 Cri L Jour 363 *Dalak v Emperor*

(69) Weir's 3rd Edn 927 (927) *High Court Proceedings 2nd July 1869* (Where at the close of the

4 (42) 29 AIR 1942 All 140 (140) 43 Cri L Jour 486 I L R (1942) All 182 199 Ind Cas 510 (DB), *Sipattar Singh v Emperor* (When only two out of three assessors are qualified to act as such it must be deemed that the trial has not commenced with the requisite number of assessors)

Note 3

I (11) 13 All 337 (338 339) 1891 All W N 93 *Empress v Md Mahomed Khan*

Note 4

v Tirumalai

Shikdar

by s 537 unless it has occasioned a failure of justice⁶

In the case of the absence of an assessor the Judge before proceeding with the trial with the aid of remaining assessors should ascertain whether his absence was due to sufficient cause. If he proceeds with the trial without ascertaining whether his absence was due to sufficient cause and without taking steps practicable to enforce his attendance this is a material irregularity which vitiates the trial⁷

5 All assessors absent — Sub-section (2) — It has been seen already in Note 2 that for a valid trial at least one assessor must attend throughout the trial. If all the assessors are prevented from attending or no assessor is able to attend throughout the trial the proceedings should be stayed and a new trial held with the aid of fresh assessors¹. But a Sessions Judge is only authorised to record evidence in the absence of the jury or the assessors when *additional evidence* is called for by the appellate Court under s 498 sub s (3)² or by the High Court under s 375 sub s (2). Where material evidence was recorded after all the assessors were discharged it was held that such evidence was recorded *coram non jure*, — that is before a tribunal which had no authority to record it³. The same principle will apply where there was no assessor present during the address on behalf of the accused⁴. The non compliance with this sub-section affects the jurisdiction of the Court and the irregularity is therefore, not one curable under section 537⁵.

6 If assessor is an interested person — Procedure — Where it is discovered after the trial has begun in a case tried with the aid of assessors that one of them is interested or otherwise unfit to sit as an assessor, this section does not apply as the assessor is neither prevented from attending nor absents himself. In such a case the Sessions Judge should ask the High Court under s 438 to set aside the order by which the incompetent assessor was appointed as well as all the subsequent proceedings and then choose another assessor and proceed with the trial *de novo*¹. Where however, at the end of the trial one of the assessors expresses the opinion that the accused is guilty adding that he has personal knowledge of the matter there is no necessity of a *de novo* trial as the assessor cannot be said to be an interested person. The proper course for the Judge is simply to ignore the opinion of the assessor if he comes to the conclusion that it is improperly expressed or that he has been influenced by extra judicial considerations.²

- 6 (01) 24 Mad 523 (532 534) 11 Mad L Jour 241 *Emperor v Therumalai* (Davies J dissenting)
7 (46) 33 AIR 1946 All 253 (254) 1945 Oudh W N (HC) 317 (318) *Daddan v Emperor*

Note 5

- 1 (91) 13 All 337 (338) 1891 All W N 93 *Queen Empress v Ud Mahmud Khan*
2 (93) 15 All 136 (137) 1893 All W N 50 *Queen Empress v Ram Lal*
Also see S 268 Note 4 and S 428 Note 8
3 (93) 15 All 136 (137) 1893 All W N 50 *Queen Empress v Ram Lal*
(73) 5 N W P H C R 110 (112) *Queen v Cheat Ram* (Trial should not have proceeded without assessor when a material addition was made to the plea of guilty)
Also see S 268 Note 4
4 (91) 13 All 337 (339) 1891 All W N 93 *Queen Empress v Ud Mahmud Khan*
5 (93) 15 All 136 (137) 1893 All W N 50 *Queen Empress v Ram Lal* (Material evidence recorded after assessors were discharged — illegality)
Also see S 268 Note 4

Note 6

- 1 (12) 13 Cr I Jour 473 (474 475) 1891 Cr I Jour 473 — *1901 v This*
h (Interests of the State)
Ind Cas 510
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DD — Joint trials.

285A. In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian, and such European, Indian British subject or American is committed for trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of section 275 or section 284A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter.

1 Legislative changes — This section together with the heading, was inserted by the Criminal Law Amendment Act 12 (XII) of 1923

Compare ss 452 and 461 of the Code of 1857 & 212 of the Code of 1861 & 183 of the Code of 1861.

The undermentioned cases¹ under s 452 of the Code which has now been repealed are no longer of any importance

2. "And is so tried"—The words "and is so tried" in this section mean if he is in fact so tried" or if he is eventually so tried. Thus a European was accused jointly with an Indian and when they appeared for the first time before the Sessions Judge the European wanted to be tried as a European British subject and the other accused wanted to be tried jointly with him. The Sessions Judge instead of starting the proceedings under s 271 referred the matter for the orders of the High Court as it was not possible to get sufficient European jurors in the place. The High Court directed the case to be tried by another Sessions Court. The Indian accused when he appeared before the latter Court claimed to be tried separately and contended that as no trial was in progress when he had previously stated that he did not want to be tried separately he was not bound by his previous choice. The contention was held to be untenable¹

3 Failure to claim separate trial—Effect — See Sect on 528B. See also the undermentioned case¹

E — Trial to Close of Cases for Prosecution and Defence

286.* (1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

Opening case
for prosecution
Examination
of witnesses

(2) The prosecutor shall then examine his witnesses

* 1882 S 286 1872 S 247, 1881 S 364

Section 285A — Note 1

1 (90) 14 Dom 160 (162) *In re Job Solomon*
(76) 1 Dom 232 (735) *Reg v Lalubhai Gopalidas*

Note 2

1 (36) 25 AIR 1938 Nag 328 (333) 1 L R (1938) Nag 516 39 Cri L Jour 818 *Surajpalsingh v Emperor*

Note 3

1 (38) 25 AIR 1938 Nag 329 (333) 1 L R (1938) Nag 516 39 Cri L Jour 818 *Surajpalsingh v Emperor* (When an Indian accused originally wished to be jointly tried with the European accused, but when the case came before a different Sessions Court claimed to be separately tried which was not permitted and revision from this order was also dismissed held he could not in an appeal from the conviction in such trial re-agitate the claim for separate trial)

Synopsis

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|---|--|
| 1 Legislative changes. | 9 Attendance of witnesses See Section 215 |
| 2 'When the jurors or assessors have been chosen | 10 Cross examination to follow examination in chief |
| 3 'The prosecutor shall open his case' | 11. Improper examination |
| 4 'By reading' | 12 Questions by Judge, jury or assessors |
| 5 Examination of accused before opening of case | 13 Duty of prosecution |
| 6 'Shall then examine his witnesses' | 14 Trial ought not to be stopped before the close of the prosecution |
| 7 Examination must be oral | 15 Treatment of witnesses |
| 8 Using depositions given before the Magistrate see S 249 and 333 and Notes thereon | |

NOTE to the Synopsis See the Notes indicated for the following topics

Adjournment for prosecution See Note 2

Discrepancies—Opportunity to explain See Note 13

Evidence in absence of jury See Note 6

Evidence taken by another Judge See Note 2

Fresh witnesses in Session See Notes 3 and 6

Time for cross-examination See Note 6

1 **Legislative changes** — This section was first introduced in its present form by the Act of 1887 and remains unaltered in the present Code

2 **"When the jurors or assessors have been chosen"** — After the jurors are sworn the trial should proceed and cannot be postponed to enable the prosecution to examine a witness on commission¹ If after the swearing in of the jury, the Judge is unable to attend as where he falls ill suddenly the trial can proceed further before a new Judge with the same jury provided no evidence has been taken and, if taken the latter Judge does not act upon it²

3, **"The prosecutor shall open his case"** — The opening of the prosecution must always be confined to matters which are necessary to enable the jury to follow the evidence. The prosecutor will have to state all that it is proposed to prove in the case so that the jury may see if there is any discrepancy between the opening statement of the prosecutor and the evidence afterwards adduced in support thereof. It would be wholly improper for him to open any matter to the jury in respect whereof no evidence is intended to be read or can be adduced at the trial. Nor is it the stage where a doubtful question of admissibility should be raised or decided. Very great care must be taken by the prosecutor in the observations to be made to the jury and topics of prejudice connected with the character of the prisoner should be carefully excluded¹

The prosecutor should state in his opening address, who the witnesses are whom he proposes to call and who have not already been examined. Though the mere fact that a witness has not been examined before the committing Magistrate is no ground for refusing to take the evidence of a relevant witness tendered for the prosecution the examination of additional witnesses should not as a general rule be sprung as a surprise on the accused². The Court should see that the prosecution puts forward a real case from the beginning and sticks to it up to the end³

Section 256 — Note 2

1 (92) 19 Cal 113 (122) *Queen Empress v Jacob*

2 (27) 14 AIR 1927 Bom 161 (167) 23 Cr L Jour 402 *Emperor v Dorabji Pertonji*
Also see S 320 Note 2

Note 3

1 (29) 16 AIR 1929 Cal 617 (620 625) 30 Cr L Jour 993 (SD) *Padam Prasad v Emperor* (Per Rankin C J and C C Ghose J)

2 (38) 20 AIR 1938 Pat 579 (582) 40 Cr L Jour 147 *Tunf v Emperor* (Public Prosecutor should give notice to accused of new evidence in his opening address)

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463 *Dhan Deb v Emperor* (Prosecution

cannot be permitted at the last moment without notice to accused to change its ground)

A Full Bench of the High Court of Lahore has expressed an opinion in the unmentioned cases⁴ that, in accordance with the practice of the High Courts, a summary of the evidence proposed to be called should be given to the Sessions Court and the accused before the trial if a witness has not been called in the committing Magistrate's Court.

4 "By reading"—The accused is entitled to know with certainty and accuracy the exact value of the charge brought against him for unless he has such knowledge, he may be seriously prejudiced in his defence¹.

5. Examination of accused before opening of case.—Section 312 of the Code empowering the Court to examine the accused *at any stage* must be read subject to the provisions of this section. Therefore a Court should not before the prosecutor opens his case and examines his witnesses under this section examine the accused under section 311¹.

6 "Shall then examine his witnesses"—The prosecution witnesses should, as far as possible, be called to prove events in their chronological order¹. It is entirely in the discretion of the Public Prosecutor to say what witnesses he will examine and in what order. The Judge cannot dictate to the prosecution the order in which the witnesses are to

4 (36) 23 AIR 1936 Lah 533 (337) 37 Cr 1 Jour 742 17 Lah 176 (1D) *Mt Niamat v Emperor* [See also (49) 27 AIR 1943 Bom 207 (207 208) 201 Ind Cas 611 *Emperor v Mukhtiyar Khan Taja Mulkhan* (It is of course a statutory practice in criminal trials before the Sessions Court that whenever the prosecution want to call additional witnesses they should supply to the defence statements of what they are going to depose but as far as panch witnesses are concerned it is not necessary for the prosecutor to supply the statements to the defence provided copies of panchnamas have already been furnished AIR 1934 Bom 497 36 Cr L Jour 311 *rehearsal*)]

Note 4

1 (16) 3 AIR 1916 Cal 184 (192) 16 Cr 1 Jour 497 (501) 42 Cal 957 *Amritlal Hazra v Emperor* Also see S 221 Note 1 b 223 Note 1 S 230 Note 3 and S 530 Note 3

Note 5

1 (22) 9 AIR 1922 All 266 (267) 24 Cr 1 Jour 609 *Sidha v Emperor*

Note 6

1 (23) 10 AIR 1923 Cal 579 (581) *Emperor v Khairunnessa Bibi*

[See also (41) 28 AIR 1941 Rang 209 (210) 1941 Rang L R 346 107 Ind Cas 850 43 Cr L Jour 157 (DB), *Shree Pru v The King* (Public Prosecutor should be required as far as possible to examine his witnesses so as to bring out the facts in their logical sequence. Particularly the expert witnesses, such as the medical witnesses ought not to be examined at an early stage of the trial when it is impossible to realise on what points their opinion is necessary)]

2 (46) 33 AIR 1946 L C 16 (19 20) 72 Ind App 305 229 Ind Cas 273 (PC) *Malak Khan v Emperor*

(45) 32 AIR 1945 P C 42 (45) 46 Cr L Jour 391 117 Ind Cas 381 (PC) *Adel Muhammad El Dabbah v Attorney General of Palestine* (It is not necessary legally for the prosecution to call or tender all the witnesses in the list furnished. The prosecutor has a discretion as to what witnesses should be called for the prosecution and the Court will not interfere with the exercise of that discretion, unless perhaps it can be shown that the prosecution has been influenced by some oblique motive)

(38) 1938 L W N 681 (682), *Jankey Singh v Dasrath Pande* (Prosecution not bound to examine all the witnesses that could possibly have spoken on the point)

(36) 23 AIR 1936 Lah 533 (536 537) 37 Cr 1 Jour 742 17 Lah 176 (FB) *Mt Niamat v Emperor*

(36) 14 Rang 40 (48) *Nga Aung Gyi v Emperor* (Discretion must be exercised under supervision of Court and consistently with practical rules of good sense)

(94) 10 All 84 (86 87) 1894 A W N 7 (FB), *Queen Empress v Durga* (Public Prosecutor should not refuse to call a truthful witness as a witness for Crown merely because evidence of such witness might

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[See (39) 26 AIR 1939 Rang 390 (391) 41 Cr L Jour 153 *Aga Sar Kes v The King* (In exercising this discretion Public Prosecutor should bear in mind that his duty is to conduct case fairly and that he should not obtain an righteous conviction)]

be examined, though he may suggest that the proper method and order of calling the witnesses should be observed³

As a general rule, the prosecutor is bound to call all available witnesses who prove their connexion with the transaction in question and who also must be able to give important information,⁴ unless he has reasonable grounds to believe that the witness, if called, would not speak the truth, or is unnecessary,⁵ or is an accomplice⁶

3 (38) 25 AIR 1938 Rang 442 (415) 40 Cri L Jour 255, *Brahmayya v The King*. (If the Judge goes further and instructs him not to call a particular witness, this is going too far)

(23) 10 AIR 1923 Cal 579 (581, 592), *Emperor v Ahirannessa Bibi*

(04) 8 Oudh Cas 55 (56) 2 Cri L Jour 191, *Emperor v Ali Mohammad*

4 (44) 31 AIR 1914 Pesh 36 (37) 46 Cri L Jour 190 217 Ind Cas 136, *Said Ahmad v Emperor* (Eye witnesses to occurrence should be examined even though they might not be useful to the prosecution)

(41) 28 AIR 1941 Rang 209 (212) 1941 Rang L R 316 43 Cri L Jour 157 : 197 Ind Cas 350 (DB), *Shue Pru v The King* (Entries in general diary relevant for the prosecution case should be proved by the public prosecutor by calling the station writers concerned)

(38) 25 AIR 1938 Lah 176 (176) 39 Cri L Jour 410, *Bahadur Singh v Emperor* (Medical officer examined before committing Magistrate—He must also be examined before Sessions Court)

(38) 25 AIR 1938 Rang 442 (415) 40 Cri L Jour 255, *Brahmayya v The King*

v Emperor

.. ss (Such witnesses can be depen-

(85) 7 All 904 (905 906) 1895 All W N 281, *Queen Empress v. Tulla* (Material evidence excluded)

(92) 15 All 6 (7) 1892 All W N 114, *Queen Empress v Ban Khandi*

(23) 10 AIR 1923 Cal 517 (519) 50 Cal 318 25 Cri L Jour 467, *Ali Yunus v Emperor*

(15) 2 AIR 1915 Cal 515 (516) 16 Cri L Jour 170 (172) 42 Cal 422, *Ram Ranjan v Emperor* (It is duty of Prosecutor to investigate truth and not merely to support police)

(20) 7 AIR 1920 D + 222 (271) 31 Cri L Jour 13 13 D + 222 (271) 31 Cri L Jour 13

(29) 16 A *v Emperor*

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committees examining them at the

Sessions trial)

(09) 10 Cri L Jour 821 (823) 3 Ind Cas 623 (Lab), *Musammal v Emperor*.

(10) 11 Cri L Jour 410 (411) 8 Ind Cas 847 3 Sind L R 200, *Imperator v Jumo* (Two eye-witnesses withheld by prosecution)

(67) 8 Suth W R Cr 87 (90), *Queen v Nobokisto Ghose*

(32) 19 AIR 1932 Lah 500 (501) 33 Cri L Jour 497 *Lachhmi Narain v Emperor*

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tion is not bound to call all witnesses—It is open to jurors to draw adverse inferences from non examination)

(38) 25 AIR 1938 Pat 579 (581) 40 Cri L Jour 147 *Yusuf Mia v Emperor* (Sufficient and best evidence produced)

(38) 25 AIR 1938 F

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himself⁶ It is not proper to refuse to examine material witnesses on the ground that a witness may be favourable to the accused or may not be favourable to prosecution⁷ or

- (17) 24 AIR 1917 Rang 429 (470) 39 Cri L Jour 217 *Agri P. U v Emperor* (Prosecution witnesses examined at committal proceedings — Intent on of such witnesses to tell different story at Sessions trial — Such witnesses are relatives of accused — I rose it or should not call them at Sessions trial)
- (16) 14 Rang 45 (2) *Agri Tung Gyi v Emperor* (It is not the duty of the prosecution to call witnesses who are not in position to give material information in connexion with the offence or to tender such witnesses for cross-examination by the defence)
- (94) 16 All 84 (80 87) 1894 All W N 7 (110) *Queen Empress v Durga* (False or unnecessary)
- (27) 14 AIR 1927 Mad 475 (476) 28 Cri L Jour 307 *In re Mu Haya Thet in* (Do)
- (24) 11 AIR 1924 Mad 239 (240) 25 Cri L Jour 75 *Dornaswami Udyan v Emperor* (Do)
- (23) 10 AIR 1923 Lat 413 (416) 2 Lat 309 21 Cri L Jour 801 *Ranjit Thir v Emperor* (Do)
- (82) 8 Cal 121 (124 125) 10 Cal L Rep 151 *Dhanna Kasi v Empress* (False)
- (87) 7 All 904 (907) 1885 All W N 284 *Queen Empress v Tullu* (Do)
- (92) 15 All 6 (7) 1892 All W N 114 *Queen Empress v Balthanla* (Do)
- (22) 9 AIR 1922 Cal 461 (461) 49 Cal 277 23 Cri L Jour 719 *Emperor v Reed* (Do)
- (23) 10 AIR 1923 Cal 517 (519) 50 Cal 318 25 Cri L Jour 467 *Muhammad Iqbal v Emperor* (Do)
- (29) 16 AIR 1920 Pat 313 (316) 8 Pat 625 30 Cri L Jour 1136 *Maharaj Tewari v Emperor* (Do)
- (07) 3 Low Bur Rul 135 (142) *King Emperor v Maung E* (Do)
- (16) 3 AIR 1916 Lah 408 (409) 17 Cri L Jour 267 (268) 1916 Pun Ra No 12 Cr *Kauri v Emperor* (Do)
- (31) 1931 Mad W N 727 (728) *Nagarathna Tetan v Emperor* (Hostile)
- (22) 9 AIR 1922 Cal 392 (395) 49 Cal 359 24 Cri L Jour 221 *Emperor v Dhiram Das* (False)
- (30) 17 AIR 1930 Cal 131 (135) 31 Cri L Jour 918 *Nayan Mandal v Emperor* (Hostile)
- (30) 17 AIR 1930 Lah 82 (84) 31 Cri L Jour 176 *Anar Singh v Emperor* (Do)
- (86) 2 Weir 378 (379) *In re Ramaswami Goundan* (False)
- (01) 21 Mad 321 (324) 2 Weir 396 *Queen Empress v Ramaswami* (Do)
- (91) 1991 Rat 541 (587) *Queen Empress v Dhamba* (Do)
- (24) 11 AIR 1924 Lah 241 (243) 24 Cri L Jour 708 *Indar Singh v Emperor* (Unnecessary)
- (28) 15 AIR 1928 Lat 46 (48) 28 Cri L Jour 869 *Parbhu Dussadh v Emperor* (Do)
- (See (36) 23 AIR 1936 Lah 233 (233) 37 Cri L Jour 742 17 Lah 176 (176) *Mt Niamat v Emperor* (In a murder case, the fact that the prosecution witnesses are relatives of the murdered man is no valid reason for discarding their evidence — What would be of importance is that the witnesses had enmity with the accused))
- (See also (28) 29 Cri L Jour 999 (1000 1001) 112 Ind Cas 215 (216 217) (Lah) *Dahadur v Emperor* (Unnecessary))
- Also see S 208 Note 7 and S 252 Note 5
- 6 (18) 5 AIR 1918 Cal 314 (315) 19 Cri L Jour 81 *Ashraf Ali v Emperor*

(41) 28 AIR 1918 Cal 314 (315) 19 Cri L Jour 81 *Ashraf Ali v Emperor*

is based on the fact that the witness is committing Court is no reason for in the list submitted by the com-

v Emperor

should not be withheld because he happens to make some adverse statements against the prosecution)

- (36) 23 AIR 1936 P C 249 (300) 37 Cri L Jour 963 (PC) *Stephen Seneviratne v The King*
- (94) 16 All 84 (87) 1894 All W N 7 (FB) *Queen Empress v Durga*
- (20) 7 AIR 1920 Pat 366 (371) 21 Cri L Jour 33 *Brahmaddeo Singha v Emperor* (It is the duty of Prosecutor to call every witness who can throw any light on the inquiry, whether they support the prosecution theory or defence theory)

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(In a murder case where a witness has given evidence which supports a plea of alibi taken by accused the prosecution authorities have no right to take it upon themselves to decide whether a witness who gives vital evidence of this sort is or is not a reliable witness — That is the function of the Court and prosecution has no right to usurp)

that he has also been summoned by the defence,⁸ or that a serious charge is made against the witness by the accused.⁹ At the same time, the prosecution should exercise a careful discrimination and avoid the piling up of evidence, the overburdening of the record and consequent waste of time.¹⁰ There is no provision in the Code entitling the prisoner to have a witness for the prosecution who is not called, put into the witness box for cross-examination. The accused may apply to have such witness examined under § 291, if he so requires.¹¹ Nevertheless the Public Prosecutor in fairness should explain to the Court his reason for not calling his witness and offer to put him in the box for cross-examination by the accused,¹² especially where the witness is a material one and whose evidence has been relied upon by the committing Magistrate.¹³ But where the Public Prosecutor is of opinion that a witness is a false one, he need not even tender him for cross examination.¹⁴ Where any witness known to the prosecution is able to swear to facts very material to the case the practice of merely allowing him to be tendered for cross examination is not proper but he must be examined in the ordinary way as to the facts known to him.¹⁵ In undefended cases the Court should in the interests of justice test the statement of the witnesses for the prosecution by questions in the nature of cross examination.¹⁶ It cannot, however, take

[See also (42) 29 AIR 1942 Oudh 45 (47-48) 17 Luck 150 42 Cri L Jour 824 196 Ind Cas 244 *Emperor v. Gaya Dun.* (The mere possibility or even probability of the story of the eye-witnesses being untrue in some respects is not sufficient justification for withholding them. The prosecution is not acting right in withholding their evidence and producing other witnesses neither named in the charge.)

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9 (1942) 29 AIR 1942 Oudh 45 (47-48) 17 Luck 150 42 Cri L Jour 824 196 Ind Cas 244

10 (83) 20 AIR 1933 All 690 (695) 34 Cri L Jour 967 55 All 1010 *Jhabicala v. Emperor*11 (68) 5 Bom H O R Cr 85 (96) *Reg v. Latchchand*

12 (1942) 29 AIR 1942 Oudh 45 (47-48) 17 Luck 150 42 Cri L Jour 824 196 Ind Cas 244

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(22) 8 AIR 1922 Pat 535 (339) 1 Pat 401 24 Cri L Jour 129 *Chandrika Pami Kahar v. Emperor*

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evidence having
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objection to that effect later on.)

[See (45) 32 AIR 1945 P C 42 (45) 46 Cri L Jour 391 217 Ind Cas 381 (PC) *Idel Muhammad E. Dabbah v. Attorney General of Palestine* (Witnesses named by prosecution but not called by them to give evidence — Prosecution is not bound to tender such witnesses for cross-examination by defence — It is a matter within the discretion of the prosecutor though generally he should tender such witnesses.)

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16 (84) 7 All 160 (162) 1984 All W N 314, *Queen Empress v. Kallu* (Per Petheram, C J)

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upon itself the tale of a prosecutor and ask the prosecution witnesses to explain discrepancies." As to effect of non examination by the prosecution of a material witness and the inference to be drawn therefrom, see section III, illustration (g) of the Evidence Act and the undermentioned cases¹⁵

- [See also (38) 25 AIR 1915 Pat 153 (158) 31 Cri L Jour 391, *Darpan Po Piran v Emperor* (Lawyer appointed by Crown to defend a poor prisoner down his work very badly. Judge should use his greater experience to cross-examine prosecution witnesses)]
- 17 (25) 12 AIR 1925 Orlb 726 (727) 26 Cri L Jour 1216 *Siraj Singh v Emperor*
- 18 (44) 31 AIR 1916 Cal 106 (107-108) 46 Cri L Jour 220 217 Ind Cas 179 *Emperor v Mular Ali* (Prosecution failing to examine important witnesses whose statement was recorded by police under S 161 — Held such omission rendered serious doubt about good faith of prosecution evidence and inference was that its evidence was not supporting the prosecution case)
- (42) 29 AIR 1941 Pat 481 (485, 186) 21 Pat 254 13 Cri L Jour 817 202 Ind Cas 331 *Pandey Singh v Emperor* (It is not the imperative duty of the prosecutor to put in the witness box all the possible elements of an occurrence. No inference adverse to the prosecution can necessarily be drawn from its failure to do so. It is a matter dependent on the particular circumstances of each case upon the nature of evidence that was expected of a witness, the nature of the offence and the circumstances under which the witnesses have not been produced. AIR 1936 PC 269 37 Cri L Jour 963 relied on)
- (39) 25 AIR 1934 Cal 625 (626) 39 Cri L Jour 961 *Srinakshapada Dasgupta v Emperor* (It is open to the jurors to draw inference unfavourable to the prosecution for the non-examination of particular witnesses)
- (34) 32 Cri L Jour 7 (9) 171 Ind Cas 906 (Lal) *Chulam Dasul v Emperor* (If the independent witnesses who were named in the first information report are not called by the prosecution the Court is justified in a summing that their evidence will not have supported the prosecution)
- (34) 25 AIR 1934 Pat 579 (581) 40 Cri L Jour 147 *Insaf Mia v Emperor* (Effect of and inference to be drawn from absence of relevant prosecution witnesses is a matter to be considered with reference to circumstances of each particular case)
- (34) 1934 1st W N 681 (682) *Sankey Singh v Dwarath Pandey* (It is for the Court to consider whether or not the non-examination of a witness calls for an adverse inference against the prosecution — If the prosecution is content with the witnesses examined by it, it is not bound to examine all the witnesses that could have possibly spoken on any point)
- (37) 24 AIR 1937 All 182 (186) 33 Cri L Jour 401 *Francis Hector v Emperor* (Prosecution deliberately withholding evidence of witnesses who are in a position to give relevant evidence must face the inference arising from such conduct)
- (36) 23 AIR 1936 Pat 46 (48) 37 Cri L Jour 320, *Hari Mahla v Emperor* (Prosecution citing nine witnesses on certain point — Examining only three — Presumption adverse to prosecution held could not be drawn from that fact)
- (85) 7 All 904 (905, 906) 1685 All W N 284 *Queen Empress v Tulla* (Retrial ordered)
- (39) 19 AIR 1939 All 185 (186) 33 Cri L Jour 913, *Mohammad Basir v Emperor*
- (82) 8 Cal 121 (125) 10 Cal L Rep 151, *Empress v Dhanoo Kazi* (Retrial)
- (15) 2 AIR 1915 Cal 545 (547) 16 Cri L Jour 170 (172) 42 Cal 422, *Ram Panjan Poy v Emperor*. (Witnesses favourable to accused withheld — Accused acquitted)
- (31) 18 AIR 1931 Lah 408 (415) 32 Cri L Jour 818, *Indar Datt v Emperor* (Necessary prosecution witness disappearing mysteriously — Inference adverse to prosecution)
- (19) 6 AIR 1919 Pat 27 (29) 4 Pat L Jour 74 20 Cri L Jour 161 (TB) *Mt Kesar v Emperor* (Failure to produce material evidence contained in the particular telegrams stamps the Crown's case *ab inito* with grave suspicion as to its honesty and *bona fides*)
- (20) 7 AIR 1920 Pat 42 (43, 44) 21 Cri L Jour 743, *Keshwar Gope v Emperor* (Conviction set aside)
- (20) 7 AIR 1920 Pat 366 (371) 21 Cri L Jour 33 *Brahmao Singh v Emperor* (Do)
- (29) 1929 Mad W N 587 (591, 592), *Kumaraswami Asari v Emperor*
- (22) 9 AIR 1922 Pat 535 (539) 1 Pat 401 24 Cri L Jour 129, *Chandrika Pam Kahar v Emperor*. (Failure to produce first informant as a witness makes prosecution case suspicious)
- (22) 9 AIR 1922 Pat 532 (594, 595) 1 Pat 630 24 Cri L Jour 91, *Niru Bhagat v Emperor* (Non-production of material witnesses like the investigation officers is a serious omission)
- (28) 15 AIR 1923 Pat 98 (100) 28 Cri L Jour 206, *Jogi Raut v Emperor* (Fact that material witnesses not produced is sufficient to discredit prosecution version)
- (07) 6 Cri L Jour 304 (313) 11 Cal W N 1085, *Nibaran Chandra Roy v Emperor*
- (16) 3 AIR 1916 Lah 408 (409) 17 Cri L Jour 267 (268) 1916 Pun Re No 12 Cr, *Kaimes v Emperor*
- (30) 17 AIR 1930 Cal 134 (136) 31 Cri L Jour 918, *Nayan Vandal v Emperor* (Held that some witnesses were false and some not material and therefore non-production of them not illegal)
- (19) 6 AIR 1919 Lah 154 (159) 20 Cri L Jour 519, *Emperor v Amalak Pam*
- (28) 15 AIR 1923 Lah 125 (128) 29 Cri L Jour 212, *Taj Mohammad v Emperor*
- (29) 16 AIR 1929 Pat 651 (654) 9 Pat 647 31 Cri L Jour 306, *Krishna Maharana v Emperor*.

On this question of the examination of witnesses by the prosecution their Lordships of the Privy Council in *Stephen Seneviratne v The King*,¹⁹ observed as follows

Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions, but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course be called by the prosecution whether in the result the effect of their testimony is for or against the case for the prosecution."

Though there is nothing in the Code which says that the prosecutor at a criminal trial can examine only such witnesses as have been examined before a committing Magistrate²⁰ yet the prosecutor cannot as of right demand that any witness who was not examined by the committing Magistrate either under S 203 or S 219 should be called and examined but the Court may call and examine such a witness if it considers it necessary in the interests of justice²¹. But only the witnesses examined in the committing

(30) 17 AIR 1930 Lah 163 (165) 31 Cri L Jour 131 *Jouaya v Emperor* (Held that non production of witnesses was justified because they were unnecessary)

(32) 19 AIR 1932 Cal 118 (119 120) 59 Cal 1335 33 Cri L Jour 135 *Girish Chandra Namdas v Emperor* (Non production of witnesses does not in itself give rise to the presumption under S 114 (g) Evidence Act)

(39) 19 AIR 1932 Cal 871 (875 876) 34 Cri L Jour 191 60 Cal 149 *Nasur Sardar v Emperor* (Where prosecution have examined sufficient witnesses to prove their case the mere fact that they had not examined other witnesses who could have given evidence is not sufficient to set aside conviction.)

(33) 20 AIR 1933 Cal 600 (602) 60 Cal 1361 35 Cri L Jour 33 *Lhuban Bijay Singh v Emperor* (Simply because the prosecution does not call certain witnesses the Court need not raise the presumption under S 114. Illust. (g) when the absence of the witnesses is explained properly)

(23) 10 AIR 1923 Oudh 217 (224) 21 Cri L Jour 770 *King Emperor v Narotam* (Two eye-witnesses sent up by the police not examined by Court — Held that there must be some limit to the number of witnesses a Court is asked to hear and no argument favourable to the accused could be based on the fact that the two witnesses had not been called)

Also see S 208, Note 7 and S 252, Note 5

19 (36) 23 AIR 1936 P C 289 (300) 37 Cri L Jour 963 (P C)

20 (41) 28 AIR 1941 Mad 324 (324) 42 Cri L Jour 404 193 Ind Cas 342 *In re Narayana Peddi*

(36) 23 AIR 1936 Lah 533 (537) 37 Cri L Jour 749 17 Lah 176 (F B) *Mit Niamat v Emperor*

ibid (Summary of evidence)

v Emperor (Prosecution)

Sessions Court — But the principal witnesses at least must be examined in the committing Magistrate's Court)

(19) 20 AIR 1932 Cal 118 (119 120)

(In
com
mons)

Court)

(33) 20 AIR 1933 All 690 (694 695) 34 Cri L Jour 967 55 All 1040 *Jlabuala v Emperor* (The mere fact that some evidence is not produced till proceedings in the Court of Session can in no way prejudice the accused if he has notice of it))

21 (41) 28 AIR 1941 Mad 324 (324) 42 Cri L Jour 404 193 Ind Cas 342 *In re Narayana Peddi* (Crown is not entitled to have first witnesses summoned for purpose of giving evidence.—Witnesses ready and available for prosecution for giving evidence may be examined by Court under S 540)

(92) 14 All 212 (213 214) 1892 All WN 63 *Queen Empress v Hayfield*

Magistrate's Court can be bound down to attend in the Sessions Court. If the witnesses are not so examined the prosecution has to depend upon such witnesses being willing to give evidence without being bound down to appear or upon being able to persuade the Court under S 540 to summon such a witness.²⁰ The Sind Judicial Commissioner's Court has held that where a material witness has not been examined in the committing Magistrate's Court his evidence cannot be relied on in the Sessions Court.²¹ A Sessions Judge commits a material irregularity in procedure in refusing to take the evidence of the persons called as witnesses. Further even if justified in so refusing, he should leave upon record clear and distinct reasons for adopting such a course.²² Where a case is tried by jury the witnesses cannot be examined in the absence of the jury and then evidence if taken cannot be acted upon.²³

When a material prosecution witness examined in the committing Magistrate's Court is not examined in the Sessions Court it is open to the Judge either to draw an adverse inference against the Crown or to examine the witness as a court witness. But the Judge cannot *compel* the prosecution to examine such witness as a prosecution witness or to tender him for cross examination.²⁴

See also Note 13

7. Examination must be oral — The examination referred to in this section means oral examination of the witnesses present (except in cases where evidence is taken by commission or where the witness is deaf or dumb). Oral examination is therefore, the general rule and it is of utmost importance that the rule should be followed in all cases where the witness is present to be examined. The demeanour of the witness may be important for the assessor or Judge in forming an opinion of his truth.¹

As to the mode of recording evidence see Ss 353 and 356 and Notes thereon

8 Using depositions given before the Magistrate — See Ss 283 and 303 and the Notes thereon

9 Attendance of witnesses — See Section 216

10 Cross examination to follow examination in-chief — The cross examination of every witness should follow his examination in chief. See S 198 of the Evidence Act of 1872. It is both irregular and inconvenient to allow all the witnesses to be examined one day and to reserve the cross examination to a subsequent date.¹ The accused is, therefore, not entitled as of right to postponement of the cross examination. The Court may however grant such a postponement on reasonable grounds as for instance, where the counsel is unprepared,² or where the accused was undefended the first day and put

[See (45) 32 AIR 1945 Sind 4 (9) 46 Cr L Jour 496 ILR (1944) Kar 305 218 Ind Crs 379 (DB) *Ladharam v Emperor* (A Sessions Court can allow an expert witness to be examined though he was not examined before the committing Magistrate when there is no prejudice to the accused)]

Also see S 540 Note 7

22 (36) 23 AIR 1936 Lah 533 (537) 37 Cr L Jour 742 17 Lah 176 (FB) *Ut Nizam v Emperor*

23 (39) 25 AIR 1938 Sind 97 (98-99) 39 Cr L Jour 618 32 Sind L R 709 *Naban Lahu v Emperor* (Important witness on whom prosecution and Court rely not examined in committing Court—Conviction

Emperor

v Dulo

Note 7

1 (86) 9 Mad 83 (84-85) 2 Weir 356 *Subba v Queen Empress*

Note 10

1 (30) 2 Weir 391 (382) *In re Gollhur, Venkatappa*

2 (14) 1 AIR 1914 Cal 834 (835) 41 Cal 299 15 Cr L Jour 596 *Sadasiv v Emperor*

application should be granted)]

Also see S 344 Note 7

only a few questions and applied the next day for cross examination by his pleader explaining why he was not engaged before,³ or where the pleader, appointed to defend the accused who had no instructions till then requested the Court to postpone the cross examination of the prosecution witnesses till the next day after the examinations in-chief were over.⁴

11 Improper examination — As to the impropriety of putting leading questions to or cross examining its own witness by the prosecution or defence, see Ss. 142 143 and 154 of the Evidence Act and the undermentioned cases¹

12 Questions by Judge, jury or assessors — Under s 166 of the Evidence Act the jurors or assessors may put any question to the witness through or by leave of the Court which the Judge himself might put and which he considers proper. Section 165 of the same Act enables the Judge to put any questions to the witnesses which he may consider necessary. See also the undermentioned case¹

13 Duty of prosecution — Though the legitimate object of the prosecution is to see that the prisoner is convicted,¹ it is not its duty to obtain a conviction *at any cost*² or obtain an unrighteous conviction.³ The duty of the Public Prosecutor is to conduct the case fairly and fearlessly and with a full sense of responsibility that attaches to his position.⁴ He should not act as the counsel for any particular person or party and should

- 3 (20) 7 AIR 1920 Pat 301 (352) 22 Cr L Jour 219 5 Pat L Jour 706, *Teka Ahir v Emperor*
4 (29) 16 AIR 1929 Cal 1 (5) 30 Cr L Jour 494 *Bazlar Pahiyan v Emperor*

Note 11

1 (36) 23 AIR 1936 Cal 675 (675-676) 39 Cr L Jour 176 *Samarali v Emperor* (It is not right for Public Prosecutor to declare a prosecution witness as hostile — He must ask permission of Court to cross examine offending witness)

(22) 9 AIR 1922 Pat 592 (594) 1 Pat 630 21 Cr L Jour 91 *Niru Bhagal v Emperor* (Section 147 Evidence Act)

(21) 6 AIR 1921 Pat 406 (407) *Dhannu Beldar v Emperor* (Leading questions could properly have been put not in examination in-chief but in cross-examination of a hostile witness.)

(23) 10 AIR 1923 Pat 62 (64) 1 Pat 753 21 Cr L Jour 69 *Jagdeo Singh v Emperor* (Leading question without declaring witness hostile)

(26) 13 AIR 1926 Cal 139 (143) 53 Cal 372 27 Cr L Jour 266 *Khiziruddin v Emperor* (Court's

" 14 Evidence Act)

Husen

R W L Reed

Note 12

1 (38) 25 AIR 1938 Pat 153 (158) 39 Cr L Jour 384 *Darpan Poldarin v Emperor* (When the lawyer appointed by the Crown to defend a poor prisoner does his work very badly, the Judge should use his greater experience to cross examine the witnesses.)

Note 13

1 (30) 17 AIR 1930 Cal 134 (136) 31 Cr L Jour 918 *Nayan Mandal v Emperor*

2 (41) 28 AIR 1941 Rang 209 (212) 43 Cr L Jour 157 1941 Rang L R 346 197 Ind Cas 350 (DB) *Shwe Pru v The King*

(37) 24 AIR 1937 Nag 274 (278) 39 Cr L Jour 92 *Daljit Singh v Emperor* (The duty of the prosecutor is to elicit the truth rather than to exercise his ingenuity in pressing the case unduly against the accused.)

Isudea v Emperor

Jogendra Nath

Object of prosecution is to secure

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not aggravate the case against the prisoner or keep back a witness because his evidence may weaken the prosecution case.⁵ He should place before the Court all materials, irrespective of the question as to whether they help the accused or go against him such as statements before the police⁶ and material documents.⁷ His only object should be to aid the Court in discovering the truth.⁸ He should avoid any proceeding likely to intimidate or unduly influence witnesses on either side. There should be on his part no unseemly eagerness for, or grasping at a conviction.⁹ The prosecution should take great care not to leave anything ambiguous on the records and to explain clearly by evidence circumstances having material bearing on the case.¹⁰

It is the duty of the Public Prosecutor to give opportunity to his witnesses to explain any discrepancies or contradictions in their depositions.¹¹ But he is not expected to call witnesses with reference to defence theories.¹² Nor is it open to him to call evidence to rebut and discredit the accused's defence before it is even known whether or not the accused intends to put forward that defence.¹³

(36) 14 Rang 45 (49) *Ngai lung Gyi v. Emperor*

(94) 16 All 84 (86) 1894 All W N 7 (FB), *Queen Empress v. Durga*

(32) 19 AIR 1932 Bom 279 (282) 56 Bom 431 33 Cri L Jour 613, *Vasudeo v. Emperor*

(15) 2 AIR 1915 Cal 545 (546) 16 Cri L Jour 170 42 Cal 422, *Ram Hanjan v. Emperor*

(33) 20 AIR 1933 All 314 (317) 55 All 379 31 Cri L Jour 699, *Shukul v. Emperor* (It is the duty of the prosecution to bring out in evidence everything in favour of an accused person and lay before the Court all the evidence even though some of that evidence may result in an acquittal)

(73) 20 Buth W R Cr 39 (38) *Queen v. Gunsha Moonda* (It is the duty of the prosecution to point out to the Court any glaring discrepancy between the evidence being given by a witness before the Court of Session and that previously recorded by the committing officer)

(20) 7 AIR 1920 Pat 366 (371) 21 Cri L Jour 33, *Brahmdco Singha v. Emperor*

(29) 16 AIR 1929 Pat 275 (283) 8 Pat 299 30 Cri L Jour 675, *Kunja Subudhi v. Emperor*

5 (71) 8 Bom II C R Cr 126 (153) (FB), *Peg v. Kashinath Dinkar*

[See (39) 26 AIR 1939 Rang 390 (392) 41 Cri L Jour 153, *Ngai Sar Koo v. The King* (Public Prosecutor should place whole evidence before Court — It is for Judge and not for him to decide whether certain evidence should be believed or not)]

6. (42) 29 AIR 1912 Lah 37 (39) ILR (1913) Lah 77 43 Cri L Jour 370 198 Ind Cas 411 (DB), *Hasni Qabul v. Emperor* (A confessional statement made by the accused to a third person almost immediately after the occurrence should be brought on record as a relevant fact though it may to some extent tell in his favour)

(29) 16 AIR 1929 Pat 275 (283) 8 Pat 299 30 Cri L Jour 675, *Kunja Subudhi v. Emperor*.

(68) 1888 Pun Re No 1 Cr, p 1 (2), *Alta Baksh v. Empress*

7. (07) 5 Cri L Jour 427 (429) 34 Cal 698 11 Cal W N 666, *Jatindra v. Emperor*

(94) 21 Cal 642 (653) *Queen Empress v. Sagal Samba Sajao*

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accused)

(17) 4 AIR 1917 Cal 123 (131) 18 Cri L Jour 385 (391) 41 Cal 477 (FB), *Fateh Chand v. Emperor*. (Per Mookerjee, J.)

(24) 11 AIR 1924 Nag 243 (245) 26 Cri L Jour 163, *Anant Vasudeo v. King Emperor*.

(03) 8 Cal W N xvii (xvii) (Announcing in conducting case condemned)

(16) 3 AIR 1916 Cal 189 (204) 16 Cri L Jour 497 (513) 42 Cal 957, *Amritlal Hazra v. Emperor*

prosecution to see that negative answer of investigating officer in cross examination does not create wrong impression of what witness had stated before police]]

Also see S 162, Note 17

12. (04) 1 Cri L Jour 718 (726) (Kathirwar), *Emperor v. Daya Shanwar*

13. (27) 14 AIR 1927 Mad 533 (535) 28 Cri L Jour 285, *In re Bhuvanath Das*

It is no part of the prosecution's duty to suggest a motive for a crime nor is it the duty of the Court to determine why the crime was committed¹

See also Note G

14. Trial ought not to be stopped before the close of the prosecution. — Sessions cases cannot be tried piecemeal. Before commencing a trial a Judge should satisfy himself that all necessary evidence is available. If it is not, he may postpone the case, but once having commenced he should, except for some very pressing reason, proceed *de die in diem* till the trial is finished,¹ the intention of the Code being that a trial before the Court of Session should proceed and be dealt with continuously from its inception to its finish²

Where, after the examination of some prosecution witnesses, some more remain to be examined, it is not open to the Judge to ask the jury whether they wish to hear any more evidence and, on their stating that they do not believe the evidence and wish to stop the case, record a verdict of acquittal, such a procedure is not warranted by law and no final opinion as to the reliability or otherwise of the evidence ought to be arrived at by the Judge or jury until the whole evidence is before them and has been considered³

15 Treatment of witnesses. — A Sessions Judge is not justified in stopping the cross examination and turning the witness out of Court because he is of opinion that the witness is not speaking the truth. This course is not sanctioned by law and is one which ought not to be followed¹

It is also illegal for a Judge to threaten a witness with the penalties of the law and no Judge should allow anything in the nature of a threat to be administered to a witness unless and until he has shown by his evidence that he is wilfully saying what is false or persistently refusing to give evidence on facts which must be within his knowledge²

Examination of accused before Magistrate to be evidence

287.* The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence

Synopsis

1. Scope of the section
- 2 "Duly recorded"
- 3 "Committing Magistrate"

NOTE to the Synopsis See the Notes indicated for the following topics:

As against co-accused	See Note 1.	Record and committal by different Magistrates	See Note 3
Confessions	See Note 1	Section mandatory	See Note 1.
Previous conviction	See Note 1.	Statement to be taken as a whole	See Note 1
Proof of statements	See Note 1	Written statements of accused	See S 256 Notes S 290, Note 6

* 1882 S 287, 1872 S 248, 1851 S 356

14 (37) to 1 stance)
(36) 23 AIR 1936 Rang 60 (62) 37 Cri L Jour 418, *U Zauana v Emperor* (Do)
Note 14

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1 (1900) 1900 All W N 149 (149) *Meharban Ali v Empress*
2 (92) 14 All 242 (256) 1892 All W N 83, *Empress v Hargobind Singh*

1 Scope of the section — This section makes it *obligatory* on the prosecution in all cases to tender in evidence the statement of the accused made before the committing Magistrate and duly recorded by him under the provisions of the Code *whether such statement tells for or against the accused*¹ The statement so tendered and read as evidence has the same effect as any other evidence adduced before the Sessions Judge² If the accused has confessed his guilt in such statement he can be convicted on the basis of such confession³ though he may retract the confession before the Sessions Judge⁴ Similarly the accused is entitled to rely on such statement to prove points in his favour though under the ordinary law of evidence he would not be entitled to make use of self-serving statements by him as evidence in his favour⁵

The section does not contemplate that the committing Magistrate should be called as a witness in the Sessions Court and examined with reference to the recorded statement⁶ In fact the record of the statement prepared by the committing Magistrate would be the only evidence admissible to prove the statement (See Evidence Act S 91) But under S 533 if in recording the statement any of the provisions of S 301 are not complied with evidence may be taken for the purpose of proving that the statement was made by the accused before the committing Magistrate

The section does not prescribe the stage at which the statement of the accused should be produced and read as evidence But it has been held that the statement should be read as part of the case for the prosecution before the accused enters upon his defence⁷

Section 287 — Note 1

1. (94) 1894 Rat 710 (713) *Queen Empress v Abdul Razak*
(70) 13 Suth W R Cr 63 (63) *Queen v Sheikh Meher Chand*
2. (40) 27 AIR 1910 Pat 14 (15) 49 Cr L Jour 633 *Mosahab Dome v Emperor* (In a limitation by the accused in the committing Magistrate's Court that he entered another's house on one night with intent to commit theft is evidence under S 287)
(66) 5 Suth W R Cr 1 (1) *Queen v Suneechur*
(92) 15 Mad 352 (353) 2 Weir 394, *Empress v Rama Teran*
3. (66) 6 Suth W R Cr 83 (83) *Queen v Hyder Jolaha*
(66) 6 Suth W R Cr 73 (73) *Queen v Punjit Sontal*
(21) 8 AIR 1921 Sind 129 (130) 16 Sind L R 67 25 Cr L Jour 574 *Mahomed v Emperor* (Judge has only to consider whether confession has been voluntarily made and conviction can be based on such confession)
- (63) 12 Suth W R Cr 49 (49) *Queen v Dhutun Rujwan*
[See (70) 14 Suth W R Cr 9 (10) *Queen v Misser Sheikh* (It is not necessary to read out the confessions to the accused and specially to ask them whether they had any objection to the reception of those confessions)]
4. (81) 1891 All W N 89 (89) *Empress v Bhagna*
(84) 1885 All W N 221 (221) *Empress v Panna Mand* (Exact value of confessions should however be ascertained)
(85) 1885 All W N 59 (59) (FB) *Empress v Madar* (Confession must be found to be spontaneous and voluntary act of party making it)
(97) 20 All 133 (134) 1897 All W N 221 *Queen Empress v Mathu Lal*
(95) 18 All 78 (81) 1895 All W N 227, *Queen Empress v Mahabir* (Before Court acts on such confession it must be satisfied as to its truth)
(74) 11 Bom H C R 137 (138) *Raj v Baktant* (In absence of evidence that confession of accused person has been induced by illegal pressure it is not to be presumed that such confession was so induced)
(15) 2 AIR 1915 Bom 249 (250 251) 40 Bom 220 17 Cr L Jour 133 *Falira Appayya v Emperor* (Evidence Act S 24—It is doubtful if statement of confessional character will be admissible)
(67) 8 Suth W R Cr 40 (40) *Queen v Mt Jema*
5. (93 1900) 1893 1900 Low Bur Rul 207 (208) *Aung Myat v Queen Empress* (Statement read as evidence under this section can be taken into consideration in determining whether the accused has discharged the onus of proving that his case comes within one of the exceptions provided by law)
6. See (91) 5 Cal W N xlvii (xlvii) *Empress v Mungrao Bhoojah* (It was remarked that the practice of calling the committing Magistrate would be open to the gravest objection)
7. (87) 2 Weir 361 (361) 10 Mad 295 *Queen Empress v Rangui*
(67) 8 Suth W R Cr Cir No 11 p

The statement of the accused must be read as a *whole*. Thus where there are several accused in a case and the statement made by one of them in the committing Magistrate's Court is read in the Sessions Court under this section the portions touching the other accused cannot be omitted.² But under S 310 if any portion of the statement bears on an alleged previous conviction charged against the accused, for the purpose of affecting the sentence to be passed on him in case of conviction such portion should not be read or referred to unless and until the accused has been convicted of the substantive offence or the verdict of the jury has been delivered or the opinion of the assessors has been recorded.

As to the weight to be attached to confessions conviction on the confession of a co-accused and the value of retracted confessions see Notes on Ss 164, 301 and 337.

2 "Duly recorded" — An accused person made a confession under improper inducement by the police. The committing Magistrate admitted the confession in evidence and examined the accused with regard to it. It was held that as the confession was not admissible in evidence (Evidence Act S 24) the committing Magistrate ought not to have questioned the accused with reference to it and that the examination of the accused under those circumstances could not be said to be duly recorded within the meaning of this section and could not be produced in evidence in the Sessions Court under this section.¹ So also an admission made by the accused before the committing Magistrate in answer to questions by the latter when there is no evidence implicating the accused is not "duly recorded".²

A written statement filed by the accused in answer to questions put to him by the committing Magistrate cannot be considered to be a document containing the examination of the accused duly recorded within the meaning of this section and must therefore be excluded from the records of the case.³

As to the mode of recording the examination of the accused, see S 301 and the Notes thereon. As to the effect of irregularities in the mode of recording the examination, see S 533 and Notes thereon.

3 "Committing Magistrate" — The words "committing Magistrate" in this section include the Magistrate who held the preliminary enquiry on which the commitment was based although the actual order of commitment was made by some other Magistrate. Hence the statement of the accused recorded by a Magistrate who held the preliminary enquiry is admissible under this section although the case was actually committed to the sessions by some other Magistrate.¹ Thus where a Magistrate who succeeds to the jurisdiction of another Magistrate commits a case to the sessions under S 350 on evidence recorded by his predecessor the statement of the accused recorded by such predecessor is admissible under this section.²

8 (69) 5 Mad H C R App iv (iv)

Note 2

1 (08) 8 Cr L Jour 62 (64) 4 Low Bur Rel 244 *Gaung Gya v Emperor*
[See also (15) 2 AIR 1915 Bom 249 (200) 17 Cr L Jour 133 (131 135 137 138) 40 Bom 270 *Fal ra*
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Note 3

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288.* The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872.

Synopsis

- 1 Legislative changes
- 2 Scope, object and applicability of the section
- 3 'Duly recorded in the presence of the accused'
- 4 'Under Chapter XVIII'
- 5 'Discretion of the presiding Judge'
- 6 'If such witness is produced and examined'

- 7 May be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act
- 8 Corroboration of evidence admitted under this section.
- 9 Practice and procedure
- 10 Approver's evidence.

NOTE to the Synopsis See the Notes indicated for the following topics

Absence of cross-examination See Note 3

Evidence of one witness and not of all witnesses See Note 2

Applicable to sessions trials and not to trials by Magistrates See Note 2

Sections 33 155 157 and 145 Evidence Act See Note 2

Depositions retracted See Notes 7 and 10

Statements taken under S 164 and S 162 See Note 8

1. Legislative changes.

- (1) There was no corresponding section in the Code of 1861. The section was first enacted in the Code of 1872. The undermentioned are cases decided under the Code of 1861¹
- (2) The words "duly recorded in the presence of the accused under Chap XVIII" were substituted for the words "duly taken in the presence of the accused before the committing Magistrate," and the words "for all purposes subject to the provisions of the Indian Evidence Act, 1872," were inserted at the end of the section by the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923.

2 Scope, object and applicability of the section — This section provides that when a witness is produced and examined in the Sessions Court, his evidence in the commitment proceedings may, in the discretion of the presiding Judge, be treated as evidence at the trial for all purposes. But for this section such evidence would, under the Evidence Act, be only admissible for the purpose of corroborating or contradicting the witness (see ss 145, 155 and 157 of the Evidence Act)¹. It would not be admissible as *substantive* evidence, i.e., for proving the truth of the facts deposed to except when the witness is not produced in the Sessions Court for any of the reasons specified in s 33 of the Evidence Act. The present section vests a discretion in the Sessions Judge to treat such evidence as *substantive* evidence in the case though none of the conditions laid down in s 33 of the

* Code of 1898, original S 288

Evidence given at preliminary inquiry admissible

288 The evidence of a witness duly taken in the presence of the accused before the committing Magistrate may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case

1882 S 288, 1872 S 249, 1861 — Nil.

Section 288—Note 1

deposition legal evidence)

Note 2

1 (25) 12 AIR 1925 Lah 483 (18.) 27 Cr L Jour 249 *Ram Karan v Emperor*

Evidence Act is present² The object of the section is to reduce the danger of witness being tampered with between the commitment and trial³

The section does not *ipso facto* make the evidence before the committing Magistrate evidence at the trial It only confers a discretion on the Sessions Judge to treat as evidence before himself the evidence of a witness given before the committing Magistrate⁴ But, where under the Evidence Act the evidence given before the committing Magistrate can be used at the sessions trial for any purpose this section in no way restricts such use⁵ Thus, for instance, where the witness is not examined in the Sessions Court his evidence in the committing Magistrate's Court can be admitted in the Sessions Court under s 33 of the Evidence Act if the conditions of that section are satisfied But where those conditions are not satisfied the evidence cannot be treated as substantive evidence in the Sessions Court in such cases⁶

The power conferred by the section is intended to be exercised with reference to each witness *individually* The section does not contemplate a general order being passed with reference to the evidence of all the witnesses or a number of them *together*⁷

The section applies only to sessions trials and not to trials before Magistrates⁸ But it applies to trials with assessors as well as to trials by jury⁹ In the undermentioned case¹ it was remarked that the section applies only to prosecution witnesses and that the position of the section shows this

The reasons given by the Magistrate in discharging the accused at first and the contents of the Sessions Judge's order in revision directing further inquiry are not admissible in evidence in the Sessions Court when the case is committed to sessions subsequently¹¹

3 "Duly recorded in the presence of the accused." — This section applies only to the evidence of a witness duly recorded in the presence of the accused by the committing Magistrate Hence the existence of a *record* or memorandum of evidence is a condition precedent to the applicability of the section.¹

Further the evidence must have been *duly* recorded (As to the mode of recording evidence in commitment proceedings see Chapter XXV of the Code) Under s. 30 and on general principles the accused is entitled as of right to cross examine the prosecution witnesses (in commitment proceedings) Hence the evidence of prosecution witnesses recorded without the accused being allowed to cross examine them is not duly recorded and cannot be introduced into the record under this section² But where the accused has

2 (87) 1887 Pun Re No 51 Cr p 132 (135) *Umar v Empress*

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Judge)

emperor (Section 33 is in the discretion of the

ing it as matter

igh (Evidence

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order when it does not occasion failure of justice) (New trial should not be granted in spite of such

[See also (74) 21 Suth W R Cr 49 (51) 12 Beng L R Ann 15 *Off Empress - A nanullah*]

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Note 3

1 (87) 1887 Pun Re No 51 Cr p 132 (134 135) *Umar v Empress*

declined to cross examine the prosecution witnesses in spite of opportunity being given to him to do so the absence of cross-examination by him does not affect the admissibility of the evidence under this section²

The section requires also that the evidence in the committing Magistrate's Court should have been recorded in the *presence of the accused*. Hence, evidence recorded in the absence of the accused cannot be admitted under this section⁴

See also the undermentioned case⁵

4 "Under Chapter XVIII." — This section applies only to the evidence of a witness recorded under Chap XVIII. The statement of a witness made on any other occasion is not within the section¹

Prior to the amendment of 1923 the words *Before the committing Magistrate* occurred in the section in the place of the words *under Chap XVIII*. The amendment makes it clear that evidence recorded under Chap XVIII falls within the section although it is not recorded *with a view to commitment*. Thus evidence recorded under s 219 *after* commitment, would fall within the section³

There is no special procedure provided for the recording of evidence under Chap XVIII. Hence the evidence recorded by a Magistrate in a case which he starts with a view to trial by himself but which he subsequently decides to commit to the sessions can be held to be evidence recorded under Chap XVIII⁵

3 (30) 17 AIR 1930 Sind 54 (55) 31 Cr L Jour 121 *Emperor v. Mahrab*

(26) 13 AIR 1926 Lah 590 (593, 594) 23 Cr L Jour 33 *Muhammad Aslam Khan v. Emperor* (Statement of witnesses recorded in presence of accused — Accused declining to cross-examine — Accused cross-examining on subsequent date—Statements are duly recorded)

[See also (80) 6 Cal L Rep 53 (56) *In the matter of Dhani Mundul* (In this case it was held that opportunity to cross-examine was not denied)]

(25) 12 AIR 1925 Oudh 726 (727) 20 Cr L Jour 1236 *Sargu Singh v. Emperor* (Absence of cross-examination in spite of opportunity—Though technically admissible evidence loses its weight)]

4. (04) 1 Cr L Jour 499 (500) 1904 Pun Re No 3 Cr *Pathana v. Emperor* (Approver's evidence taken in accused's absence)

(13) 14 Cr L Jour 211 (212) 35 All 260 19 Ind Cas 307 *Emperor v. Gulab*

(14) 1 A I R 1914 Oudh 388 (389) 16 Cr L Jour 132 (133) 17 Oudh Cas 363 *Pattu v. Emperor* (Statements taken under S 164)

(94) 1894 Ilac 728 (728) *Queen Empress v. Parsi Lu*

(87) 1887 Pun Re No 51 Cr p 132 (134) *Unar v. Empress*

(74) 21 Suth W R Cr 5 (5) *Queen v. Nusuruddin*

(96) 23 Cal 361 (365) *Alimuddin v. Queen Empress*

5 (26) 13 Cal 121 (123, 124) *Adyan Singh v. Queen Empress* (No objection taken by opposite party — Held that there was no reason to reject the evidence)

Note 4

1 (12) 13 Cr L Jour 926 (729) 14 Ind Cas 418 36 Mad 159 *In re Dasrur Venkata Rao* (Statement of a witness made during a search)

(05) 7 Cr L Jour 325 (328) 18 Mad L Jour 66 3 Mad L Tim 270 31 Mad 127, *In re Sanappa Rao* (Statement to police-officer or to an investigating Magistrate)

(04) 1 Cr L Jour 499 (500, 501) 1901 Pun Re No 3 Cr *Pathana v. Emperor* (Approver's statement before District Magistrate who is not committing Magistrate is not admissible under this section)

(89) 1889 Rat 468 (470) *Queen Empress v. Nana Raju* (Statements to Magistrates not empowered to commit do not fall under S 288)

(22) 9 AIR 1912 Mad 303 (303) 23 Cr L Jour 262 *Malaya Coundan v. Emperor* (Statement taken in presence of accused given before *mehtar* may not be admitted as substantive evidence)

(32) 19 AIR 1919 Cal 683 (685) 33 Cr L Jour 170 *Agendra Nath v. Emperor*

2 (26) 13 All. 1926 Cal 235 (237) 53 Cal 191 26 Cr L Jour 1577, *Abdul Cam v. Emperor*

3 (40) 27 AIR 1910 Lah 389 (391) 1 L R (1910) Lah 151 42 Cr L Jour 29 *Fazal v. Emperor* (Mere mention of Chapter XVIII in this section does not mean that the provisions of that chapter are to be applied in order to attract provisions of this section, but followed in their entirity)

(26) 13 All. 1926 Cal 235 (237) 53 Cal 191 26 Cr L Jour 1577 *Abdul Cam v. Emperor*

5. "Discretion of the presiding Judge." — The section leaves it to the discretion of the presiding Judge whether or not to admit the evidence referred to in it.¹ But the power being one in derogation of the general principle that a Court can only act on the evidence given before it (see definition of evidence in the Evidence Act, s 3), the decision to let in the previous deposition of a witness under this section should be arrived at after careful consideration and only where there are sound and reasonable grounds for such a decision.² The desire to expedite the trial or the fact that the counsel for both the sides have agreed to this course, is not a sufficient reason for acting under the section.³ The power should be confined to cases where the Judge has reason to think that a witness has deposed truly before the committing Magistrate but is not telling the truth before himself and that it is desirable in the interests of justice that the previous deposition of the witness should be brought on the record of the trial.⁴ But the Judge will be not justified in exercising his power under this section where there are only minor discrepancies between

Note 5

- 1 (44) 31 AIR 1944 Cal 323 (324) 46 Cr L Jour 199 1LR (1913) 2 Cal 381 217 Ind Cas 159 (DB), *Emperor v Rakenuddin Vondal* (Discretion should be sparingly and very carefully used)
- (42) 23 AIR 1942 Lah 215 (216) 43 Cr L Jour 828 1LR (1943) Lah 397 202 Ind Cas 340 (DB), *Mahomed Sarnar v Emperor*
- (37) 24 AIR 1937 Sind 61 (65) 38 Cr L Jour 487, *Manghan Khan v Emperor* (Section is not one to be lightly used)
- (22) 9 AIR 1922 Lah 1 (12) 3 Lah 141 23 Cr L Jour 513 *Narain Das v Emperor* (Such evidence should not be allowed to be read out to witnesses before defence is given opportunity of cross-examining them)
- (85) Weir 3rd Edn 934 (936) *In re Subba Niah*
- (87) 1887 Pun Re No 51 Cr p 132 (134), *Umar v Empress*
- 2 (45) 32 AIR 1915 Cal 467 (469 470) 1LR (1914) 2 Cal 305 (DB), *Asgar Ali Mandal v Emperor* (Prayer to put in deposition of witness in committing Court, made at late stage—Prayer disallowed)
- (44) 31 AIR 1944 Cal 823 (324) 46 Cr L Jour 199 1LR (1943) 2 Cal 331 217 Ind Cas 159 (DB) *Emperor v Rakenuddin Vondal* (Witness completely resiling from evidence given before committing Magistrate—Court will be exercising wise discretion in bringing previous statement on record under this section)
- (74) 21 Suth W R Cr 49 (51) 12 Beng L R App 15 *Queen v Amanullah* (Discretion is to be exercised upon substantial materials rightly before the Court, and reasonably sufficient to guide the judgment of the Court to the truth of the matter, and not upon mere speculation or conjecture)
- (30) 17 AIR 1930 Cal 706 (707) 57 Cal 940 82 Cr L Jour 180, *Ahadem v Emperor* (Examination in chief of prosecution witness before committing Magistrate without his cross-examination on vital point brought on record before Sessions Court—Though Sessions Court had discretion it was not allowed in as being unfair to defence)
- (96) 9 C P L R App Cr 24 (25) *Empress v Tularam Brahmin*
[See (37) 24 AIR 1937 Sind 61 (65) 39 Cr L Jour 497, *Manghan Khan v Emperor*]
3. (85) Weir 3rd Edn 934 (936 937), *In re Subba Niah*
- 4 (41) 23 AIR 1941 Mad 258 (259) 42 Cr L Jour 265 1LR (1941) Mad 172 192 Ind Cas 299 (DB), *In re Pachayanna Goundan* (Murder case—Several eye-witnesses giving evidence in Magistrate's Court in accordance with dying declaration of deceased—In Sessions Court some of them denying personal knowledge of occurrence—Depositions in Magistrate's Court held could be treated as substantive evidence)
- (40) 27 AIR 1940 Mad 136 (137) 41 Cr L Jour 323, *In re Chinna Papiah* (But evidence of such witness should not be relied upon in absence of corroboration)
- (37) 24 AIR 1937 Sind 61 (65) 38 Cr L Jour 487, *Manghan Khan v Emperor*
- (30) 17 AIR 1930 All 746 (747) 32 Cr L Jour 152 *Abdul Jalil Khan v Emperor*
- (86) 9 C P L R Cr 24 (25) *Empress v Tularam Brahmin*
- *v Emperor* (Only one divergence though)
- Krishna Iyer* (Statements in committing Magistrate's Court by relatives of accused resiled from in sessions trial—Statements can justifiably be accepted as evidence under this section)
- (29) 16 AIR 1929 Mad 837 (839) 31 Cr L Jour 768 53 Mad 160, *Kesava Pillai v Emperor* (Witness retracting statement before Sessions Judge—Reason to think that he is not telling truth—Section can be applied)
- (24) 11 AIR 1924 Mad 379 (381) 47 Mad 232 25 Cr L Jour 715 *P Somadu v Appi Gadu* (Do)

statements made before the committing Magistrate and before himself⁵ When the witness alleges that his statement before the committing Magistrate was the result of improper influence or pressure the Sessions Judge should investigate into the truth of his allegation before coming to the conclusion that his deposition in the Sessions Court (which contradicts that in the committing Magistrate's Court) is false⁶ See also Note 7

6. "If such witness is produced and examined" — It is a condition precedent to the incorporation of the previous deposition of a witness under this section that he should be produced and examined as a witness at the sessions trial¹ The examination contemplated is examination of the witness in the ordinary way Hence mere cross examination of a witness or merely tendering a witness for cross examination is not sufficient to satisfy the requirements of the section in this respect² So also the mere examination of a witness as to the fact of his having made the previous deposition is not enough for allowing action under this section³

7 May be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act — By force of this expression the previous deposition of a witness admitted under this section can be treated as *substantive* evidence in the case and not merely as evidence useful for the purpose of corroborating or contradicting a witness¹ The words *for all purposes* subject to the provisions of the Indian

5 (44) 31 AIR 1944 Cal 373 (394) ILR (1943) 9 Cal 381 46 Cri L Jour 199 217 Ind Cas 158 (DB) *Emperor v. Rahenuddin Mondal*

(37) 24 AIR 1937 Sind 61 (65) 38 Cri L Jour 487 *Ma ghan Khan v. Emperor* (The provisions of

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relied upon)

Note 6

1 (44) 31 AIR 1944 Lah 377 (380) (DB) *Saudagar Singh v. Emperor* (Section does not apply to absent witnesses)

—It does not dispense with examination of the witness as directed by S 296)

(87) 1867 Pun Re No 51 Cr p 132 (134) *Usar v. Empress*

(34) 21 AIR 1934 Lah 212 (214) 30 Cri L Jour 349 *Emperor v. Natha Singh* (Witness produced but

witness along

mply tendered

for cross examination)

(30) 17 AIR 1930 Cal 706 (707) 57 Cal 910 32 Cri L Jour 160 *Khadem v. Emperor* (Examination in chief of prosecu on witness before committing Magistrate without his cross-examination on vital point brought on record before sessions.)

3 (80) Weir 3rd Edn 934 (936) *In re Sibba Nask*

Note 7

1 (40) 33 AIR 1946 Lah 48 (49) 271 Ind Cas 638 *Parita v. Emperor*

(44) 31 AIR 1944 Cal 303 (325) ILR (1943) 2 Cal 391 46 Cri L Jour 199 217 Ind Cas 153 (DB) *Emperor v. Palenuddin Mondal*

(40) 29 AIR 1940 Lah 215 (216) ILR (1943) Lah 397 43 Cri L Jour 893 202 Ind Cas 340 (DB) *Mahomed Sarfaraz v. Emperor* (Words subject to the provisions of the Indian Evidence Act cannot be read so as to limit the purpose for which the deposition may be used)

(37) 24 AIR 1937 I C 119 (121) 33 Cri L Jour 493 61 Ind App 113 ILR (1937) Bom 711 (FC), *Palitra v. Emperor* (Do)

(40) 27 AIR 1940 Nag 340 (347) 1940 Nag L Jour 403 (409) ILR (1941) Nag 110 43 Cri L Jour 17, *Parmanand v. Emperor*

(40) 27 AIR 1940 Pat 269 (273) 19 Pat 369 41 Cri L Jour 910 *Nath Mondal v. Emperor*

(30) 23 AIR 1936 Lah 357 (

As seen already, the evidence admitted under this section constitutes substantive evidence in the case quite as much as any other evidence. There is no legal objection to a conviction being based purely on the prior deposition of a witness admitted under this section.⁵ But as a matter of prudence, before preferring the evidence given before the committing Magistrate to that given before himself and acting on such evidence, a Judge should have very substantial grounds for doing so.⁶ Especially, it would be highly unsafe

(25) 12 AIR 1925 Lah 452 (453) 6 Lah 190 26 Cr L Jour 1245, *Amir Zaman v Crown* (For instance, evidence, which had been wrongly admitted by the committing Magistrate, in violation of the provisions of the Evidence Act, could not be transferred to the sessions' file)

(25) 12 AIR 1925 Pat 51 (53) 3 Pat 781 26 Cr L Jour 270, *Jehal Teli v. Emperor*

(26) 13 AIR 1926 Pat 440 (442) 27 Cr L Jour 591, *Bigna Kumhar v Emperor*

(26) 13 AIR 1926 Cal 105 (105, 106) 26 Cr L Jour 1553, *Pasaruddin v. Emperor*.

(27) 14 AIR 1927 All 479 (480) 49 All 251 27 Cr L Jour 1365, *Behari v Emperor*.

(25) 12 AIR 1925 Bom 266 (267) 26 Cr L Jour 705 : 50 Bom 215, *Basappa v Emperor*

5 (40) 27 AIR 1910 Nag 310 (317) : 1910 Nag L Jour 459 (469) 1 L R (1941) Nag 110 . 42 Cr L Jour 17, *Parmanand v. Emperor*. (Corroboration not necessary)

(36) 23 AIR 1936 Lah 357 (358) 37 Cr L Jour 567 : 17 Lah 419, *Narayan Singh v. Emperor*, (Section does not show that there need be corroboration)

(35) 22 AIR 1935 All 691 (692) 36 Cr L Jour 823, *Raja Ram v Emperor* (Independent corroboration is not invariably necessary)

(34) 21 AIR 1934 Oudh 222 (224) 35 Cr L Jour 894, *Emperor v Shankar*

6. (42) 29 AIR 1912 Mad 700 (701) : 44 Cr L Jour 119 203 Ind Cas 591 (DB), *In re Shanmuga Kone*. (It is not necessary for the Judge before taking action under S 288 to conduct an inquiry to satisfy himself beforehand that the evidence given by the witness before him was false and the evidence given before the committing Magistrate was, therefore, likely to be true)

(40) 27 AIR 1940 Mad 136 (137) 41 Cr L Jour 323, *In re Chinna Papiah*. (Where a witness in a Court of Session relies from a statement made by him in a committing Court, his evidence should not be relied on in the absence of corroboration although it may be treated as substantive evidence under S 288)

(1900) 4 Cal W N 49 (55), *Pajrang Lal v. Empress* (It is improper to bring on the record without further inquiry the evidence of a witness before the committing Magistrate who says that his evidence in the lower Court was given under pressure and threat by the police.)

(85) Weir 3rd Edn 939 (940) *In re Nukala Subbaya*.

ting Magistrate — Witness examined in sessions — Previous statement becomes substantive evidence under S 288, Cr P C — Statement modified or resiled in Sessions Court — Conviction on previous statement is unsafe unless circumstances indicate truth of statement)

(24) 11 AIR 1924 Mad 379 (382) 47 Mad 232 : 25 Cr L Jour 715, *Peda Somadu v Appigadu*

(25) 12 AIR 1925 Lah 399 (400) 6 Lah 171 27 Cr L Jour 438, *Rakha v. Emperor*

(19) 6 AIR 1919 Lah 238 (240) 1919 Pun Re No 17 Cr 20 Cr L Jour 791, *Sher Dul v Emperor*. (When

ght to be given

error. (Adoption

committing Magistrate and Sessions Judge quite contrary — There must be independent corroboration to base conviction on evidence before committing Magistrate)

(1900) 4 Cal W N 49 (55), *Pajrang Lal v. Empress* (It is improper to bring on the record without further inquiry the evidence of a witness before the committing Magistrate who says that his evidence in the lower Court was given under pressure and threat by the police.)

(85) Weir 3rd Edn 939 (940) *In re Nukala Subbaya*.

Evidence Act, 1972" did not occur in the section as it stood prior to the amendment of 1923. Hence, the view taken in some of the decisions prior to the said amendment that the evidence admitted under this section could only be used for the purpose of corroboration or contradiction of a witness and not as a substantive evidence² is now no longer law.

The words "subject to the provisions of the Indian Evidence Act" do not mean that the previous statements of a witness admitted under this section can be treated as evidence only in those cases in which such a course is expressly provided for by the Evidence Act³. Nor does the expression mean that the prior depositions can be used as evidence in every case in which there is no express provision in the Evidence Act prohibiting such a course. The expression only means that the evidence admitted under this section is subject to the same rules as to admissibility and relevancy as any other evidence and that a Judge is not at liberty to admit irrelevant evidence under this section merely because it happens to be the deposition of a witness given before the committing Magistrate⁴.

(36) 23 AIR 1936 Pat 11 (14) 36 Cri L Jour 237, *Emperor v Lalji Poy*
(25) 12 AIR 1925 All 185 (186) 47 All 276 26 Cri L Jour 450, *Tully v Emperor* (Previous statements relied upon for purpose of upholding conviction of appellants)
(24) 11 AIR 1924 Mad 379 (381) 47 Mad 232 25 Cri L Jour 715, *Pilla Somadu v Appajiadu*
(23) 12 AIR 1925 Lah 399 (399) 6 Lah 171 27 Cri L Jour 438, *Pakha v Emperor*
(25) 12 AIR 1925 Lah 452 (453) 8 Lah 199 26 Cri L Jour 1245, *Amir Zaman v Emperor* (The expression merely means that the law of evidence enacted in that Act must be complied with)
(33) 20 AIR 1933 Rang 57 (59) 11 Rang 4 34 Cri L Jour 286, *Nga Nyein v Emperor*
49 All 251, *Behari v Emperor*
Jour 641, *Gansu Oraon v Emperor*
Cri L Jour 66, *Bhikari Pati v Emperor* (If

(04) 1 Cri L Jour 184 (196) 2 Low Bar Rul 125, *Shue Hla v Emperor*
(66) 4 Cri L Jour 61 (64, 65) 28 All 683 1966 All WN 187 3 All L Jour 852, *Dwarkan Prasad v Emperor*
(22) 9 AIR 1922 Bom 108 (109) 46 Bom 97 22 Cri L Jour 636, *Maruti Joti v Emperor*

(01) 24 Mad 414 (416), *Queen Empress v Doraisami Ayyar* (Such evidence may be used as much as

3 (42) 29 AIR 1942 Lah 215 (216) I L R (1943) Lah 397 43 Cri L Jour 828 202 Ind Crs 340 (DB) *Mahomed Sarwar v Emperor* (Words "subject to provisions of Evidence Act" cannot be read so as to limit the purpose for which deposition may be used.)

as 393 (DB) *v Emperor* (substantive evidence)

As seen already, the evidence admitted under this section constitutes substantive evidence in the case quite as much as any other evidence. There is no legal objection to a conviction being based purely on the prior deposition of a witness admitted under this section⁶. But as a matter of prudence before preferring the evidence given before the committing Magistrate to that given before himself and acting on such evidence a Judge should have very substantial grounds for doing so⁶. Especially, it would be highly unsafe

(25) 12 AIR 1925 Lah 453 (453) 6 Lah 199 26 Cr L Jour 1245 *Asur Zaman v Crown* (For instance evidence, which had been wrongly admitted by the committing Magistrate in violation of the provisions of the Evidence Act, could not be transferred to the sessions file)

(25) 12 AIR 1915 Pat 51 (53) 3 Pat 781 26 Cr L Jour 270 *Jehal Teli v Emperor*

(26) 13 AIR 1916 Pat 440 (440) 27 Cr L Jour 594 *Digna Kumhar v Emperor*

(26) 13 AIR 1916 Cal 105 (105 106) 26 Cr L Jour 1503 *Pasaruddin v Emperor*

(27) 14 AIR 1927 All 478 (480) 49 All 251 27 Cr L Jour 1865 *Behari v Emperor*

(25) 12 AIR 1925 Bom 266 (267) 26 Cr L Jour 705 50 Bom 215 *Dasappa v Emperor*

5 (40) 27 AIR 1940 Nag 340 (347) 1940 Nag L Jour 459 (469) 1 L R (1941) Nag 110 42 Cr L Jour 17 *Parmanand v Emperor* (Corroboration not necessary)

(36) 23 AIR 1936 Lah 357 (358) 37 Cr L Jour 567 17 Lah 419 *Narman Singh v Emperor* (Section does not show that there need be corroboration)

(35) 22 AIR 1935 All 691 (697) 36 Cr L Jour 823 *Raja Ram v Emperor* (Independent corroboration is not invariably necessary)

(34) 21 AIR 1934 Oudh 232 (234) 35 Cr L Jour 891 *Emperor v Shankar*

6 (42) 29 AIR 1942 Mad 700 (701) 44 Cr L Jour 119 203 Ind Cas 591 (DB) *In re Shanmuga Kone* (It is not necessary for the Judge before taking action under S 288 to conduct an inquiry to satisfy himself beforehand that the evidence given by the witness before him was false and the evidence given before the committing Magistrate was, therefore, likely to be true)

(42) 29 AIR 1942 Sind 139 (140) 44 Cr L Jour 73 1 L R (1942) Kar 299 203 Ind Cas 482 (DD) *Dodo Bihadur v Emperor* (Statements made in committing Magistrate's Court whether should be brought on record in Sessions Court and be preferred as substantive evidence to statements in Sessions Court, is matter of prudence and not of law — Sessions Judge held acted prudently)

(40) 27 AIR 1940 Mad 136 (137) 41 Cr L Jour 323 *In re Chinna Papiiah* (Where a witness in a Court of Session recedes from a statement made by him in a committing Court his evidence should not be relied on in the absence of corroboration although it may be treated as substantive evidence under S 288)

(40) 27 AIR 1940 Mad 136 (137) 41 Cr L Jour 323 *In re Chinna Papiiah*

(36) 23 AIR 1936 Pat 11 (14) 36 Cr L Jour 235 *Emperor v Lalji Roy* (Statements before committing Magistrate — Witness examined in sessions — Previous statement becomes substantive evidence under S 288 Cr P C — Statement modified or recused in Sessions Court — Conviction on previous statement is unsafe unless circumstances indicate truth of statement)

(24) 11 AIR 1924 Mad 379 (382) 47 Mad 232 25 Cr L Jour 715 *Peda Somadu v Appigadu*

(25) 12 AIR 1915 Lah 399 (400) 6 Lah 171 27 Cr L Jour 438 *Rakha v Emperor*

(19) 6 AIR 1919 Lah 238 (240) 1919 Pun Re No 17 Cr 20 Cr L Jour 792 *Sher Dil v Emperor* (When there are strong grounds apart from the statements being retracted for doubting truth of statements made before committing Magistrate they should not be accepted as substantive evidence)

(25) 12 AIR 1915 Pat 51 (55) 3 Pat 781 26 Cr L Jour 270 *Jehal Teli v Emperor*

(26) 13 AIR 1916 Pat 440 (443) 27 Cr L Jour 594 *Digna Kumhar v Emperor* (Weight to be given to previous evidence depends on facts of each case)

(1893) Oudh Sel Cas No 229 p 456 *Queen Empress v Akbar Singh*

(22) 9 AIR 1922 Bom 108 (109) 46 Bom 97 22 Cr L Jour 636 *Maruti Joti v Emperor* (Adoption of such course should be found necessary for purposes of justice)

(22) 9 AIR 1922 Bom 108 (109) 46 Bom 97 22 Cr L Jour 636 *Maruti Joti v Emperor*

committing Magistrate and Sessions Judge quite contrary—There must be independent corroboration to base conviction on evidence before committing Magistrate)

(1900) 4 Cal W N 49 (53), *Fayrang Lal v Empress* (It is improper to bring on the record without further inquiry the evidence of a witness before the committing Magistrate who says that his evidence in the lower Court was given under pressure and threat by the police)

(85) Weir 3rd Edn 939 (940) *In re Anulala Subbaya*

Evidence Act, 1872" did not occur in the section as it stood prior to the amendment of 1923. Hence, the view taken in some of the decisions prior to the said amendment that the evidence admitted under this section could only be used for the purpose of corroboration or contradiction of a witness and not as a substantive evidence² is now no longer law.

The words "subject to the provisions of the Indian Evidence Act" do not mean that the previous statements of a witness admitted under this section can be treated as evidence only in those cases in which such a course is expressly provided for by the Evidence Act³. Nor does the expression mean that the prior depositions can be used as evidence in every case in which there is no express provision in the Evidence Act prohibiting such a course. The expression only means that the evidence admitted under this section is subject to the same rules as to admissibility and relevancy as any other evidence and that a Judge is not at liberty to admit irrelevant evidence under this section merely because it happens to be the deposition of a witness given before the committing Magistrate⁴.

- (36) 23 AIR 1036 Pat 11 (14) 36 Cr L Jour 235, *Emperor v Lalji Poy*
 (25) 12 AIR 1925 All 185 (186) 47 All 276 26 Cr L Jour 450, *Tully v Emperor* (Previous statements relied upon for purpose of upholding conviction of appellants)
 (24) 11 AIR 1924 Mad 379 (381) 47 Mad 232 25 Cr L Jour 715, *Pala Somadu v Appigadu*
 (25) 12 AIR 1925 Lah 399 (399) 6 Lah 171 27 Cr L Jour 438, *Pakha v Emperor*
 (25) 12 AIR 1925 Lah 452 (453) 6 Lah 199 26 Cr L Jour 1245, *Amir Zaman v Emperor* (The expression merely means that the law of evidence enacted in that Act must be complied with)
 (33) 20 AIR 1933 Rang 57 (59) 11 Rang 4 34 Cr L Jour 286, *Nga Nyein v Emperor*
 (27) 14 AIR 1927 All 479 (480) 27 Cr L Jour 1365 49 All 251, *Ichari v Emperor*
 (23) 10 AIR 1923 Pat 550 (554) 2 Pat 517 24 Cr L Jour 641, *Ganga Oraon v Emperor*
 (30) 17 AIR 1930 Pat 545 (547 548) 9 Pat 592 32 Cr L Jour 66, *Dhikari Pati v Emperor* (If truthful and corroborated sufficiently, it may be preferred to statement in Sessions Court.)
 (28) 29 Cr L Jour 73 (75) 106 Ind Cas 585 (587) (Lah) *Ala Singh v Emperor*
 (23) 10 AIR 1923 Mad 20 (23) 45 Mad 766 24 Cr L Jour 417, *Velliah Lone v Emperor*
 (04) 1 Cr L Jour 184 (190) 2 Low Bur Rol 125, *Shree Hla v Emperor*
 (06) 4 Cr L Jour 61 (64, 65) 28 All 683 1906 All W N 187 : 3 All L Jour 852, *Dwarika Prasad v Emperor*
 (22) 9 AIR 1922 Bom 108 (109) 46 Bom 97 22 Cr L Jour 636, *Maruti Joti v Emperor*
Emperor
Emperor (Evidence

- (30) 17 AIR 1930 Cal 228 (230) 31 Cr L Jour 916 *Tafis Pramanik v Emperor* (Jurors are at liberty to believe evidence admitted under this section)
 (01) 24 Mad 414 (416), *Queen Empress v Doraisami Ayyar* (Such evidence may be used as much in favour of the defence as in support of the prosecution)
 (34) 21 AIR 1934 Lah 743 (745) 15 Lah 765 35 Cr L Jour 1005 *Puran v Emperor*
 (17) 4 AIR 1917 Lah 331 (332 333) 18 Cr L Jour 703 (705) 1917 Lun Re No 37 Cr *Purhi v Emperor* (Evidence brought in under this section cannot be accepted as proper corroboration of confession made to Magistrate and subsequently retracted)

v Empress

llai v Emperor (Evidence before Magistrate retracted

before Sessions Judge — Judge acts legally in convicting upon testimony tendered before Magistrate)

- 3 (42) 29 AIR 1942 Lah 215 (216) 1 L R (1943) Lah 397 43 Cr L Jour 828 202 Ind Cas 340 (DB) *Mahomed Saricar v Emperor* (Words "subject to provisions of Evidence Act" cannot be read so as to limit the purpose for which deposition may be used)

- 4 (44) 31 AIR 1944 Sind 178 (182) 46 Cr L Jour 348 ILR (1944) Kar 75 217 Ind Cas 393 (DB)

o v Emperor
 as substantive
 evidence)

It has been held in a number of decisions that when the evidence of a witness before the committing Magistrate is inconsistent with his evidence in the Sessions Court and it is proposed to use his previous statement under this section it is the duty of the Judge to draw his attention to his previous statement and afford him an opportunity of explaining the inconsistency between his two statements.² See Evidence Act s 145. But the correctness of this view is doubtful. The correct position seems to be that when once the deposition in the committing Magistrate's Court is admitted under this section it becomes evidence in the case for all purposes provided that in admitting the evidence before himself the committing Magistrate had not violated any provision of the Evidence Act. In this view it is incorrect to say that s 145 or s 155 of the Evidence Act governs the position and that depositions taken before the committing Magistrate which contradict the evidence given in the Sessions Court cannot be put in without putting to the witness portions of the statement with which it is sought to contradict him.³ See also Note 7.

See also the undermentioned cases⁴

- (21) 6 AIR 1921 All 215 (216) 27 Cr L Jour 813 *Nagina v Emperor*
 (29) 16 AIR 1929 Nag 233 (235) 30 Cr L Jour 333, *Musa v Emperor* (Whole statement to be put to witness)
 2 (45) 32 AIR 1945 Cal 159 (165) 220 Ind Cas 237 (DB) *Emperor v Ajit Kumar Chosh* (The application of s 289 is subject to the provisions of the Evidence Act. If a party seeks to contend that the evidence given by a witness before the trial Judge by a portion of his statement made before the committing Magistrate it can only be done by having recourse to s 145 of the Evidence Act)
 (44) 31 AIR 1944 Cal 393 (394) 46 Cr L Jour 199 ILR (1943) 2 Cal 391 217 Ind Cas 109 (DB), *Emperor v Rahenuddin Mondal* (If a previous statement of a witness is properly brought on record under s 289 and either of the parties wishes to use any portion of it to contradict the witness it is incumbent upon that party to observe the provisions of s 145 of the Evidence Act)
 (81) 1881 All W N 74 (74) *Empress v Nazara*
 (29) 16 AIR 1929 Lah 111 (112) 29 Cr L Jour 1047 *Sadar v Emperor* (Witness was not asked explanation as to discrepancy between statements during preliminary enquiry and committal proceedings)
 (80) 7 All 862 (863) *Queen Empress v Dan Sahai*
 (22) 9 AIR 1922 Pat 40 (42) 23 Cr L Jour 218 *Lachmi Lal v Emperor*
 (30) 17 AIR 1930 Pat 338 (339 344) 32 Cr L Jour 438 *Nanhu Mahlon v Emperor*
 (04) 1 Cr L Jour 86 (88) 31 Cal 142 (FB) *Emperor v Zauar Rahman* (Per Prinsep Offg C J)
 (15) 2 AIR 1915 Bom 237 (241) 16 Cr L Jour 754 *Lakshman Totarai v Emperor* (Sensible in every criminal trial Judges cannot be too careful to conform strictly with principles of evidence)

(It is the duty of the Sessions

Judge to notice all important variations and discrepancies in the deposition of the witness as given before him and as given before the committing Magistrate))

- 3 (44) 31 AIR 1944 Sind 178 (182) 46 Cr L Jour 348 ILR (1944) Ear 75 217 Ind Cas 393 (DB), *Pano v Emperor* (AIR 1930 Pat 338 33 Cr L Jour 438 not approved)
 (42) 29 AIR 1942 Lah 215 (216) 43 Cr L Jour 828 ILR (1943) Lah 397 209 Ind Cas 340 (DB) *Mahomed Sarwar v Emperor* (Dissenting from AIR 1930 Pat 338 32 Cr L Jour 438 on the ground that it conflicts with AIR 1937 P C 119 64 Ind App 148 ILR (1937) Bom 711 33 Cr L Jour 493 (FC))
 4 (44) 31 AIR 1944 Lah 206 (208 209) 45 Cr L Jour 660 213 Ind Cas 355 (DB) *Kala v Emperor* (Statement of witness for prosecution who was given up by prosecution transferred to Sessions record at request of defence—Witness is to be treated as defence or Court witness and not as prosecution witness.)
 (36) 23 AIR 1936 Sind 140 (141) 37 Cr L Jour 1045 *Samero v Emperor* (Witness reading from statement made in committing Magistrate's Court—Notice to show cause cannot be issued when case is pending)
 (85) Weir 3rd Edn 934 (936) *In re Subba Nair* (Rule appears to contemplate that the witness shall first have been examined and that after that his evidence before the Magistrate may be treated as evidence)
 (87) 1847 Pan Re No 51 Cr p 131 (135) *Umar v Empress* (Judge can treat deposition as part of the material on which he sums up to the jury—The deposition should, however, be known to the jury or the assessors in the same way as other documentary evidence that is by reading the whole or such part to the jury or assessors and if necessary showing it to them)

It has been held in a number of decisions that when the evidence of a witness before the committing Magistrate is inconsistent with his evidence in the Sessions Court and it is proposed to use his previous statement under this section, it is the duty of the Judge to draw his attention to his previous statement and afford him an opportunity of explaining the inconsistency between his two statements³ See Evidence Act s 145. But the correctness of this view is doubtful. The correct position seems to be that when once the deposition in the committing Magistrate's Court is admitted under this section it becomes evidence in the case for all purposes provided that in admitting the evidence before himself the committing Magistrate had not violated any provision of the Evidence Act. In this view it is incorrect to say that S 145 or S 155 of the Evidence Act governs the position and that depositions taken before the committing Magistrate which contradict the evidence given in the Sessions Court cannot be put in without putting to the witness portions of the statement with which it is sought to contradict him³ See also Note 7.

See also the undermentioned cases⁴

- (21) 8 AIR 1921 All 215 (216) 27 Cr L Jour 813 *Nagina v Emperor*
 (29) 16 AIR 1929 Nag 233 (935) 30 Cr L Jour 333, *Musa v Emperor* (Whole statement to be put to witness)
 2 (45) 32 AIR 1945 Cal 159 (165) 220 Ind Cas 237 (DB) *Emperor v Ajit Kumar Chosh* (The application of S 288 is subject to the provisions of the Evidence Act. If a party seeks to contradict the evidence given by a witness before the trial Judge by a portion of his statement made before the committing Magistrate it can only be done by having recourse to S 145 of the Evidence Act)
 (44) 31 AIR 1914 Cal 303 (324) 46 Cr L Jour 199 1LR (1913) 2 Cal 381 217 Ind Cas 158 (DB) *Emperor v Rakenuddin Mondal* (If a previous statement of a witness is properly brought on record under S 288 and either of the parties wishes to use any portion of it to contradict the witness it is incumbent upon that party to observe the provisions of S 145 of the Evidence Act)
 (81) 1891 All W N 74 (74) *Empress v Nazara*
 (29) 16 AIR 1929 Lah 111 (112) 29 Cr L Jour 1047 *Sadar v Emperor* (Witness was not asked explanation as to discrepancy between statements during preliminary enquiry and committal proceedings)
 (85) 7 All 662 (663) *Queen Empress v Dan Sahai*
 (32) 9 AIR 1922 Pat 40 (42) 23 Cr L Jour 218 *Lachma Lal v Emperor*
 (30) 17 AIR 1930 Pat 338 (339 341) 32 Cr L Jour 438 *Vanhu Mahtou v Emperor*
 (04) 1 Cr L Jour 86 (88) 31 Cal 142 (7B) *Emperor v Zauar Rahman* (Per Princep Offg C J)
 (10) 2 AIR 1915 Bom 237 (241) 16 Cr L Jour 751 *Lakshman Totaram v Emperor* (Semble in every criminal trial Judges cannot be too careful to conform strictly with principles of evidence)
 (97) 1897 Rat 924 (925) *Queen Empress v Soma Dalji*

(It is the duty of the Sessions deposition of the witness as given

before him and as given before the committing Magistrate))

- 3 (44) 31 AIR 1944 Sind 178 (182) 46 Cr L Jour 348 1LR (1944) Kar 75 217 Ind Cas 393 (DB), *Pano v Emperor* (AIR 1930 Pat 338 32 Cr L Jour 438 not approved)
 (42) 29 AIR 1912 Lah 215 (216) 43 Cr L Jour 828 1LR (1913) Lah 397 202 Ind Cas 340 (DB), *Mahomed Sarwar v Emperor* (Dissenting from AIR 1930 Pat 338 32 Cr L Jour 438 on the ground that it conflicts with AIR 1937 P C 119 64 Ind App 146 1LR (1937) Bom 711 38 Cr L Jour 495 (PC))
 4 (44) 31 AIR 1914 Lah 206 (209 209) 45 Cr L Jour 660 213 Ind Cas 355 (DB) *Kala v Emperor* (Statement of witness for prosecution who was given up by prosecution transferred to Sessions record at request of defence—Witness is to be treated as defence Court witness and not as prosecution witness)
 (36) 23 AIR 1936 Sind 140 (141) 37 Cr L Jour 1045 *Samero v Emperor* (Witness residing from statement made in committing Magistrate's Court—Notice to show cause cannot be issued when case is pending)
 (85) Weir 3rd Edn 931 (936) *In re Subba Nayk* (Rule appears to contemplate that the witness shall first have been examined and that after that his evidence before the Magistrate may be treated as evidence)
 (87) 1887 Pan Re No 51 Cr p 134 (135) *Umar v Empress* (Judge can treat deposition as part of the material on which he sums up to the jury—The deposition should, however, be known to the jury or the assessors in the same way as other documentary evidence, that is by reading the whole or such part to the jury or assessors and if necessary showing it to them)

10. Approver's evidence—The section is wide enough to include the testimony of an approver. Hence, where an approver is examined as a witness in the committing Magistrate's Court and is again examined as a witness in the Sessions Court, his evidence before the committing Magistrate can be introduced under this section into the record of the sessions case, notwithstanding that he has repudiated his former statement¹. But it would be unsafe to base a conviction on the retracted statement of an approver in the absence of any corroboration². See also S 337, Note 16.

289. (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(2) If he says that he does not, the prosecutor may sum up his case, and, if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce

* 1882 S 289, 1872 S 251, 1851 S 372

mination of each witness)

(97) 1897 Rat 924 (925), *Queen-Empress v Soma Daji* (The Sessions Judge should record the statements as exhibits in his own proceedings)

(87) 1887 Rat 343 (343), *Queen-Empress v Govardhan* (Sessions Judge should in his proceedings

or (Time
in witness

Note 10

1 (39) 26 AIR 1939 All 567 (572) 40 Cr L Jour 856 ILR (1939) All 736, *Dhola Nath v Emperor* (Sessions Judge can rely on earlier statement in preference to the statement before the Sessions Court)

(30) 17 AIR 1930 Pat 545 (547, 548) 9 Pat 592 32 Cr L Jour 66 *Dhikari v Emperor*

(94) 1894 Pan Re No 14 Cr, p 43 (44) *Manun v Empress* (It is not rule of law but it is true proposition that evidence of accomplice requires just as much, or as little, corroboration as is needed to convince mind of prudent person that facts alleged against accused are true)

arabhadra v Emperor

In the following cases, however, it was doubted whether this section applies to the evidence of an approver who has forfeited his pardon. It is submitted that so long as the approver is examined as witness his evidence may be admitted under this section.

evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence

Synopsis

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| <ol style="list-style-type: none"> 1 Legislative changes 2 When the examination of witnesses for prosecution is concluded 3 After the examination of any of the accused 4 The accused shall be asked whether he means to adduce evidence 5 The prosecutor may sum up his case — Sub section (2) | <ol style="list-style-type: none"> 6 Where there is no evidence that the accused committed the offence 7 Record a finding of not guilty 8 Direct the jury to return a verdict of not guilty 9 Shall call on the accused to enter on his defence — Sub section (4) 10 Procedure where the witnesses for the accused are absent 11 Effect of non compliance with the section |
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NOTE to the Synopsis See the Notes indicated for the following topics

Accused not adducing evidence — No adverse inference to be drawn See Note 9

Accusals where there is no prosecution evidence See Note 6

Not proven — Finding of See Note 7

Re-calling of prosecution evidence See Note 9

Record of the defence See Note 9

1 Legislative changes

- (1) The corresponding S 317 of the Code of 1861 contained a single clause that the accused should be called upon to enter on his defence after the close of the prosecution evidence
- (2) The first two clauses of S 251 of the Code of 1872 contained similar provisions, clause (1) thereof corresponding to sub ss (1) and (2) and clause (2) to sub s (4) of the present section
- (3) Section 289 of the Code of 1882 was the same as the present section

2 When the examination of witnesses for prosecution is concluded —

The general principle is that an accused person is entitled to know what the evidence against him is before he is called upon to enter on his defence¹ This section accordingly provides that he is to be called upon to enter on his defence only after the examination of the prosecution witnesses is concluded² The closing of the case for the prosecution is thus not mere form but with certain exceptions closes the door to any further evidence against the accused the prosecutor cannot re open his case and make additions to it except such voluntary additions as the accused may make himself³ and except for the purpose of contradicting any new case set up by the accused in his defence⁴ If for any reason the Court recalls any prosecution witness after the accused has made his defence the accused should be given a further opportunity of calling evidence with reference to the evidence so recorded⁵ The Court should wait before proceeding under this section till all the evidence on the side of the prosecution is concluded⁶ it cannot proceed under this section in the

Section 289 — Note 2

1 (193) 10 AIR 1923 All 399 (393) 45 All 373 2, Cr L Jour 30, *Maladeo v Emperor*

2 (20) 7 AIR 1908 Bom 437 (111) 22 Cr L Jour 53 *Alex Pimento v Emperor*

(11) 12 Cr L Jour 7 (8) 9 Ind Cas 46 (C) *Radha Mahab Pakra v Emperor*

(79) 4 C L J 438 (316) *In re Turf Hill*

(21) 10 AIR 1908 All 131 (933) 29 Cr L Jour 841 *Karam Chand v Emperor*

3 (19) 10 AIR 1908 All 377 (31) 45 All 373 2, Cr L Jour 30, *Maladeo v Emperor*

Also see S 244 Note 3 and S 277 Note 10

4 (71) 3 N W L H C R 271 27, *Queen v Clotey Lal*

5 (70) 13 N W L R C R 11 (15) *Queen v Akmal*

(1) 12 AIR 1908 All 511 (511) 26 Cr L Jour 1035 *Shuqa v Emperor* (Case relating to trial before a Magistrate)

Also see S 37 Note 2 and S 310 Note 10

6 (9) 14 All 21 (114) 1-9 All W N 63 *Queen Empress v Hafsu J*

Also see S 310 Note 5

course of the prosecution evidence because it does not believe the evidence so far tendered¹

3 After the examination, if any, of the accused — The words *if any*² would appear to suggest that the examination of the accused is not always necessary in a sessions trial. This however is not so. The words are intended to cover only those cases where the accused has no circumstances to explain as for instance, where he has admitted his guilt and are not intended to relax the imperative provisions of S 312 in *all* cases³

Consequently before an accused person is called upon to enter on his defence he should be examined as to whether he has anything to say regarding the evidence against him² even if he had been examined with great care before the committing Magistrate because it makes a considerable difference to listeners like the jurors whether a previous statement is read over to them or the accused is examined in their presence so that they may see his demeanour³

See also S 342 Note 20

4 "The accused shall be asked whether he means to adduce evidence" — After the conclusion of the prosecution evidence the Court is bound to ask the accused person if he means to adduce evidence and the accused himself cannot waive the benefit of such a provision¹. The words *adduce evidence* in sub s (1) do not mean the same thing as the words *enter on his defence* in sub s (4). It is only where at a later stage the Court considers that there is evidence that the accused person committed the offence that the accused is to be called upon to enter on his defence²

5 "The prosecutor may sum up his case" — Sub section (2) — The prosecutor may sum up his case only if the accused says he does not mean to adduce evidence. In a case where several persons are tried together the word *he* in sub s. (1) and (4) should be construed to apply to *all* the accused together and so a prosecutor may sum up only if all the accused say they do not mean to adduce evidence¹

6 Where there is no evidence that the accused committed the offence — The words *no evidence* in sub s (2) mean merely that there is not on the record any evidence which *even if true* would amount to legal proof of the offence charged against the accused. They cannot be extended to mean *no satisfactory, trustworthy or conclusive evidence*¹. The real test in deciding whether there is evidence or not is to see whether a

7 (89) 2 Weir 384 (384 385) "O Mad 415 Queen Empress v Narasingam
(98) 1 Oudh Cas 85 (97) Queen v Bhup Singh

Note 3

1 (03) 10 Cr L Jour 325 (339) 3 Ind Cas 620 (Cal) Khudiram Bose v Emperor
(03) 10 Cr L Jour 325 (339) 3 Ind Cas 620 (Cal) Khudiram Bose v Emperor

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Also see S 342 Note 20

Note 4

1 (68) 10 Cr L Jour 717 (717) 10 Cr L Jour 717

[See also

person in

2 (20) 71

Note 5

1 (94) 18 Bom 364 (365) Queen Empress v Sadanand Narayan

Note 6

1 (88) 1888 All W N 153 (153) Empress v Nanka

(88) 10 All 414 (414 417) 1888 10 All 414 (414 417)

(92) 16 Bom 41

(83) 9 Cal 875

(20) 12 AIR 19

worth the name as against the fact very different from no evidence)

emperor

cused

peror

(No evidence

Judge at a trial held with the aid of jurors could say that there was no evidence which could go before the jury.² However a mere scintilla of evidence is not enough to justify the Judge in leaving a case to the jury. There must be evidence from which they might reasonably conclude the fact to be established.³ The evidence referred to is the evidence let in on behalf of the prosecution so where the only evidence is the confession of a co-accused⁴ or the evidence of witnesses of a co-accused⁵ it is a case of "no evidence" within the meaning of this section. The evidence contemplated by sub s (2) includes both direct and circumstantial evidence.⁶ The words "no evidence" do not however, mean absence of evidence on behalf of the prosecution owing to failure of witnesses to attend. So, where the prosecution could not adduce evidence owing to failure of witnesses to attend, the Court cannot treat it as a case of "no evidence" and proceed under this section.⁷

7. Record a finding of not guilty — If the Court considers that there is no evidence, it can, in a case tried with the aid of assessors itself record a finding of not guilty even without taking the opinions of the assessors but if there is some evidence, though not trustworthy, satisfactory or conclusive, the Court must record the opinions of assessors before recording a finding of not guilty.¹ But the Court cannot purporting to act under this section, record a finding of not guilty where it considers the charge itself improper.² Where there is no evidence the Judge should enter a verdict of acquittal there is no warrant for a finding of "not proven".³

8 "Direct the jury to return a verdict of not guilty" — If in a case tried by a jury there is no legal evidence that the accused committed the offence, the Court should direct the jury to return a verdict of "not guilty". It must not leave it to the jury to express their opinion since a finding of guilty by the jury under such circumstances cannot be sustained,¹ even if there is some evidence available but not called by

(89) 2 Weir 391 (381, 392)

(29) 16 AIR 1929 Pat 121 (124) 30 Cr L Jour 519 *Emperor v Nawal Kishore*

(91) Oudh Sel Cas No 274 p. 607 (608) *Joga Singh v Ganesh Singh*

2 (27) 14 AIR 1927 All 90 (91) 49 All 181 27 Cr L Jour 1369 *Balchand v Emperor v Upendra*

5 (09) 10 Cr L Jour 68 (69) 2 Ind Cas 523 (Mad) *In re Raghataraju*

6 See (37) 24 AIR 1937 Pat 263 (270) 15 Pat 817 38 Cr L Jour 673 *Samarendra Kumar v Emperor* (The judgment uses the words "oral and circumstantial" but apparently what is meant is "direct and circumstantial")

7 (26) 13 AIR 1926 Cal 584 (585) 27 Cr L Jour 125, *Superintendent and Remembrancer of Legal Affairs v Sardar Saik*

Note 7

1 (90) 18 Cr L Jour 101 (102) 20 Cr L Jour 101 (102)

Also see S 309 Note 3

2 (90) 12 All 551 (552) 1890 All W N 178 *Dwaraka Lal v Mahadeo Rai*

3 (65) 2 Weir 381 (381), *In re Korada Gumman*

Note 8

1 (41) 23 AIR 1941 Bom 120 (128) 42 Cr L Jour 513 194 Ind Cas 5 (FD) *Emperor v Thokars Narsi* (Under S 289 Cr P C, in a case tried by the jury though the word used is "may" and not "must" it is well settled that if the Judge comes to the conclusion that there is no evidence to go to the jury, it is the duty of the Judge to direct the jury that in law they must acquit)

(41) 23 AIR 1941 Bom 123 (124) 42 Cr L Jour 470 1 I L R (1941) Bom 515 193 Ind Cas 852 (FD), *Emperor v Dawood Hasham* (Section 289 Cr P C, confers in terms a discretion on the Judge, but it is discretion which must be exercised judicially, it is quite clear that where the Judge is satisfied that there is no evidence to go to the jury, he must in his discretion withdraw the case from the jury, or, in other words, direct them to return a verdict of not guilty)

the prosecution³ The direction of a Judge that there is no evidence that the accused committed an offence is binding on the jury and must be followed by them, and where the Judge, in such a case, directs the jury to return a verdict of "not guilty," the jury must accept that opinion whether they agree with it or not; a return of verdict of guilty in such a case cannot be accepted³ The Court cannot forbear from directing a return of a verdict of not guilty if there is no evidence, even on the ground that the case of a co accused is likely to be prejudiced thereby⁴ But if there is some evidence the case must go before the jury and the Court cannot direct a verdict of not guilty because it *disbelieves* the evidence⁶

A Court of Session, unlike a High Court, has no power to stay proceedings under s 273 on unsustainable charges and all that it can do after hearing the evidence and coming to the conclusion that there is no evidence that the accused committed the offence is to direct the jury to return a verdict of not guilty, but it cannot do so before the commencement of the trial This provision is meant for remedying any suspicion of injustice under which the accused may labour in respect of what he considers to be a committal on insufficient evidence⁶

9. "Shall call on the accused to enter on his defence" — Subsection (4). — The calling upon an accused person to enter on his defence under this subsection is not a mere formality but is an essential part of a criminal trial¹ So, where there is some evidence on behalf of the prosecution which might go before a jury, the Court should call upon the accused to enter on his defence² after the close of the prosecution evidence and summing up by the prosecutor.³ As to whether a failure to call upon the accused to enter upon his defence is an irregularity covered by S 377, see Note 11

(41) 28 AIR 1941 Mad 763 (763, 764) 43 Cr L Jour 106 197 Ind Cas 71 (DB), *In re Chittrabalu Theroor* (Trial by jury for offence under S 395, Penal Code — Some accused pattadars holding ryoti lands under zamindar — Estate authorities distraining their cattle for recovering arrears of rent — Accused along with others forcibly recovering cattle and inflicting injuries on opposite parties — No proof of exchanges of muchilika between zamindar and accused or of continuance of valid patta—Arrears of more than one year held were not recoverable) 299 (2) to

(61) 1 Suth W R Cr 51 (51, 58), *Queen v Greedhary*

(67) 8 Suth W R Cr 87 (92), *Queen v Nobokisto Ghose*

(71) 16 Suth W R Cr 19 (20), *Queen v Rutton Dass*

(71) 15 Suth W R Cr 46 (46), *Queen v Bhar Ali* (Conviction by a jury set aside in a case of murder in which there was total absence of all evidence to show the prisoner's guilt)

(99) 2 W R Cr 151 (151) 7 Cr L Jour 106 197

(129)

(20)

2 (111) 13 AIR 1926 Cal 728 (729) 27 Cr L Jour 398, *Haricharan Das v Emperor*

(1)

3 Judge

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Judge
et)

4 (26) 13 AIR 1926 Cal 728 (729) 27 Cr L Jour 398, *Haricharan Das v Emperor*

5 (72) 16 Suth W R Cr 20 (21) *In re Hurao Shaha*

(27)

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for.

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(25)

6 (35) 23 AIR 1935 Nag 201 (201, 205) : 36 Cr L Jour 1339 31 Nag L R 300, *Maroti v. Emperor*

Note 9

1. (96) 23 Cal 252 (253), *Queen v Imam Ali Khan*

2. (92) 16 Bom 414 (423) *Queen-Empress v Vaji Ram*

3. (91) 1891 Rat 581 (582), *Queen Empress v Dhamba*

Where several persons are tried together even if one of them offers to adduce evidence all of them should be called upon to enter on their defence and they must follow one another in their defence since there cannot be a summum up only in the case of accused not adducing evidence and a right of reply as against others⁴ Since in a criminal case the burden of proof is on the prosecution and the conviction must be based on evidence which excludes the theory of innocence⁵ the accused should be called upon to enter on his defence only if the evidence is such as to enable the Court to judge rather than conjecture⁶ For the same reason no adverse inference can be drawn against the accused if he fails to adduce evidence even if he had in answer to a question under the first part of this section undertaken to adduce evidence⁷ If the accused makes any statement in his defence it ought to be recorded. If he does not voluntarily make any statement or declines to answer questions under S 342 the facts should be noted. When there is nothing else to show the nature of the defence a note of the address to the Court under S 290 if any should be recorded. The record is not complete unless it shows the nature of the defence set up⁸.

Where the accused calls no witnesses the clause means that he or his pleader is to make his final address to the Court⁹.

10 Procedure where the witnesses for the accused are absent — Where due to a mistake the witnesses for the defence were not in attendance not having been summoned by the Magistrate it was held that the trial should be adjourned and the accused should be given an opportunity to examine his witnesses by summoning them if necessary¹ after calling upon him to enter on his defence².

11 Effect of non compliance with the section. — The criminal proceedings are bad unless they are conducted in the manner prescribed by law and if they are substantially bad in themselves the defect will not be cured by any consent or waiver on the part of the accused³. Thus it is irregular to record the prosecution evidence after the accused has entered on his defence⁴ but it is only an irregularity which does not vitiate the trial if there has been no prejudice caused to the accused by reason of such irregularity⁵.

4 (94) 18 Bom 361 (367) *Queen Empress v Sadanand Narayan*

5 (95) 189 Ind Rat 779 (783) *Queen Empress v Narayan Natlu*

6 (95) 189 Ind Rat 772 (773) *Queen v Ganesh Bhikaji*

7 (84) 10 Cal 140 (149 150) 13 Cal L Rep 308 *Hurry Churn v Empress*

8 (91) 15 Cal 156 (157) 11 Cal L Rep 117

v Mt Hardas

1907

1935 Mad WN 1092 *Thappa v Emperor*

(27) 14 AIR 1927 Cal 250 (251) 28 Cal L Jour 297 51 Cal 996 *Dechulal v The Injured Lady*

Note 10

1 (69) 12 Suth W R Cr 72 (73) *Queen v Mookun*

(71) 10 Suth W R Cr 84 (85) 6 Beng L R App 89 *Queen v Ishan Dutt*

2 (75) 23 Suth W R Cr 58 (59) *Queen v Jussuruddin*

Note 11

1 (76) 2 Cal 23 (30) 20 Suth W R Cr 57 *Queen v Bholanath Sen*

Also see S 537 Note 33

2 (70) 13 Suth W R Cr 86 (87) *Queen v Sham Kishore* (In this case however it was held that the accused knew the evidence to be given and anticipated the same in his defence — So no prejudice)

(18) 15 AIR 1913 Lah 953 (953) 29 Cal L Jour 844 *Karam Chand v Emperor* (A prosecution witness examined after the whole of defence evidence was recorded — Procedure is bad and vitiates trial)

(70) 13 Suth W R Cr 15 (15) *Queen v Assanoollah* (Prosecution witness recalled after defence of the accused without giving him further opportunity — Conviction quashed)

3 (80) 8 Cal 151 (156) 10 Cal L Rep 51 *Empress v Kalschurn*

(79) 4 Cal L Rep 338 (341) *In the matter of Turbullah* (Case commenced by examination of witnesses for defence)

Also see S 214 Note 3 and S 256 Note 10

Where the Court records a finding of not guilty or directs the jury to return a verdict of not guilty without recording the opinions of the assessors or the verdict of the jury, as the case may be, in a case where there is enough evidence to go to the jury the Court acts without jurisdiction and the trial is illegal.⁴ But the Calcutta High Court has held under similar circumstances that it is only an irregularity which does not vitiate a trial if there is no prejudice to the other accused.⁵ Where there is no evidence and the jury returns a verdict of guilty by reason of the Judge not directing them to give a verdict of not guilty the conviction is bad in law.⁶ Entering upon defence on being called upon to do so marks a special stage in, and is an essential part of a criminal trial. Omission to call upon the accused to enter on his defence according to the Calcutta High Court⁷ and the Chief Court of Lower Burma⁸ cannot but occasion failure of justice and conviction consequent thereon must be set aside. But the High Courts of Allahabad⁹ and Madras¹⁰ have taken the view that it is only an irregularity which does not vitiate the trial if there has been no prejudice to the accused. Where the accused is not asked if he means to adduce evidence his conviction is liable to be set aside.¹¹

290. The accused or his pleader may then open his case stating Defence the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross examination and re examination (if any) may sum up his case.

Synopsis

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| 1 Defence | 4 Summing up after evidence — Right of |
| 2 Accused's right to examine witnesses | 5 Evidence in criminal cases |
| 3 Accused's right to cross-examine witnesses | 6 Written statement |

NOTE to the Synopsis See the Notes indicated for the following topics

Adverse inferences against accused See Note 5
Burden of proof See Notes 1 and 5
Duty to explain incriminating facts See Note 5

Record of defence set up See Note 1
Witnesses for co accused—Cross examination See Note 3

1 Defence — The last section (S 299) provides that if after the prosecution evidence is taken in a sessions trial the Court considers that there is evidence that the accused committed the offence he should be called upon to enter on his defence. This and the next section provide for the procedure to be followed in conducting the defence.

The accused is entitled to set up any defence technical or otherwise.¹ There is no

* 1882 S 290 1872 S 251 para 3 1861 S 374

- 4 (94) Oudh Sel Cas No 274 p 607 (609) *Joga Singh v Ganesh Singh*
(88) 10 All 414 (417) 1888 All W N 129 *Queen Empress v Munna Lal*
(89) 2 Weir 391 (391) (Court not taking the opinion of assessors commits an error in law)
Also see S 309 Note 3

5 (1882) 10 All 414 (417) *Sham Ali v Emperor*

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(71)
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covered by S 53(f)

10 (36) 23 AIR 1936 Mad 89 (83) 37 Cal L Jour 45 *In re Tipopa*

11 (68) 10 Buth W R Cr 7 (7) *Bhugwan v Dayal Gope*

Also see S 256 Note 10

Section 290 — Note 1

- 1 (36) 23 AIR 1936 Nag 55 (58) 37 Cal L Jour 474 *Dewan Singh v Emperor* (Under the law it is perfectly open to an accused person to raise any plea of law or fact which may make for his acquittal)
(14) 1 AIR 1914 Cal 456 (459) 41 Cal 350 15 Cal L Jour 383 *Romesh v Emperor*

legal bar to his raising even inconsistent defences². Thus he can raise a defence of *alibi* as well as of private defence³. But the defence will become weaker by inconsistent pleas, being raised⁴.

The record of the trial should show the nature of the defence set up⁵. The nature of the defence is to be gathered not only from the statement of the accused but also from the trial of cross examination of the prosecution witnesses and the arguments of the defence pleader⁶.

Though under s 103 of the Evidence Act the burden of proving that the case of the accused falls within one of the general exceptions in the Penal Code is on him it is not necessary that he should specifically raise such a plea. A Court is bound to give effect to a plea of private defence if it is made out on the evidence though it is not specifically raised by the accused⁷. So also in discharging this burden the accused need not establish his plea beyond a reasonable doubt. If the accused makes out a *prima facie* case in favour of his plea then the burden shifts to the prosecution which has still to discharge its original and major onus that never shifts, i.e. that of establishing on the whole case the guilt of the accused beyond a reasonable doubt⁸.

The accused is not bound to disclose the nature of his defence in the committing Magistrate's Court⁹. Nor is he bound to disclose his defence in the Sessions Court till he is called on to enter upon his defence¹⁰. But if he means to bring any charges against the prosecution (e.g. a charge of fraud) as part of his defence there is an equitable rule that he should disclose his intention during the cross examination of the prosecution witnesses so that the prosecution may have an opportunity of explaining matters. Unless such an opportunity is given to the prosecution the defence so far as it is based on the allegations

2 (36) 23 AIR 1936 Rang 1 (?) 37 Cri L Jour 293 *Nga Ba Sein v Emperor* (The accused himself may on his own behalf take up one line of defence but it is equally open to his pleader on his behalf to take up another and alternative line of defence)

(23) 10 AIR 1923 Cal 717 (718) 25 Cri L Jour 190 *Nagendra Chandra v Emperor*
[But see (10) 11 Cri L Jour 374 (376) 3rd All 451 6 Ind Cas 589 *Emperor v Wajid Hussain* (Where accused has raised plea inconsistent with a defence which would bring his case within one of the general exceptions he cannot in appeal set up a case upon the evidence taken at his trial that his act came within such general exception)]

3 (18) 5 AIR 1918 All 189 (190) 40 All 284 19 Cri L Jour 371 *Yusuf v Emperor*
(19) 6 AIR 1919 Cal 439 (441) 20 Cri L Jour 661 *Afruddi Chakdar v Emperor*
[See (20) 7 AIR 1920 Pat 813 (814) 5 Pat L Jour 64 21 Cri L Jour 799 *Fauzi Kest v Emperor* (It is open to an accused person to plead the right of private defence either specifically or as an alternative defence)]

4 (23) 10 AIR 1923 Cal 717 (718) 25 Cri L Jour 190 *Nagendra Chandra v Emperor*

5 (71) 15 Buth W R Cr 16 (17) *In re Gopal Haryain*

6 (30) 17 AIR 1930 Cal 447 (442 443) 31 Cri L Jour 1203 *Kuti v Emperor*

7 (36) 23 AIR 1936 Rang 1 (2) 37 Cri L Jour 293 *Nga Ba Sein v Emperor*

(27) 14 AIR 1927 Mad 97 (97) 27 Cri L Jour 1193 *In re Jogals Bhaugo*

(15) 2 AIR 1915 Mad 53rd (533) 15 Cri L Jour 710 *In re Pachay Gounden*
Bahadurkhan v Emperor
Charan Mookerjee

1203 *Kuti v Emperor* (Charge to jury expressly calling upon jury not to consider plea of private defence because it was not specifically pleaded though

v Kishen Lal

a Nadan v Emperor

Also see S 271 Note 9

8 (43) 30 AIR 1913 Lah 56 (58) 20th Ind Cas 552 41 Cri L Jour 397 (Dil) *Hasan Din v Emperor*
(There is a subtle but fundamental distinction between the degree of certainty required in cases where the burden of proving a fact is on the prosecution and those where the burden of proof is on the accused)

9 (30) 17 AIR 1930 Cal 188 (189) 31 Cri L Jour 695 *Kali Dilas Hasra v Emperor*

10 (77) 14 AIR 1927 Snd 104 (107) 27 Sind L R 336 23 Cri L Jour 66 *Emperor v Saran*

against the prosecution, must fail¹¹

The accused can raise a new defence at a late stage of the case, but unless it can be said that such a defence could not have been raised earlier, the weight to be attached to it will suffer¹²

See also Note 5, S 296, Note 10 and S 312, Note 29

2. Accused's right to examine witnesses—When a prisoner puts forward a distinct defence and cites witnesses but such witnesses on their appearance in Court say that they know nothing in prisoner's favour, it is the duty of the Judge, instead of dismissing them at once, to question them with a view to see if there is any truth in the defence¹

It is no part of the duty of a Judge to examine a witness for the accused when his pleader has refused to do so and the accused has not raised any objection.²

See section 291 and Notes thereon

3. Accused's right to cross-examine witnesses.—An accused is entitled to cross examine the witness of a co accused whose case is adverse to his own¹

Where a witness examined by the prosecution in the committing Magistrate's Court is given up by the prosecution and the accused thereafter calls him as his own witness, the accused cannot cross examine him the reason being that the Evidence Act gives the right of cross examination only to the adverse party except in certain cases (Evidence Act Ss 138 and 151)²

4 Summing up after evidence—Right of—When there are more than one accused in a case, their pleaders should be allowed to sum up their respective cases after the evidence for all the accused has been taken¹ Any arbitrary and undue curtailment by the Court of the parties' right of argument is to be deprecated²

5 Evidence in criminal cases—The burden of proving the guilt of the accused in all criminal cases is on the prosecution¹ There is no obligation on the accused

11 (27) 14 AIR 1927 Sind 101 (107) 27 Sind L R 356 28 Cri L Jour 66 *Emperor v Saran*
(14) 1 AIR 1914 Cal 456 (466) 41 Cal 530 15 Cri L Jour 385 *Gomesh Chandra v Emperor*
(28) 15 AIR 1928 All 222 (225) 30 Cri L Jour 530 *Emperor v Jhabbar Mal*

12 (33) 20 AIR 1935 Pat 481 (483) 34 Cri L Jour 828 *Emperor v Kameshwar Lal*
[See also (36) 23 AIR 1936 Lah 233 (233) 37 Cri L Jour 751, *Dilwar v Emperor* (Defence of alibi ought to be raised at the earliest possible opportunity and raising such a defence for the first time in the Sessions Court would be fatal to the defence)]

Note 2

1 (69) 11 Suth W R Cr 9 (9), *Queen v Bhugner Putla*

2 (83) 1883 All W N 169 (190) *Empress v Harpat*

Note 3

1 (32) 19 AIR 1932 Lah 103 (110) 33 Cri L Jour 97 135 Ind Cas 200 (DB), *Mohinder Singh v Emperor* (Case of accused common to co accused and not adverse — Held no prejudice caused to

7 *Emper*

Also see S 291 Note 9

[But see (69) 12 Suth W R Cr 75 (76) *Queen v Surroop Chand Paul*]

2 (97) 20 All 155 (157) 1897 All W N 229 *Queen Empress v Zauar Hussin*

[But compare (23) 10 AIR 1923 Cal 717 (718) 25 Cri L Jour 190 *Nagendra Chandra v Emperor* (Witness not given up by prosecution but not examined in the Sessions Court — Accused is entitled to cross examine such witness)]

Note 4

1 (32) 19 AIR 1932 Lah 103 (110) 33 Cri L Jour 97 *Mohinder Singh v Emperor*

2 (37) 24 AIR 1937 Pat 263 (273) 38 Cri L Jour 673 15 Pat 817, *Samarendra Kumar v Empe* or
(If the Judge has properly charged the jury, the mere fact that the case has not been adequately argued on behalf of the accused cannot by itself be a good ground for ordering a re trial)

Note 5

1 (46) 33 AIR 1946 All 191 (195) 1945 All W R (HC) 287 (290) (DB) *Ram Kala v Emperor* (The prosecution must, even though there may be some lacuna in the defence not strictly consistent with the innocence of the accused prove his guilt beyond all reasonable doubt)

to produce any evidence in his defence in the first instance² Unless and until the prosecution has established a *prima facie* case against the accused no adverse inference can be drawn against him from the non-production of any evidence by him³ Similarly the accused cannot be convicted merely on the ground of the weakness or falsity of his defence⁴ The prosecution cannot seek to use an admission in the accused's statement to fill up a gap in the prosecution evidence⁵ A conviction cannot be based merely on suspicion⁶ Where the

- (43) 30 AIR 1913 Lah 56 (53) 41 Cri L Jour 397 20s Ind Cas 552 (DB) *Hasan Din v Emperor* (The original and major onus on the prosecution never shifts)
- (33) 20 AIR 1933 Cal 800 (501 801) 61 Cal 169 35 Cri L Jour 156 140 Ind Cas 767 (DB) *Robert Stuart Wanchope v Emperor*
- (19) 6 AIR 1919 Cal 305 (30s) 20 Cri L Jour 721 52 Ind Cas 881 (DB) *Lanchanan Dore v Emperor* (In criminal case the burden of proving the charge substantially as drawn lies on the prosecution)
- (40) 27 AIR 1910 Lah 54 (57) 41 Cri L Jour 447 *Bhag Singh v Emperor* (The rule is subject to exception contained in S 105 of the Evidence Act)
- (39) 26 AIR 1939 Sind 909 (214) 41 Cri L Jour 23 1 L R (1910) Kar 249, *Shewaram Jethanand v Emperor* (Prosecution must fully prove guilt of accused — Merely proving *prima facie* case is not sufficient)
- (30) 17 AIR 1930 Bom 179 (181) 31 Cri L Jour 1096 *Keshaji Madhaji v Emperor* (Cheating by cheque — Burden of proof ordinarily is on prosecution to prove that non payment was not accidental but intentional)
- 2 (40) 27 AIR 1910 Mad 379 (33s) 41 Cri L Jour 621 *Pez v Krishnan*
- (32) 19 AIR 1932 Lah 243 (244) 33 Cri L Jour 411 *Hayat v Emperor* (Two persons seen together and shortly afterwards one of them found to have been murdered No onus rests on survivor to explain how deceased met with his death)
- (94) 1891 Rat 696 (686) *Queen Empress v Jethmal Narayan* (Prisoner on his trial is merely on his defensive and owes no duty to any one but himself he could not be convicted because he had not tried to explain to the Court how the death in question occurred or by what means)
- 3 (42) 29 AIR 1912 All 47 (40) 1 L R (1911) All 912 198 Ind Cas 452 43 Cri L Jour 380 *Ghura v Emperor* (The silence of an accused must never be allowed to any degree to become a substitute for proof by the prosecution of its case No presumption arises *ipso facto* from the silence of an accused person)
- (95) 1895 Rat 779 (782) *Queen Empress v Narayan Malhi*
- (81) 10 Cal 140 (149) 13 Cal L Rep 359 *Hurry Churn v Empress*
- (82) 8 Cal 121 (125) 10 Cal L Rep 151 *Empress v Dhuunno Kazi*
- 4 (23) 10 AIR 1923 Mad 365 (367) 24 Cri L Jour 426 *Ramudu Iyer v Emperor*
- (40) 27 AIR 1910 Pat 365 (370) 41 Cri L Jour 114 (120) *Rambrichh v Emperor* (Even if the version put forward by the defence is wholly untrue the prosecution must establish beyond all reasonable doubt that the case put forward by them is true)
- (40) 27 AIR 1910 Lah 54 (57) 41 Cri L Jour 417 *Bhag Singh v Emperor*

(68) 1868 Pun Re No 27 Cr p 52 (57) *Jehangeer Khan v Crown*

Lal v Emperor (Weak

- 5 (95) 12 AIR 1925 Lah 85 (85) 5 Lah 401 26 Cri L Jour 370 81 Ind Cas 464 (DB) *Emperor v Jaswant Rao & Co* (An accused person cannot be asked to make admissions for the purpose of enabling the Crown to procure a legal decision)
- (37) 21 AIR 1937 Ma 1209 (210) 39 Cri L Jour 323 1 L R (1937) Mad 359 *Seshapani Chetty v Emperor*
- (01) 27 Mad 233 (210) 2 W L R 40s *Mohideen Abdul Kadir v Emperor*
Also see S 256 Note 10
- 6 (40) 27 AIR 1910 Pat 365 (371) 41 Cri L Jour 114 *Rambrichh Singh v Emperor*
- (39) 52 Mad L W 420 (428 429) *In re Rams Reddy* (Utmost suspicion without the element of certainty does not justify a conviction — Benefit of doubt should be given to accused)

prosecution evidence is not conclusive about the guilt of the accused and there is doubt the accused is entitled to the benefit of doubt and must be acquitted? But where the prosecution has established a *prima facie* case against the accused it is for him to explain the incriminating circumstances appearing against him⁶ See also Note 1 and S 367, Note 6

6 Written statement—There is no provision for filing a written statement by the accused in sessions trials¹ See S 256 and Notes thereon See also S 312

291.* The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance as to examination but he shall not, except as provided in sections 211 and and summoning of 231, be entitled of right to have any witness summoned witnesses other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial

Synopsis

1 Scope of the section

2 Examination of witnesses present in Court

3 Right to issue of process for compelling attendance of witnesses

NOTE to the Synopsis See the Notes indicated for the following topics

Adjournment for summoning new witnesses See Summons refused by Magistrate—Issued by Note 3 Sessions Court See Note 3

Refusal to summon witnesses named—Delay See Witnesses not previously named but present See Note 2

1 Scope of the section—This section entitles the accused to examine in his defence in the Sessions Court all witnesses who are present whether they have been named by him previously or not. It also entitles him to the assistance of the Court in compelling the attendance of all those witnesses who were included by him in the list of witnesses delivered by him to the committing Magistrate under S 211. As it is a frequent ground of appeal against a conviction by the Sessions Court that the Court refused or omitted to examine witnesses for the defence the Court should be careful to note specifically in the record whether the accused elected to call any witnesses in his defence or refused to do so

* 1882 S 291 1872 S 363 1881 S 375

(Specially in a murder

murder

(39) 5 Mad L W 420 (429) *In re Rama Reddi*

8 (31) 18 AIR 1931 Pat 384 (386) 10 Pat 590 53 Cr L Jour 111 *Leda Dhagat v Emperor*

(28) 15 AIR 1928 Pat 100 (101) 5 Pat 627 29 Cr L Jour 239 *Ghanshjam v Emperor* (Merely

are in
tribunal

Also see S 312, Note 1 and S 312 Note 29

Note 6

1 (26) 13 AIR 1926 Pat 566 (568) 27 Cr L Jour 1041 *Emperor v Zahir Haidar*

(16) 3 AIR 1916 Cal 633 (641) 16 Cr L Jour 794 *Emperor v Dwijendra Chandra*

(35) 22 AIR 1935 Cal 687 (688 689) 37 Cr L Jour 30 63 Cal 481 *Emperor v Tarak Nath*

[See however (33) 20 AIR 1933 All 690 (695) 55 All 1010 34 Cr L Jour 967 *Jhabwala v Emperor* (If the accused has already prepared a written statement there is no reason why he should not be allowed to file it in the Court of Sessions)]

ror

and whether the witnesses called by him were examined¹

2 Examination of witnesses present in Court — Under this section the accused is entitled as of right to examine as a witness in his defence any person who is present in the Court notwithstanding that he was not named by him previously as his witness¹ *4 fortiori* if a witness included in the list delivered by the accused to the committing Magistrate under S 211 is present in Court the Court is bound to allow him to be examined² In the undermentioned case³ it was held that if the accused insists on the examination of a witness in attendance who had been *discharged* before the Court may if it thinks that the interests of justice would be served allow him to be examined

3 Right to issue of process for compelling attendance of witnesses — This section provides that except in certain cases the accused is not entitled as of right to the issue of summons to any witness not included in the list delivered by him to the committing Magistrate under S 211 Nor can he insist on an adjournment being granted to enable him to examine any such witness¹ But it is open to the Sessions Court in the exercise of its *discretion* to issue summons for the attendance of such witnesses² and ordinarily an application by an accused for summons ought not to be refused if there is time to secure the attendance of the witnesses before the conclusion of the trial³

In the case of witnesses included in the list delivered by the accused to the committing Magistrate under S 211 ss 216 and 217 provide that they should be summoned to give evidence before the Sessions Court or if they have been examined before the committing Magistrate should be required to execute bonds binding themselves to give evidence in the Sessions Court If any of them fail to appear in the Sessions Court the accused is entitled as of right to the issue of process to compel their attendance⁴ or to an

Section 291 — Note 1

1 (90) 17 All 524 (326) 1895 All W N 111 *Queen Empress v Pirbhai*

Note 2

1 (75) 94 Suth W R Cr 18 (19) *Queen v Lucy Naram*

(89) 18 Cal 610 (618) *Dika Khan v Queen Empress* (Accused is entitled to call as his witness any one who is in Court whether summoned by him or not)

2 (66) 1866 Pun Re No 118 Cr p 119 *Ahmud Khan v Empress*

3 (23) 10 AIR 1903 Oudh 142 (142) 24 Cr L Jour 518 *Nageshwar v Emperor*

Note 3

1 (1880) 8 Suth W R Cr 29 (29) *Queen v Bordonath Singh*

(71) 16 Suth W R Cr 29 (30 34) 7 Beng L R 564 *Queen v Dholanath Moolerjee*

(33) 90 AIR 1933 Pat 559 (580) *Ram Sewak v Emperor*

(25) 19 AIR 1925 Lah 557 (558) 27 Cr L Jour 134 *Nazir Singh v Emperor*

Also see S 211 Note 6 S 216 Note 2 and S 510 Note 7

2 (35) 22 AIR 1935 Sind 216 (217) 29 Sind L R 302 37 Cr L Jour 108 *Hote v Emperor* (Nothing to show that application for summons is made for delaying proceedings or other ulterior purpose — Application should be allowed)

(97) 19 All 502 (503 504) 1897 All W N 134 *Queen Empress v Shalwar Ali* (Sessions Judge is bound to summon such witnesses if he considers their evidence material)

(34) 21 AIR 1934 All 372 (373) 35 Cr L Jour 591 *Misra Lal v Emperor* (Sessions Judge has inherent jurisdiction to summon material witnesses)

(34) 21 AIR 1934 Lah 200 (201) 30 Cr L Jour 1031 *Fazal Husain v Emperor* (No list put in before

adjournments

[See (93) 7 Cal W N 188 (190) *Drojsendra Lal v Emperor* (It is for the accused and not for the Judge to say what amount of evidence is proper to be placed before the jury)]

(30) 17 AIR 1930 Cal 362 (363) 31 Cr L Jour 1077, *Muhtal Hossain v Emperor* (In a serious case the Judge should allow every opportunity to the accused to adduce such evidence as they choose either

adjournment of the case to enable him to secure their attendance⁵ This right of the accused applies not only to the witnesses included in the list which the committing Magistrate is bound to accept under S 211, sub s (1), but also to those included in the list which he accepts in the exercise of his discretion under sub s (2) of that section⁶

But the right of the accused in issue of process is one that can be waived by him. Hence, if the accused has said that he does not wish to examine any witness but requests for process at a late stage of the case, the Court may decline to comply with his request⁷ Similarly, where the Court directs the accused to make his application for summons early but the latter delays and applies for summons at the last moment, his application may be rejected⁸ But the accused is not bound to apply for summons before he is called on to enter upon his defence⁹

Where the committing Magistrate has in the exercise of his discretion under S 210 refused to issue summons to a certain witness and the accused applies to the Sessions Court for summons to such witness the Sessions Court can issue such summons¹⁰ The Sessions Court has power under this section to recall a prosecution witness for cross examination by the accused when the accused had no opportunity of cross examining him before¹¹

Prosecutor's right of reply ***292.** The prosecutor shall be entitled to reply—
(a) if the accused or any of the accused adduces any oral evidence, or
(b) with the permission of the Court, on a point of law, or

* Code of 1898, original S 292

Prosecutor's right of reply **292** If the accused or any of the accused adduces any evidence, the prosecutor shall be entitled to reply

Code of 1882 S 292

Prosecutor's right of reply **292** If the accused or any of the accused has stated when asked under S 143 that he means to adduce evidence the prosecutor shall be entitled to reply

Code of 1872 S 252

Prosecutor's right of reply **252** If any evidence is adduced on behalf of the accused person the officer conducting the prosecution shall be entitled to reply

Code of 1861 S 376

376 If any evidence is adduced on behalf of the accused person or if he answers any question put to him by the Court the prosecutor or the counsel or agent for the prosecution shall be entitled to a reply

(71) 15 Suth W R Cr 84 (35) 6 Bng L R App 88 *Queen v Ishan Dutt*

(89) 2 Weir 383 (383) *In re Munsummal* (Application for issue of summons should be allowed in each

on for
being
the

suppl. to Code of 1861 S 376

(71) 16 Suth W R Cr 14 (15) *Queen v Rajadonnar Mookerjee*

Also see S 211, sub s (2) of 1898

v Emperor

(82) 2 Weir 383 (383) *In re Munsummal*

6 (30) 17 AIR 1930 Cal 188 (189) 31 Cn L Jour 69, *Kali Bilash v Emperor*

Also see S 211 Note 7

7 (25) 12 AIR 1925 Pat 381 (384) 26 Cn L Jour 713 *Jamal Momim v Emperor*

8 (20) 7 AIR 1920 Cal 531 (531 532) 47 Cal 758 21 Cn L Jour 842 *Fazludd v Emperor*

9 (69) 12 Suth W R Cr 22 (22), *Queen v Mookun*

10 (10) 12 Suth W R Cr 22 (22)

11

led to
the

— and a third case is entitled to another opportunity to cross examine)

(c) with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence

Provided that, in the case referred to in clause (c) the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced.

a. This section was substituted for original S 292 by the Code of Criminal Procedure (Amendment) Act, 18 [XIII] of 1923

Synopsis

- | | | |
|--|---|---|
| 1 Object of the section | } | 5 Production of document in cross-examination of prosecution witness — Right of reply |
| 2 Prosecutor, meaning of | | |
| 3 "If the accused or any of the accused" | | |
| 4 Extent of right of reply | | 6 Reply wrongly allowed—Effect |

1 Object of the section — The object of the Legislature in enacting this section is to give each side an opportunity to comment upon the evidence let in by the other and not to give an additional advantage to the prosecutor¹

There is no similar provision so far as the trial of warrant cases is concerned, but it has been held that even in such cases, both the prosecutor and the accused should be allowed to address arguments to the Court after the evidence is let in²

2 Prosecutor, meaning of — Section 270 provides that in every trial before a Court of Session, the prosecution shall be conducted by a *Public Prosecutor*. The "Prosecutor" in this section therefore means the Public Prosecutor

Sections 492 and 493 provide for the appointment of Public Prosecutors, the latter also providing that if a private person instructs a pleader to prosecute in any Court any person, in any such case such pleader shall act under the directions of the Public Prosecutor. See Notes on those sections

3 "If the accused or any of the accused" — Where one of several accused persons tried jointly calls witnesses at the trial but the other accused call no witnesses, the prosecutor has the right of reply on the whole case. He is not to sum up as to such of the accused as do not call evidence and reply on the evidence that may have been adduced by the others¹. Where, however, the accused are indicted under separate counts in the same indictment, the charges are distinct and the prosecutor has a right of reply upon that prisoner only in whose behalf evidence was called²

4 Extent of right of reply. — If any of the accused lets in oral evidence, the prosecutor is entitled to reply. Such reply need not be confined to the evidence let in by such accused, but may be as against all the accused and generally on the whole case¹. Where under clause (c) of this section, only documents are put in and no oral evidence is let in on behalf of the accused, the prosecutor can only comment upon such documents, but cannot, except with the permission of the Court address on the whole case

Section 292 — Note 1

1 (84) 10 Cal 140 (142) 13 Cal L Rep 353 *Hurry Churn v Empress* (Prosecutor should not be allowed to reply where no evidence was produced for defence)

(17) 4 AIR 1917 Cal 524 (524 525) 17 Cri L Jour 423 (424) 43 Cal 426, *Emperor v Sreenath Mahapatra* (Do)

(96) 4 Cri L Jour 1 (10 11) 30 Bom 421 8 Bom L R 421, *Emperor v Bhaskar*

(97) 1897 Rat 939 (934) *Queen Empress v Lapprey*

2 (25) 15 AIR 1929 Bom 557 (559) 53 Bom 119 30 Cri L Jour 185, *Vinayak Lazman v Emperor*. (It is not a question of indulgence but of right)

Note 3

1 (94) 18 Bom 364 (365) *Queen-Empress v Sadanand Narayan*

2 2 Hyde 247 (247) *Queen v Abbas*

Note 4

1 (94) 18 Bom 364 (365), *Queen Empress v Sadanand Narayan*

5 Production of document in cross-examination of prosecution witness

— Right of reply — Section 292 of the Code of 1892 provided that the prosecutor had a right of reply where the accused or any of the accused had stated, when asked under S 291 that he meant to adduce evidence. It was, however, held by the Calcutta High Court¹ that where the accused *did not in fact adduce any evidence*, there was no right of reply even though he had stated when questioned under S 293 that he meant to adduce evidence. There was also a conflict of opinions on the question whether where the accused filed documents in cross examination of the prosecution witnesses, he must be taken to have adduced evidence so as to give the prosecutor a right of reply.²

Under the section as it stood before the amendment of 1923 the prosecutor had a right of reply where the accused or any of the accused *adduced any evidence*. This, however, did not settle the conflict on the question whether the filing of a document in cross examination of the prosecution witness gave the prosecutor a right of reply.³

The present amended section has set the conflict at rest. The right of reply now depends upon the accused adducing *oral evidence* after the close of the prosecution case or by the production of a document *after he enters on his defence*. The filing of a document during the cross examination of the prosecution witness will not give the prosecutor a right of reply.⁴

6 Reply wrongly allowed — Effect — Where the prosecutor is wrongly allowed to reply in a case in which there is no right of reply, the irregularity is not one which will vitiate the whole proceedings or which will call for a re trial even from the stage at which the error arose.⁵

Note 5

- 1 (84) 10 Cal 140 (142) 13 Cal L Rep 358 *Hurry Churn v Empress*
 2 (92) 14 All 212 (219 220) 1892 All W N 63 *Queen Empress v Hayfield* (Yes)
 (94) 16 All 88 (101) 1894 All W N 23 *Queen Empress v Moss* (Yes)
 (89) 11 Mad 399 (340) 2 Weir 380 *Queen Empress v Venkatapathi* (Yes)

(No)

- (90) 17 Cal 930 (933) *Queen Empress v Solomon* (No)
 (98) 2 Cal W N cci (cci) *Empress v Felur Kurmi* (No)
 3 (06) 4 Cri L Jour 1 (10) 30 Bom 421 8 Bom L R 491 *Emperor v Bhashkar* (Yes—The amended section is intended to give a right of reply whenever at any stage evidence is recorded for defence which is not part of that adduced for the prosecution)
 (10) 15 Cri L Jour 241 (241 242) 7 Low Bur Rul 84 23 Ind Cas 193 *Emperor v J S Birch* (No—Because in this case the Judge remarked that matter was doubtful and gave benefit of doubt to the accused 4 Low Bur Rul 5 dissented from)
 (09) 9 Cri L Jour 284 (286 291) 1 Ind Cas 280 (Bom) *Emperor v Abdul Ali* (No)
 (06) 10 Cal W N cclxvii (cclxvii) *Emperor v Tumul* (No)
 (17) 4 AIR 1917 Cal 524 (524 525) 17 Cri L Jour 423 (424) 43 Cal 426 *Emperor v Sreenath Mahapatra* (No—Because S 292 must be read in connexion with S 293 and must be construed accordingly)
 (04) 1 Cri L Jour 451 (452 453) 31 Cal 1050 8 Cal W N 628 *Emperor v Robert Stewart* (No)
 (08) 8 Cri L Jour 215 (220) 1 Sind L R 91 *Emperor v Bhuro* (No—If the prosecution has not ce of statement put in cross examination Yes—If the prosecution cannot be deemed to have had not ce)

—Ob ter)

Emperor

Note 6

- 1 (31) 18 AIR 1031 Lah 534 (535) 15 Lah 172 32 Cri L Jour 944 *Kundan v Emperor*

293. (1) Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court

1 Scope of the section — This section provides for the local inspection of the scene of occurrence or any other material place by the jury or assessors in sessions cases. Section 533B provides for similar inspection by Magistrates and Judges¹. See S 533B and Notes thereon

2 "Whenever the Court thinks" — It is only in cases where the Court considers that an inspection would assist the jury or the assessors in determining whether the charge is true or false that it should be ordered. Where the charge against a prisoner was that he made certain statements on oath knowing them to be false (the statement being that one M threatened to cut the tree) it was held that a local inspection as to the condition of tree was not material to the case¹. See also the undermentioned case²

3 Jury or assessors not to hold communication with any other person — It is imperative that the jury or assessors should not have any extra judicial knowledge of the facts in the case they are to decide the case on the legal evidence taken by the Judge. Where a Sessions Judge directed the assessors to make an inspection of the locality and also instructed them to examine witnesses if they desire to do so the High Court condemned the procedure and held that in asking the assessors to take evidence he was abdication his own high functions¹

294.† If a juror or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross examined and re examined in the same manner as any other witness

1 Scope and object of the section — The principle of this section is that no man shall be convicted except on evidence which he has had an opportunity of testing by cross examination and of contradicting the same by rebutting evidence¹. A juror or assessor is expected to form and give his opinion on the evidence given at the trial and not to act upon his personal knowledge of any relevant facts of the case without giving evidence of the same as a witness in the case²

* 1852 S 293, 1872 S 253, 1861 S 345

† 1882 S 294, 1872 S 258, 1861 — Nil

Section 293 — Note 1

1 See (12) 13 Cri L Jour 150 (157) 13 Ind Cas 844 39 Cal 476 *Alia Rai v Jhimgur Tewari*

Note 2

1 (1865) 2 Suth W R Cr 60 (60) *Queen v Settanath Ghosal*

2 (10) 11 Cri L Jour 121 (125) 37 Cal 340 5 Ind Cas 365 *Balboi Sheikh v Emperor* (Case of Magistrate himself making local inspection)

Note 3

1 (66) 5 Suth W R Cr 59 (60) *Queen v Chatterdharee Singh*

Section 294 — Note 1

1 (10) 11 Cri L Jour 121 (126) 5 Ind Cas 365 37 Cal 340 *Balboi Sheikh v Emperor*

2 (01) 24 Mad 523 (543) 11 Mad L Jour 441 *King Emperor v. Tarumal Peidi*

Where at the end of a trial one of the assessors expresses his opinion as to the guilt of the accused basing his opinion on his own personal knowledge, without giving the evidence of the same as a witness it has been held that this expression of opinion does not necessitate a *de novo* trial with the aid of other assessors and that the Judge should in such a case ignore the opinion of the assessor³

Where the juror or assessor is examined as a witness he is not disqualified from acting as a juror or assessor in the case after giving his evidence⁴

Jury or assessors to attend at adjourned sitting **295.** If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial

1 Adournment of sessions case — Where a sessions case is adjourned the jury or assessors are bound under this section, to attend the adjourned hearing. A failure to attend will be punishable under section 332

As to adjournments of criminal trials see Section 314

296.† The High Court may, from time to time, make rules as to locking up jury keeping the jury together during a trial before such Court lasting for more than one day, and subject to such rules, the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes

1 Scope and object of the section. — This section touches on the undesirability of separation of the jury before their verdict is given¹ and empowers the High Courts to make rules for locking them up during trial. The jury are not entitled to talk to persons connected with the accused during the progress of the trial². Where one of the jurors during the trial of a case expressed his opinion outside Court as to the guilt of the accused person and made a fairly distinct intimation that he had formed an opinion to that effect it was held that when this was brought to the notice of the trial Judge a *de novo* trial should be ordered after discharging that jury³. The object of this section is to see that the jury comes to a conclusion in the case on the evidence adduced thereon uninfluenced by anything that may be said or done outside the Court. See also the under-mentioned case⁴

See also sections 282 and 300 and Notes thereon

F — Conclusion of Trial in Cases tried by Jury.

297.† In cases tried by jury, when the case for the defence and the Charge to jury prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided

* 1882 S 295, 1872 S 260 1861 S 378

† 1882 S 296 1872 and 1861 — Nil

† 1882 S 297, 1872 S 255 1861 S 379

3 (39) 26 AIR 1939 Lah 475 (479) 1 L R (1939) Lah 243 41 Cr L Jour 65 *Emperor v Pahlu*
4 (70) 13 Sath W R Cr 60 (61) 4 Beng L R A C 15 *Empress v Mukhta Singh* (Obiter)

Section 296 — Note 1

1 (25) 12 AIR 1925 Pat 797 (802) 4 Pat 626 27 Cr L Jour 49 *Rippan v Emperor*

2 (27) 14 AIR 1927 Cal 698 (629) 53 Cal 279 28 Cr L Jour 783 *Blubau Chaudia v Emperor*
(of Donomally G 1st

4 Leg
Court at Bombay before
and after Ind an Penal Code came into operation—Practice of the Courts in England was followed)

Synopsis

- | | |
|---|--|
| <ol style="list-style-type: none"> 1 Legislative changes 2 Object of charge to jury 3 Judge, if should himself charge the jury 4 Charge as to part only of case 5 "When the case for the defence are concluded" 6 Summing up the evidence for the prosecution and defence 7 Summing up where there are several accused 8 Direction to recommend for mercy 9 "Laying down the law by which the jury are to be guided" | <ol style="list-style-type: none"> 10 Effect of non-observance of this provision — Laying down the law 11 Misdirection 12 Non-direction. 13 Effect of misdirection. 14 Duty of appellate Court in reviewing a charge 15 Record of charge to jury See Note 15 on Section 367 16 Effect of a juror not understanding the charge 17 Effect of a bad charge 18 When Judge can re-charge the jury. |
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NOTE to the Synop — See the Note, indicated for the following topics

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| <p>Abandoning—No pre-emption of guilt See Note 12.</p> <p>Absence of evidence for the prosecution See Note 12</p> <p>Accuracy in charging See Note 6</p> <p>Approver's evidence See Note 9</p> <p>Benefit of doubt See Note 12</p> <p>Charge as a whole See Note 4</p> <p>Charges as to evidence See Note 6</p> <p>Charge through translator See Note 3</p> <p>Charge without reference to defence evidence See Note 6</p> <p>Circumstantial evidence See Note 9</p> <p>Confession of co-accused See Note 9</p> <p>Counsel pointing out omissions in charges See Note 12</p> <p>Defence not raised by accused See Note 6</p> <p>Direction to neglect part of evidence See Note 11</p> <p>Duty of Judge in charging the jury See Note 6</p> <p>Expert evidence See Note 9</p> <p>Form and nature of charge See Note 6</p> <p>Handing copy of Penal Code to jury See Note 9</p> | <p>Impartial charge See Note 6</p> <p>Inadmissible evidence See Note 11</p> <p>Judge not to charge too strongly for prosecution See Note 6</p> <p>Lengthy arguments of counsel — Judge's charging not affected See Notes 6 and 9.</p> <p>Mere reading of sections See Note 9</p> <p>Non-examination of defence witnesses See Note 9</p> <p>Non-examination of material witness for prosecution See Note 9</p> <p>Omission of important points, for defence See Note 12</p> <p>Omission to reject irrelevant evidence See Note 12.</p> <p>Onus of proof — Direction as to See Note 11</p> <p>Prior convictions — Reference to See Note 11</p> <p>Reading of evidence not needed See Note 6</p> <p>Recent possession of stolen property See Note 9</p> <p>Reference to prior trials See Note 12</p> <p>Rejection of evidence See Note 11</p> <p>Section 164 — Evidence taken under See Note 9</p> <p>Suggestion, denied—Effect See Note 9</p> |
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1. Legislative changes.

Changes introduced in the Code of 1872 —

- (1) The words "when the case for the defence and the Prosecutor's reply, if any, are concluded the Court shall proceed to charge," etc., were introduced, thereby showing the stage at which the Court should address the jury.
- (2) The words 'and laying down the law by which the jury are to be guided' were also added thereby throwing on the Judge the duty of explaining the law to the jury.

Changes introduced in the Code of 1882 —

The words "A statement of the Judge's direction to the jury shall form part of the record" which occurred in the former Code were omitted.

2. Object of charge to jury. — In a trial by jury the jurors are the sole judges of all questions of *fact*,¹ their verdict on questions of fact cannot be set aside on

Section 297 — Note 2

1. (45) 32 AIR 1915 Lah 105 (110) 47 Cr.L. Jour 4 1LR (1915) Lah 290 • 220 Ind. Cas. 467 (FD) *Abdul Rahim v Emperor* (Even in cases of formal evidence, e.g., evidence relating to the state of articles recovered from accused in course of investigation, identification of dead bodies, their being escorted to mortuaries and preparation of plans, etc., it is for the jury and not the Judge to decide whether the evidence is trustworthy or not. Those are matters entirely for the jury.)

appeal (ss 418, 423) It is, therefore, of supreme importance that they should be given all the guidance and help that may be necessary for arriving at a correct decision on questions of fact. The object of this section is to furnish such guidance and help.² It is the duty of the Judge to place the case before the jury in such a way as to enable them to come to a reasonable and fair conclusion.³ Jurors are ordinarily men who are not used to analyse and weigh the evidence and it is quite impossible for them to retain in their memory the whole of the facts which have been detailed before them.⁴ In the absence of intelligent guidance and assistance from the Judge, few juries, in a contested case would be able to come to an unanimous opinion being left in a state of great perplexity by the influence of speeches of the contending lawyers.⁵ Every party to a trial by jury has, therefore a legal and constitutional right to have the case which he has made either in pursuit or in defence fairly submitted to that tribunal.⁶ The section accordingly makes it incumbent upon the Judge to charge the jury before their verdict is taken.⁷

The duties of the Judge in charging the jury are laid down by this section and the next but they are not exhaustive, they must be read together with numerous judicial decisions on the point.⁸

3 Judge, if should himself charge the jury—The right course for the Judge is to charge the jury *himself* but where there are difficulties in the way of doing this as when the Judge does not happen to be sufficiently acquainted with the vernacular language

(41) 28 AIR 1941 Bom 50 (53) 11LR (1941) Bom 27 19th Ind Cas 671, *Emperor v Bhagardas Bhusar*

2 (42) 29 AIR 1942 Nag 127 (130) 11LR (1942) Nag 749 44 Cr L Jour 18 203 Ind Cas 214 (DB) *Government C P and Derar v Bhaguram Roday* (Attention of jury to be drawn to essential points in evidence)

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up of evidence

by the Judge pointed out)

(28) 13 AIR 1926 Cal 139 (141) 53 Cal 872 27 Cr L Jour 266 *Khajiruddin v Emperor*
(66) 6 Suth W R Cr 72 (72) *Empress v Dolakee Koormee*

3 (39) 28 AIR 1939 Cal 610 (611) 40 Cr L Jour 880 *Mohsena Khatun v Emperor* (Charge to jury if confusing and muddled giving no assistance to jury is sufficient ground to upset verdict)

(37) 24 AIR 1937 Cal 321 (323) 11LR (1937) 2 Cal 345 39 Cr L Jour 371 *Silandar v Emperor*
(36) 23 AIR 1936 Cal 186 (187) 37 Cr L Jour 673 *Yab Khan v Emperor*

4 (32) 19 AIR 1932 Cal 395 (397) 33 Cr L Jour 496 *Akbar Sherah v Emperor* (It is the duty of a Judge to analyse and weigh evidence and marshal the facts indicating the material facts on which the jury should concentrate their attention)

(26) 13 AIR 1926 Cal 235 (239) 53 Cal 181 26 Cr L Jour 1577, *Abdul Gani v Emperor* (It is necessary to give the jury all help in estimating evidence)

5 (66) 5 Suth W R Cr 80 (87) Beng L R Sup 459 (FB) *In re Elakee Duksh* (The accuracy of the summing up of the Judge is of utmost importance)

(19) 6 AIR 1919 Cal 536 (538) 19 Cr L Jour 630 *Ismail Sarhar v Emperor* (Verdict of a jury who had no sufficient assistance and guidance from the Judge must be upset)

6 (09) 10 Cr L Jour 65 (67) 2 Ind Cas 517 (Bom) *Emperor v Kesari Dayal Kanji*
(27) 14 AIR 1927 Cal 631 (632) 28 Cr L Jour 742 *Emperor v Rajab Ali Fakir* (Charge should not be one-sided)

(86) 1886 Rat 288 (288) *Queen Empress v Abdul Karim* (A careful summing up may often change the hasty and superficial impression of jury)

7 (36) 23 AIR 1936 Bom 52 (53) 60 Bom 599 37 Cr L Jour 366 (FB) *Puttan Hasan v Emperor*
(19) 6 AIR 1919 Cal 439 (449) 20 Cr L Jour 661 *Afiruddin Chakdar v Emperor*

(69) 11 Suth W R Cr 89 (39) 7 Beng L R 67n *Queen v Jaga Poly*

[See however (97) 20 Mad 445 (446) 2 Weir 384 *Queen Empress v Ramalingam* (Where, after all the prosecution evidence has been taken and the Public Prosecutor has waived his right to summarise evidence the jury expresses an opinion that the case should stop, it was held that the formality of summing up could be dispensed with and the opinion of the jury could be treated as verdict of not guilty)]

8 (27) 14 AIR 1927 Oudh 209 (259) 2 Luck 597 28 Cr L Jour 663 *Nahru Mal v Emperor*

so as to be understood by the jury, his delivering the charge through another person is not improper¹

4 Charge as to part only of case—The law does not recognize intermediate verdicts of juror the Judge should address the jury on the whole case before taking their verdict he should not ask for their verdict on one issue reserving his address on other questions of fact¹

5. "When the case for the defence . . . are concluded."—The stage at which the Judge is to address the jury is when the prosecution and the defence have let in all their evidence and after the arguments if any of the prosecution and the defence a charge before that will be premature¹ It is illegal to allow the jury to pronounce their verdict before the accused is called upon to enter on his defence² After the prisoner claims to be tried all the evidence whether statements of witnesses or admissions of the prisoner, should be placed before the jury³ It is not open to a Judge after hearing some of the prosecution witnesses to ask the jury whether they wish to hear any more evidence, and on their stating that they do not believe the evidence and wish to stop the case to record a verdict of acquittal He is bound to allow the whole evidence to be placed before the jury⁴ Only in cases where under s 259 the Judge finds that there is no evidence to go to the jury can the case be withdrawn from the jury in all other cases the full facts should be placed before them and then the charge should be delivered⁵

6 Summing up the evidence for the prosecution and defence.—A charge to the jury consists of

(1) summing up the evidence for the prosecution and defence and

(2) laying down the law by which the jury are to be guided

Under this section the Judge is bound to sum up the evidence whether or not the jury desire him to do so¹ The summing up of the evidence is the presentation to the jury of a summary of the evidence as it appears on the negative and affirmative sides of the case² The summing up should not be in the nature of a judgment and the Judge should

Note 3

1 (27) 14 AIR 1917 All 721 (723) 50 All 365 28 Cri L Jour 950, *Surnath Bhaduri v Emperor* (The important thing is that the review of evidence made by the Judge should be placed before jury in a manner which they can understand)

(28) 15 AIR 1928 Cal 401 (409) 29 Cri L Jour 633 *Dwijapada Halder v Emperor* (Vernacular translation of charge was delivered by Public Prosecutor and the defence counsel was given right to object to any part of translation—Held accused was not prejudiced)

(19) 6 AIR 1919 Cal 439 (441 442) 20 Cri L Jour 664 *Afurudds Chakdar v Emperor* (Assistance of Public Prosecutor not desirable)

Note 4

1 (29) 16 AIR 1919 Cal 62 (63) 30 Cri L Jour 434 *Government of Bengal v Nasar*
(96) 2 Weir 499 (500) *In re Dadata Kunhi* (Such a course was held to be irregular although not illegal)

Note 5

1 (14) 1 AIR 1914 Mad 319 (321) 36 Mad 585 15 Cri L Jour 197, *Public Prosecutor v Abdul Hameed*

(02) 7 Cal W N xxxi (xxxii) *Emperor v Olu*

(24) 11 AIR 1924 Lah 17 (20) 4 Lah 382 25 Cri L Jour 377, *Lyme v Emperor*

2 (95) 23 Cal 252 (253) *Queen Empress v Imam Ali Khan* (In this case the jury were not also charged as required by law)

(68) 9 Sath W R Cri Letters 10 (10) (Jury not to express opinion before conclusion of trial and before hearing summing up and direction of the Judge)

3 (66) 2 Weir 334 (337)

(86) 2 Weir 497 (498) *In re Doraswami Aiyar Thevar*

4 (97) 20 Mad 445 (445 446) 2 Weir 384 *Queen Empress v Pambalinjam*

5 (89) 2 Weir 391 (391 392)

Note 6

1 (36) 23 AIR 1936 Bom 52 (53) 60 Bom 599 37 Cri L Jour 366 (FB) *Puttan Hasan v Emperor*

2 (42) 29 AIR 1942 Nag 127 (130) 1LR (1942) Nag 749 44 Cri L Jour 19 203 Ind Cas 214, *Government, C P and Berar v Raghuram Eddaji*

not give his opinions as definite facts³ It is not necessary to read over to the jury all the evidence *in extenso*⁴ In fact it will be anything but helpful to the jury to take the witnesses one by one in the order of their examination and to place their disconnected statements⁵ Though it is not necessary for a Judge to read his notes of the evidence to the jury, he is not legally prohibited from asking the jury whether they have a particular piece of evidence in mind or whether it would help them for him to read his notes⁶ The Judge should group the depositions of the witnesses in such a way as to direct the attention of the jury to the evidence regarding each particular fact sought to be proved⁷ He should sift, analyse and marshal the facts in order to enable the jury to weigh the evidence intelligently, to estimate the value of each part of it with the rest⁸ But it is not possible

(42) 29 AIR 1942 Oudh 221 (225) 17 Luck 516 43 Cr L Jour 416 198 Ind Cas 714 *Jaganna v Emperor*

(26) 13 AIR 1926 All 752 (753) 49 All 209 23 Cr L Jour 15, *Enayat Hussain v Emperor* (Summary of only leading points should be given)

(17) 4 AIR 1917 Mad 335 (335 336) 17 Cr L Jour 19 (19) *In re Sangar*

[See (09) 10 Cr L Jour 567 (568) 4 Ind Cas 391 (Mad) *In re Muthan Papayya* (Sessions Court must sift evidence if the counsel have not done so)]

3 (37) 24 AIR 1937 Nag 110 (112) 38 Cr L Jour 589 1LR (1937) Nag 123 *Fateh Mohammad v Emperor*

4 (42) 29 AIR 1942 Nag 127 (132) 1LR (1942) Nag 749 44 Cr L Jour 18 203 Ind Cas 714 *Government C P and Derar v Naghuram* (Cramping into the judgment minute details of evidence which are likely to confuse the minds of the jury is not desirable)

(42) 29 AIR 1942 Oudh 221 (225) 17 Luck 516 43 Cr L Jour 416 198 Ind Cas 714 *Jaganna v Emperor* (Judge need not bring minor discrepancies in evidence to notice of jury — But salient points and important issues must be brought to their notice — Mere non-direction not amounting to misdirection is not fatal to charge — Omission to address jury on every suggestion made by defence counsel is not non-direction)

(36) 23 AIR 1936 Bom 50 (53) 60 Bom 599 37 Cr L Jour 366 (FD) *Pullan Hasan v Emperor* (It is not necessary for him to read his notes of the evidence to the jury though it may often be desirable to read his notes of important parts of the evidence nor is it necessary for him to go through the whole of the evidence)

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(96) 1896 Rat 850 (850) *Queen Empress v Fakira Venkappa*

(66) 6 Suth W R Cr 92 (93) *Empress v Kallu Churan* (Charge of false evidence — Both the depositions in full should be laid before the jury)

(68) 5 Bom H C R 80 (88) *Reg v Fattchchand Vastachand*

(97) 1897 Rat 917 (917) *Queen Empress v Basvantappa Lingappa*

(1865) 2 Suth W R Cr 63 (63) *Queen v Sreemunt Adup*

(9a) 19 Bom 741 (743) *Queen Empress v Rego Montopoulo*

5 (21) 8 AIR 1921 Cal 697 (698) 22 Cr L Jour 608 *Abdul Rahim v Emperor*

(35) 20 AIR 1935 Sind 145 (166) 28 Sind L R 397 36 Cr L Jour 1161 *Emperor v Hari* (Judge

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should be specially called to it)

for any Judge to bring all the important facts together in one place in the charge for the benefit of the jury. Where there are a large number of important points to be discussed it is necessary that some of those points should be separated by some considerable time from the other items of the charge.⁹

This section does not say either that the charge should be reduced to writing or that it should be delivered *ex tempore*. The reading out of a written charge, therefore does not violate any provision of this section.¹⁰

The charge should be characterised by clearness, coherence¹¹ and sequence¹² and great care should be taken to place the evidence accurately and with precision.¹³ It should not be colourless and should not fail to bring before the jury the main circumstances in the case.¹⁴ It should be delivered in direct and simple language. Involved expressions

- (27) 14 AIR 1927 Cal 631 (632) 29 Cri L Jour 74^o *Emperor v Pajab Ali Fakir*
 (29) 16 AIR 1929 Cal 742 (746) 57 Cal 740 31 Cri L Jour 673 *Nagendranath v Emperor* (Facts must be marshalled under separate heads and distinct compartments as they affect each separate incident in the story)
 (34) 21 AIR 1934 Cal 169 (171) 35 Cri L Jour 601 (S B) *Molva Khan Kabuli v Emperor* (Judge should direct the attention of the jury to essential points)
 (34) 21 AIR 1934 Cal 847 (849) 62 Cal 337 36 Cri L Jour 353 *Ilu v Emperor* (Summing up does not mean merely giving summary of evidence)
 (34) 21 AIR 1934 Cal 273 (275) 35 Cri L Jour 1313 *Ram Sumer Ahir v Emperor* (No connected narrative nor any sufficient attempt to sift and marshal the evidence against each accused nor to direct jury about its relevance or value or what offence it disclosed—*Held*, there was no direct on)
 (35) 22 AIR 1935 Cal 534 (537) 62 Cal 911 36 Cri L Jour 1246, *Asanulla v Emperor*
 9 (38) 25 AIR 1938 Mad 477 (478) 39 Cri L Jour 393 *In re Thevar Sertai*
 10 (42) 29 AIR 1912 Nag 126 (127) 1LR (1942) Nag 775 203 Ind Cas 573 44 Cri L Jour 113 (DB) *Motiram Ganpat v Emperor*
 11 (43) 30 AIR 1913 Cal 47 (49) 41 Cri L Jour 307 204 Ind Cas 565 (DB) *Naimuddin v Emperor*
 (67) 8 Suth W R Cr 87 (88 93) *Queen v Nobo Kisto Ghose* (In charging jury Judge should avoid extraneous and unnecessary argument and discussion)
 (68) 8 Cri L Jour 35 (37 40) 10 Bom L R 565 *In re Shambhu Lal Jitandas*
 (70) 13 Suth W R Cr 42 (43) *Queen v Shahabuddin Sheikh*
 (00) 2 Cri L Jour 157 (159) 1 Cal L Jour 159 *Shyama Charan Chakravarti v Emperor* (Charge should be free from confusing and irrelevant matters)
 (20) 7 AIR 1920 Cal 406 (408) 21 Cri L Jour 899 *Edon Karikar v Emperor* (Charge confusing — Verdict set aside)
 (14) 12 Cri L Jour 140 (140 141) 9 Ind Cas 788 (Mad) *Palavesa Tevan v Emperor* (The charge lacked lucidity as regards law bearing on the charges and also as regards statement of evidence)
 (26) 15 AIR 1928 Pat 326 (334) 29 Cri L Jour 325 *Mt Champa Pasin v Emperor*
 (33) 20 AIR 1933 Pat 488 (491) 34 Cri L Jour 892 *Sachidanand v Emperor*
 (31) 32 Cri L Jour 1138 (1140) 131 Ind Cas 317 (Cal) *Emperor v Javed Siddar* (In statement of facts in the charge relevant and irrelevant, important and unimportant facts should not be mixed together)
 12 (34) 21 AIR 1934 Cal 77 (78) 35 Cri L Jour 463, *Kamiraddi Sheikh v Emperor* (Some sequence is essential, chronological sequence will do but even an alphabetical sequence is better than no sequence at all)

impression of the case for the prosecution and the evidence in support of it it is a confusing charge and the verdict must be set aside.)

- (39) 26 AIR 1939 Cal 610 (611) 40 Cri L Jour 860, *Mohsena Khatun v Emperor* (Judge mixing up arguments of the defence with the statement of the case for the prosecution — Charge confusing and rendering no assistance to jury—*Held*, it was sufficient ground for setting aside verdict)
 (37) 24 AIR 1937 Cal 266 (267) 38 Cri L Jour 767, *Madan Titaldas v Emperor* (Judge should exercise greatest care in assisting jury when it is difficult to judge which side has perjured)
 (93) 1693 Rat 644 (651) *Queen-Empress v Yesu*
 14 (37) 24 AIR 1937 Cal 463 (466) 38 Cri L Jour 931, *Sarat Chandra v Emperor*

high flown, imaginative and fanciful language¹⁵ and slang or colloquial phrases¹⁶ should be avoided. The aim of a jury trial is not a psychological examination of the mentality of jurors. It is concerned with the definite proof of a distinct offence and the use of language tending to divert the attention of the jury from the main issue to a subsidiary point should be avoided.¹⁷ As observed in *Molla Khan v Emperor*,¹⁸ "It is the manner of saying it, the arrangement and structure of his charge, which will make it either of value or valueless to the jury."

Where there is no suggestion that the summing up was open to any objection it should be assumed that the Judge directed the jury adequately and properly as to the weight of the evidence.¹⁹

Charge should not be too elaborate or too meagre — A charge should not be too summary or meagre.²⁰ As has been observed above it should sift and analyse the evidence.²¹ To say to the jury "you have heard the evidence, do you find the accused guilty or not?" is no charge at all.²² Nor is it a sufficient compliance with the law to say that the evidence given is "very poor evidence which standing alone amounts to nothing."²³ The evidence given by the witnesses should be individually discussed.²⁴ On the other hand the charge should not be too elaborate.²⁵ It is sufficient if the main, salient and important points alone are placed before the jury.²⁶ In fact in a case where numerous points arise

- 15 (10) 11 Cr L Jour 539 (539) 7 Ind Cas 915 (Cal) *Harendra Pal v Emperor*
 (30) 17 AIR 1930 Cal 430 (432) 31 Cr L Jour 1115 *Manohar Mandal v Emperor*
 [See (41) 28 AIR 1941 Cal 106 (108) ILR (1940) 2 Cal 258 42 Cr L Jour 385 193 Ind Ca 30
Emperor v Mujaffar Sheikh (Case depending upon circumstantial evidence—Theoretically discourse on what is circumstantial evidence in unintelligible language is worthless)]
 16 (18) 5 AIR 1918 Cal 88 (92) 45 Cal 557 19 Cr L Jour 305 *Amiruddin Ahmed v Emperor*
 (Use of expressions which assume the guilt of the accused should be avoided)
 17 (33) 20 AIR 1933 Pat 488 (492 493) 31 Cr L Jour 692 *Sachidanand v Emperor*
 18 (34) 21 AIR 1934 Cal 169 (172) 35 Cr L Jour 601 (SB)
 19 (37) 24 AIR 1937 P C 24 (26) 38 Cr L Jour 281 (PC) *Alexandra Pereira Chandra Sekera v The King*

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Emperor (Charge should not be unduly long)

(1864) 1 Suth W R Cr 22 (23) *Queen v Madhub Mal* (Whole evidence was read out — Onus on to ment on details of stolen articles did not amount to misdirection)

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with a greater or less bearing on the main issue the Judge cannot be expected to place them all before the jury, nor is it fair to criticise every phrase in his summing up.²⁷ To charge the jury at very great length may itself be an obstacle to the jury arriving at a correct decision. They are laymen and to enable them to come to a correct decision it is necessary that essentials should be clearly brought out and not overwhelmed and obscured by too great a mass of detail.²⁸

Charge should be impartial — The summing up should be dispassionate and impartial²⁹ and should not create prejudice against the accused.³⁰ The Judge should take

- (42) 29 AIR 1912 Pat 481 (484) 21 Pat 258 43 Cr L Jour 817 202 Ind Cas 331 (DB) *Ram Deo Singh v Emperor*
- (38) 25 AIR 1938 Cal 620 (627) 33 Cr L Jour 964 *Brishpada Bafadar v Emperor*
- (36) 23 AIR 1936 Bom 52 (53) 60 Bom 599 37 Cr L Jour 366 (TB) *Pultan Hasan v Emperor*
- (36) 23 AIR 1936 Nag 103 (104) 37 Cr L Jour 607 31 Nag L R (Sup) 215 *James Dowdall v Emperor* (It is impracticable to set forth every bit of evidence on either side to the minutest detail and dilate on the minor discrepancies or contradictions occurring in the evidence in a meticulous manner)
- (30) 17 AIR 1930 Pat 513 (519) 9 Pat 606 32 Cr L Jour 72 *Ram Sarup v Emperor*
- (30) 17 AIR 1930 Cal 434 (436) 57 Cal 1162 32 Cr L Jour 111 *Jabanullah v Emperor* (Charge should shortly state salient points evidence adduced and points for determination with reference to law.)
- (27) 9 AIR 1922 Cal 192 (193) 24 Cr L Jour 8 *Abdul Gafur Khan v Emperor*
- (3) 27 Bom 626 (630) 5 Bom L R 599 *Emperor v Waman Shitram*
- (16) 3 AIR 1916 Pat 236 (238) 17 Cr L Jour 353 (355 356) 1 Pat L Jour 317 *Elnath Sahay v Emperor* (In doing so speeches made by public prosecutor and prisoner's counsel can be taken into consideration)
- (81) 7 Cal 42 (46) 8 Cal L Rep 273 *Empress v Rachna Mohato*
- (34) 21 AIR 1931 Cal 112 (143) 35 Cr L Jour 536 *Fajer Ali Darji v Emperor*
- (14) 1 AIR 1914 P C 116 (123 124) 41 Cal 1073 8 Low Bur Rul 16 15 Cr L Jour 309 41 Ind App 149 (PC) *Channing Arnold v Emperor* (Salient propositions of law should be subject of separate analysis)
- (35) 22 AIR 1935 All 103 (105) 36 Cr L Jour 612 *Asizkhan v Emperor*
- (7) (36) 20 AIR 1938 Cal 638 (667) 40 Cr L Jour 101 1 L R (1938) 1 Cal 636 *Abdul Gafur v Emperor*
- 28 (43) 30 AIR 1943 Pat 103 (163) 21 Pat 865 44 Cr L Jour 507 206 Ind Cas 365 (DB) *Lokhono Sahu v Emperor*
- (40) 27 AIR 1940 Nag 221 (224) 41 Cr L Jour 894 190 Ind Cas 283 *Bapurao v Emperor*
- (37) 24 AIR 1937 Pat 191 (193) 38 Cr L Jour 129 *Rajendra Nath v Emperor* (Held that meticulous detail which is regarded as required in charge to jury led in this case to actual misdirection on points of real importance)
- (33) 20 AIR 1933 Pat 496 (497) 35 Cr L Jour 56 *Emperor v Ardali Mian*
[See also (36) 23 AIR 1936 Cal 186 (187) 37 Cr L Jour 673 *Nabi Khan v Emperor* (Judge should not go into unnecessary details with regard to such aspects of the case as are really of very little importance)]
- 29 (41) 28 AIR 1941 Cal 406 (408) 42 Cr L Jour 781 195 Ind Cas 774 (DB) *Emperor v Sekan-dar Ali Shah* (Where the charge of a Judge to the jury almost assumes that the prosecution case is proved and throws the onus on the accused to establish his innocence and the Judge repeats more than once that the jury must have reasons for their doubts before they can consider that they have a reasonable doubt the charge is open to serious objection)
- (21) 8 AIR 1921 Cal 252 (255) 23 Cr L Jour 244 *Emperor v Taribulla* (Judge should not usurp the functions of an advocate)
- (34) 21 AIR 1934 Cal 273 (275) 35 Cr L Jour 1313 *Ram Sumer Ali v Emperor* (Unjustifiable remarks meant to disparage the case for the prosecution in the eyes of the jury amount to misdirection)
[See (35) 22 AIR 1935 All 928 (929) 37 Cr L Jour 173 *Sri Kishan v Emperor* (Judge telling there is no reason to disbelieve a particular witness—No evidence by the defence contradicting that witness—No misdirection)]
- [See also (37) 24 AIR 1937 Nag 110 (112) 33 Cr L Jour 599 1 LR (1937) Nag 123 *Fateh Mahomed v Emperor* (Judge not leaving it to the jury to consider whether they should believe the defence evidence or no—Misdirection)]
- 30 (39) 28 AIR 1939 Cal 497 (499) 40 Cr L Jour 877, *Moxladdi v Emperor* (Jury should be cautioned against being influenced against the accused by evidence showing or tending to show that the accused were of bad character)
- (37) 24 AIR 1937 Nag 110 (112) 33 Cr L Jour 599 1 LR (1937) Nag 123 *Fateh Mahomed v Emperor* (Charge vitiated by a strong bias in favour of the prosecution and a strong bias against the defence)

up neither the role of the Public Prosecutor nor that of the defence counsel³¹ He should refer to important pieces of evidence both for the prosecution and against it³² He should not put the case of the prosecution too strongly and fail to put the defence case as strongly as it ought to be³³ The usual way of charging the jury would be to ask them to start with the presumption of the innocence of the accused³⁴ to trace the history of the case as laid before the Court by the prosecution,³⁵ placing before the jury the evidence for

(84) 10 Cal 140 (145) 13 Cal L Rep 358 *Hurry Churn v Empress* (Weak point in prosecution evidence not pointed out)

(14) 1 AIR 1914 Cal 519 (550) 15 Cal L Jour 147, *Osai Mollah v Emperor* (Judge's opinion as to the evidence was not put before the jury)

asad v Emperor (Complaint jury not to pay attention to it)
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Affairs v Shyam Sunder Bhumij

(27) 14 AIR 1927 Cal 200 (201 202) 28 Cal L Jour 201 *Isu Sheikh v Emperor* (Matters not on record were put before the jury)

(28) 15 AIR 1928 Cal 551 (552) 30 Cal L Jour 120 *Mahomed Segiruddin v Emperor* (Case based on circumstantial evidence — Failure to put it to the jury that circumstances should be such that there was no other explanation)

v Emperor
Emperor
attention was not drawn

Segiruddin v Emperor (Charge

Eran v Emperor

(In this case the evidence was

fairly put to the jury)

31 (87) 24 AIR 1937 Cal 266 (267) 38 Cal L Jour 767 *Madan Tialdas v Emperor*

(78) 1 Cal L Rep 436 (437) *In the matter of Chinabash Glose*

(26) 15 AIR 1928 Cal 500 (502) 29 Cal L Jour 497 *Samiuddin v Emperor*

32 (42) 29 AIR 1942 Bom 71 (77) 1 LR (1942) Bom 884 43 Cal L Jour 509 199 Ind Cas 200 (FD) *Emperor v Kasam Ali* (Where a Judge in his charge to the jury has put the evidence on the side of the prosecution as well as on the side of the defence before the jury and has not omitted any point in favour of the accused the charge cannot be said to be in contravention of S 297 Cr P C)

23 *Fateh Malomed v*
putting to jury defence

evidence.—Misdirection)

(36) 23 AIR 1936 Bom 52 (53) 60 Bom 999 37 Cal L Jour 366 (FB) *Puttan Hasan v Emperor*

(11) 12 Cal L Jour 537 (539) 12 Ind Cas 513 (Oudh) *Makbul Ahmad v Emperor*

(11) 12 Cal L Jour 193 (196) 10 Ind Cas 684 (Cal) *Rashidazzaman v Emperor*

(1864) 1 South W R Cr Letters 10 (10) (It is the Judge's duty in summing up the evidence to lay before the jury all the facts required by them to be determined)

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ment)

not jury

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(Failure to put before the jury points which are favourable to the accused is a misdirection which vitiates the trial.)

summing up in this case)]

In re Balam Paleyga.

Emperor

Emperor v Tasem Ali

Emperor

(29) 16 AIR 1929 Pat 34 (35) 7 Pat 153 30 Cal L Jour 273 *Wajid Ali v Emperor*

[See (66) 6 South W R Cr 64 (64) *Empress v Mohabur Singh*]

the prosecution³⁶ and drawing their attention to the weak points, if any, in such evidence,³⁷ then to state the case for the defence in sufficient detail³⁸ and to draw the attention of the jury to all the points in favour of the defence³⁹ even though the accused or his pleader omitted to raise⁴⁰ or did not lay much stress on such points⁴¹. The Judge should not tell the jury that if they find that the defence case is a false one it is an element in favour of the prosecution and that the falsity of the defence may have the effect of confirming them in their belief that the prosecution story is true. But, if such language is employed, it should always be accompanied by the legal caution that the onus of proving explicit guilt is upon the prosecution alone⁴². The Judge should not try to explain away points favourable to the accused⁴³ or ridicule the defence⁴⁴. A Judge in his charge to the jury should

- 36 (87) 5 Cr L Jour 427 (430) 34 Cal 698 11 C W N 666, *Jatindra Nath v Emperor*
 (18) 5 AIR 1918 Cal 314 (315 318) 19 Cr L Jour 81 *Asraf Ali v Emperor*
 (29) 16 AIR 1929 Cal 244 (246) 56 Cal 566 30 Cr L Jour 1031 *Debendra Narayan v Emperor*
 37 (3) 24 AIR 1937 Cal 266 (267) 39 Cr L Jour 767, *Madan Tilakdas v Emperor* (If he feels that there is something extremely suspicious about the prosecution case he ought to show his hand to the jury—He is not a mere judicial automaton)
 (37) 24 AIR 1937 Cal 269 (272) 38 Cr L Jour 1018 *Sanyasi Gani v Emperor* (Charge held defective and conviction set aside)
 (36) 1936 Oudh W N 187 (190) *Dehari v Emperor* (Case of dacoity—Guilt of accused depending entirely upon identification—Judge should point out shortcomings of prosecution witnesses in his charge to jury)
 (68) 5 Suth W R Cr 13 (18) *Queen v Choonee*
 (29) 1909 Mad W N 946 (947 952) *Doraiswamy v Emperor*
 (28) 15 AIR 1918 Cal 690 (691) 56 Cal 115 30 Cr L Jour 350 *Mokbul Khan v Emperor*
 [See (1865) 3 Suth W R Cr 29 (31) *Empress v Boudnath Singh*]
 38 (88) 1858 Rat 426 (427) *Qusen Empress v Dattu*
 [See also (33) 20 AIR 1933 P C 124 (131 133) 34 Cr L Jour 322 (332 333) (PC) *Dwarkanath v Emperor*]
 39 (41) 25 AIR 1941 Mad 339 (345) 42 Cr L Jour 414 193 Ind Cas 375 *In re Dalam Fateyya* (Vandalism and theft or dacoity are different—Failure to point out difference amounts to misdirection)
 (41) 28 AIR 1941 Oudh 567 (569) 17 Luck 198 42 Cr L Jour 728 195 Ind Cas 371 *Israr Husain v Emperor* (Not placing before jury points in favour of accused is misdirection)
 (1900) 4 Cal W N 196 (200) *Rahamat Ali v Empress*
 (37) 24 AIR 1937 Cal 269 (272) 39 Cr L Jour 1018 *Sanyasi Gani v Emperor*
 (29) 1929 Mad W N 946 (947 948) *Doraiswamy v Emperor* (It is the Judge's duty to put strong as well as weak points in the prosecution case to the jury)
 (15) 2 AIR 1915 Bom 249 (251 252) 40 Bom 220 17 Cr L Jour 133, *Fahira Appaya v Emperor*
 (71) 15 Suth W R Cr 37 (39 40) *Queen v Mahima Chunder Das*
 (15) 2 AIR 1915 Cal 773 (783) 16 Cr L Jour 561 (570) (F B) *Emperor v Upendranath Das* (Per Mukerjee J)
 40 (40) 27 AIR 1940 Nag 221 (224) 41 Cr L Jour 694 190 Ind Cas 283 *Dapurao v Emperor*
 (24) 11 AIR 1924 Cal 257 (282) 25 Cr L Jour 817 (FB) *Emperor v Barendra Kumar* (But there must be evidence in support of such point)
 (30) 17 AIR 1930 Cal 442 (442 443) 31 Cr L Jour 1203 *Kuti v Emperor* (There must be some

(Accused unrepresented — Likely arguments that would have been advanced by pleader if the accused had been represented)

- (37) 24 AIR 1937 Cal 266 (268) 39 Cr L Jour 767, *Madan Tilakdas v Emperor*

not make an appeal or exhortation to the jury such as 'The whole Karachi is watching you The whole commercial world is watching you' For in doing so the Judge passes beyond the limits of wise guidance or advice and introduces extraneous considerations in the charge which may not leave the jury to come freely to their conclusions⁴⁵ Where there are discrepancies in the evidence the Judge should not merely say that there are discrepancies but should point out *what* they are⁴⁶ It will not be proper to advise the jury to disbelieve a man who has given consistent evidence merely because there are a few minor discrepancies⁴⁷ nor is it proper to put before the jury hypothetical or speculative cases for which there is no foundation in evidence⁴⁸

But having regard to S 298 sub s (2), it is proper and reasonable for the Judge to direct the jury as to the weight to be attached to the evidence called at the trial provided that the Judge takes care to caution the jury that they are the sole judges of all questions of fact⁴⁹

45 (39) 26 AIR 1939 Sind 909 (216) 41 Cri L Jour 28 11LR (1940) Kar 249 *Shikaram v Emperor*
[See (25) 1^o AIR 1925 Sind 116 (122) 25 Cri L Jour 761 *Topandas v Emperor*]

assessors)
(27) 14 AIR 1927 Cal 300 (207) 28 Cri L Jour 201 *Isu Shen v Emperor*
(76) 25 Suth W R Cc 54 (54) *Queen v Chunder Kumar Mussondar*
(84) 11 Cal 10 (13) *Leu Tu v Queen Express*

[See also (38) 25 AIR 1938 Pat 575 (576) 40 Cri L Jour 31 *Bulal Gope v Emperor* (Defence relying on omissions by witnesses before police and Court — Court should draw attention of jury to those omissions and if it thinks that omissions were due to certain circumstances it should leave jury to decide value of such omissions — General observations however create wrong impression on jury)
(38) 25 AIR 1938 Pat 579 (584) 40 Cri L Jour 147 *Fayyaz Mia v Emperor*]

47 (20) 7 AIR 1920 Pat 575 (575 576) 22 Cri L Jour 1250 *Bairnath Mahton v Emperor*
(1864) 1 Suth W R 17 (17) *Queen v Bustee Khan*

48 (38) 23 AIR 1936 Rang 421 (425) 37 Cri L Jour 1050 14 Rang 710 (FB) *Emperor v Nga E Pe* (Judge not bound to enter into an irrelevant explanation on case not raised by accused—This may

43) 20 AIR 1933 Pat 481 (484 485) 34 Cri L Jour 898 *Emperor v Kamteshwar Lal*
(16) 3 AIR 1916 Low Bur 114 (122 123) 17 Cri L Jour 49 (57 54 58) 8 Low Bur Rul 306 (FD) *Aga Mya v Emperor*

[See (28) 15 AIR 1928 Pat 139 (141) 6 Pat 573 29 Cri L Jour 696 *Nathum Nonsa v Emperor*]
(In this case the High Court held on facts that the Judge did not put any hypothetical case as there

53) 20 AIR 1933 Pat 481 (484 485) 34 Cri L Jour 898 *Emperor v Kamteshwar Lal*
(16) 3 AIR 1916 Low Bur 114 (122 123) 17 Cri L Jour 49 (57 54 58) 8 Low Bur Rul 306 (FD) *Aga Mya v Emperor*

53) 20 AIR 1933 Pat 481 (484 485) 34 Cri L Jour 898 *Emperor v Kamteshwar Lal*
(16) 3 AIR 1916 Low Bur 114 (122 123) 17 Cri L Jour 49 (57 54 58) 8 Low Bur Rul 306 (FD) *Aga Mya v Emperor*

53) 20 AIR 1933 Pat 481 (484 485) 34 Cri L Jour 898 *Emperor v Kamteshwar Lal*
(16) 3 AIR 1916 Low Bur 114 (122 123) 17 Cri L Jour 49 (57 54 58) 8 Low Bur Rul 306 (FD) *Aga Mya v Emperor*

53) 20 AIR 1933 Pat 481 (484 485) 34 Cri L Jour 898 *Emperor v Kamteshwar Lal*
(16) 3 AIR 1916 Low Bur 114 (122 123) 17 Cri L Jour 49 (57 54 58) 8 Low Bur Rul 306 (FD) *Aga Mya v Emperor*

After the Judge has summarised the evidence for the prosecution and the defence, he should tell the jury that though they do not believe the defence, it does not follow that they must believe the prosecution. Giving such a direction at the end of the charge will not amount to misdirection.⁵⁰

Summing up is not rendered unnecessary by reason of counsel having addressed jury — The sufficiency of a charge to the jury must depend largely upon the special circumstances of each case such as the constitution of the jury, their intelligence and education, the elaboration with which the case has been conducted, the skill of the defence and a variety of other circumstances.⁵¹ But the Judge will not be relieved of the duty of placing before the jury the important facts of the case simply because the counsel have addressed long arguments to them.⁵² It is necessary that the jury should learn from the Judge what are the important points to which their attention should be directed.⁵³

Effect of omission to refer to defence case — An omission to refer to the case of the defence or the failure to deal with it in an adequate manner will vitiate the trial.⁵⁴

- (36) 37 Cri L Jour 17 (18) 159 Ind Cas 172 (Irb), *Harold H Watson v Emperor*
 (34) 21 AIR 1934 All 1032 (1033) 36 Cri L Jour 322, *Danu Dhar v Emperor*
 (34) 21 AIR 1934 All 326 (328) 35 Cri L Jour 688, *Sumera v Emperor*. (Judge giving dogmatic and unqualified opinion on question of fact of cardinal importance — This amounts to misdirection.)
 (34) 21 AIR 1934 Cal 757 (757) 35 Cri L Jour 1467, *Hossain Ali v Emperor* (Expression of opinion on matters of evidence is not misdirection where Judge warns that the jury are not bound to accept his opinion on questions of fact.)
 (35) 22 AIR 1935 Rang 214 (216) 13 Rang 141 36 Cri L Jour 1232, *H W Scott v Emperor* (A Judge charging the jury does not fulfil his duty if he merely reiterates the evidence given by the witnesses for the prosecution and the defence, and then leaves the jury to decide the case one way or another.)
 (35) 22 AIR 1935 Pat 263 (263, 266) 14 Pat 225 36 Cri L Jour 1026, *Harilal v Emperor*. (Criticism of and exposures of weak points in arguments on behalf of defence do not amount to misdirection if jury are warned that they are not bound by such expressions of opinion.)
 (35) 22 AIR 1935 All 929 (929) 37 Cri L Jour 173, *Sri Kishan v Emperor*. (Judge expressing opinion on question of fact under S. 298, sub-s. (2) — It is not necessary on every occasion when he expresses such opinion to tell jury that they are sole judges of questions of fact, it is enough if this point is mentioned at the end of the charge to the jury.)
 [See (38) 25 AIR 1938 Cal 460 (462) 39 Cri L Jour 674, *Ebadi Khan v Emperor*. (Having admitted a document Judge should leave it to the jury as to what weight they would allow to the evidence — Nor should he give his reasons for admitting document in evidence.)]
 50 (38) 25 AIR 1938 Cal 659 (662) 40 Cri L Jour 101 ILR (1938) 1 Cal 636, *Abdul Gafur v Emperor*.
 [See also (43) 30 AIR 1943 Mad 527 (528) 44 Cri L Jour 766 206 Ind Cas 265, *Vridichand Sowcar v Emperor*. (Judge should not leave it to the jury to tell the jury that the evidence has been heard.)]

(18) 5 AIR 1918 Pat 201 (208) 19 Cri L Jour 896, *Ram Bhagwan v Emperor*.

(10) 11 Cri L Jour 13 (14) 3 Sind L R 102 : 4 Ind Cas 597, *Imperator v. Mungghwazayo*

(27) 14 AIR 1927 Oudh 259 (260) 2 Luck 597 : 23 Cri L Jour 633, *Nakrimal v Emperor* (Judge ought to have repeated in some form the gist of the counsel's argument)

53 (19) 6 AIR 1919 Cal 142 (144) 20 Cri L Jour 300 (TB) *Pary v Emperor*.

54 (91) 1891 Rat 581 (582), *Queen Empress v Dhambar* (Charge should not confine itself to case for the prosecution)

(26) 13 AIR 1926 Mad 370 (370) 27 Cri L Jour 176, *In re Ambalam* (Defence case was not adequately put before the jury)

(37) 21 AIR 1937 Cal 263 (272) 33 Cri L Jour 1018, *Sanyas Gauri v Emperor* (Evidence not properly put before jurors — Witnesses in prosecution evidence not pointed out but points in favour of accused omitted — Charge is defective and misleading — Conviction and sentence of accused must be set aside)

Where however, the defence was not specific but consisted in merely denying the charge coupled with destructive criticism of the prosecution evidence, it was held that it was enough if the Judge drew the attention of the jury to the discrepancies in the prosecution evidence and the criticisms advanced and that no useful purpose would be served by formally charging the jury that the defence was a denial of the prosecution case⁵⁵

Allowing jury to have experiment as to question of identification — See the undermentioned case⁵⁶

7 Summing up where there are several accused — Where there are several accused the Judge should deal with the evidence relating to each of the accused¹

was not drawn to discrepancies)

(74) 11 Bom H C R 166 (169) *Reg v. Salharam Mukundji* (Evidence properly admitted was withheld from the jury)

(89) 1889 Rat 484 (186) *Queen Empress v. Ardeshtir* (Case under S 405 Penal Code — Omission to charge jury as to the necessity of still proof of *mens rea*)

(103) 5 Bom L R 207 (209) *Emperor v. Appuna Devappa* (In this case it was held that there was no omission)

led the jury to neglect all oral evidence

not drawn to most material contradiction)

ur v. Emperor (Jury's attention was

(08) 18 Mad L Jour 541 (541) 4 Mad L Tim 194 *In re Gangi Reddi Buchanna* (Omission to refer to plea of alibi and to the evidence bearing thereon)

(12) 13 Cri L Jour 271 (272) 14 Ind Cas 656 (Mad) *Venkatian v. Emperor* (Facts favourable to accused elicited in cross examination)

(24) 11 *v. Emperor* (In this case

(32) 1^c to draw attention of the jury to the fact that there was no corroboration of complainant's evidence as against certain accused)

(23) 10 AIR 1923 Cal 517 (519) 50 Cal 318 25 Cri L Jour 467 (470) *Mahomed Yunus v. Emperor* (Failure to warn the jury that a statement made by a certain accused was not a confession and could

agan Lall (Omission to tell the jury that the evidence

Jour 508 *Surendra Nath v. Emperor* (Rape — Failure to warn jury not to accept girl's evidence without corroboration)

(See (41) 28 AIR 1941 Mad 339 (342) 42 Cri L Jour 414 193 Ind Cas 375 *In re Balam Paleyga* (Improper exclusion of relevant evidence attempted to be let in on behalf of the accused and failure to

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(30) 11 AIR 1933 AH 328 (328) 31 Cri L Jour 173 *Sri Kishan v. Emperor* (Where there is no evidence for the defence a discussion of only the prosecution evidence cannot be attacked as one-sided)

56 (34) 21 AIR 1934 Cal 744 (745) 36 Cri L Jour 129 *Sarup Ali v. Emperor* (Evidence as to accused being identified in diffused light from electric torches — Judge while charging jury as to evidence of identification on allowing jury to have experiment with such torches in absence of accused — Held that the procedure was gravely irregular)

Note 7

1 (45) 3rd AIR 1945 Pat 109 (116) 23 Pat 656 48 Cri L Jour 515 218 Ind Cas 465 (DB) *Emperor v. Ram Setwan Mishra*

(42) 29 AIR 1942 Pat 199 (200) 21 Pat 130 43 Cri L Jour 230 197 Ind Cas 647 (DB) *Arjun Panda v. Emperor*

(41) 28 AIR 1941 Mad 658 (659) 42 Cri L Jour 631 194 Ind Cas 857 *In re Subbaraya Ajar* (Numerous accused tried for same offence — Omission to marshal evidence against each accused — Fresh trial should ordinarily be ordered — Evidence against accused very slight — Fresh trial is not necessary)

(40) 27 AIR 1940 Pat 417 (419) 41 Cri L Jour 738 *Judagi Gope v. Emperor*

(41) 28 AIR 1941 Mad 339 (341) 42 Cri L Jour 414 193 Ind Cas 375 *In re Balam Paleyga*

that is to say, he must point out to the jury exactly the evidence against each of the accused separately, it is not sufficient if he simply asks the jury to consider the case of each accused separately.² But it has been held that where the evidence is common to all the accused and is very brief it is not necessary for the Judge to keep on repeating the same evidence in the case of each accused.³ It is a wrong method of approach to summarise the evidence against each of the accused persons and ask the jury at the end of each summary if the accused has been falsely implicated thereby putting before them a false issue which is likely to misguide them into thinking that unless they are satisfied that the case is false, they must find the accused guilty.⁴

The discussion of the evidence of individual prosecution witnesses should precede that part of the charge in which the jury is asked to consider the case as against individual accused separately.⁵

The Judge should not in his charge to the jury merely use the word 'accused' leaving the jury in considerable doubt as to which accused he refers he should make reference to each accused separately.⁶

See also the undermentioned cases⁷

(39) 26 AIR 1939 Sind 209 (214) 41 Cri L Jour 29 I L R (1940) Kar 249 *Shewaram v Emperor* (Where the Judge in his charge to the jury has not sufficiently distinguished the cases of each of the two accused who are being tried and whose cases are widely different so as to make a difference on the admissibility of evidence it amounts to a misdirection.)

(35) 25 AIR 1938 Cal 475 (476) 39 Cri L Jour 701 *Kalyayani Das v Emperor*

(38) 25 AIR 1938 Pat 579 (583) 40 Cri L Jour 147 *Yusuf Mia v Emperor*

(37) 1937 Mad W N 737 (738) *Nachappa Goundan v Emperor* (Omission to do this is a very serious defect.)

(36) 23 AIR 1936 Cal 186 (187) 37 Cri L Jour 673 *Nabi Khan v Emperor*

(36) 1936 Oudh W N 201 (203) *Fajid Husain v Emperor*

(07) 5 Cri L Jour 78 (80) 30 Mad 44, *Mari Valayan v Emperor*

(08) 7 Cri L Jour 358 (359) (Mad) *In re Acchabha Beers* (Jury should be warned that the confession by one accused incriminating himself cannot be used against the other accused.)

(20) 7 AIR 1970 Cal 966 (987) 47 Cal 46 21 Cri L Jour 775 *Hemanta Kumar Pathak v Emperor* (Attention of the jury must be invited to each of the accused a statement to the charge framed against him.)

(35) 22 AIR 1935 Cal 534 (537) 62 Cal 911 36 Cri L Jour 1246, *Asanulla v Emperor* (To hang a lot of number of witnesses round the neck of each accused without any discussion of the evidence given by the witnesses is not the way of carrying out the above rule.)

(34) 21 AIR 1934 Cal 273 (275) 35 Cri L Jour 1313 *Rim Sumer Ahir v Emperor*

(36) 23 AIR 1936 Cal 186 (187) 37 Cri L Jour 673 *Nabi Khan v Emperor*

(42) 29 AIR 1942 Oudh 221 (224) 17 Luck 516 43 Cri L Jour 416 193 Ind Cas 714, *Jagannath v Emperor*

[See also (42) 29 AIR 1942 Cal 277 (280) 43 Cri L Jour 693 200 Ind Cas 329 (DB) *Ayub Ali v Emperor* (All the accused persons were defended together and there was no separate defence for each of these accused — Held that the charge to the jury was not defective merely because the evidence against each accused was not tribulated at the end of the charge.)]

12 Cal 253 42 Cri L Jour 335 193 Ind Cas 302,

46 Cri L Jour 513 218 Ind Cas 465 (DB), *Emperor*

Nabi Khan v Emperor

210 Ind Cas 539 *O to George Giffler v The*
 1st and 2nd defendants (The charge was framed with reference to property — J and N
 1st — G's case must be considered separately

from that of J and N)

(38) 35 AIR 1938 Mad 853 (860) 40 Cri L Jour 355 *Arumugam v Emperor* (Charge under S. 401 of being members of gang — Evidence that big gang was committing acts of depredation all over India and that some of the accused were found associated together in crime characteristic of gang is sufficient

8 **Direction to recommend for mercy.**—The jury should not be directed by the Judge to recommend the accused to mercy¹ Where the jury returned a verdict of guilty and at the same time recommended the accused to mercy, it was held that the recommendation for mercy did not imply that the jury did not believe the accused to be guilty at all²

9 **"Laying down the law by which the jury are to be guided"**—There should be only one charge to the jury both on the facts and on the law. It is illegal to comment upon the evidence and ask the jury to consider whether the prisoner is guilty and then to explain the law and take their verdict as to what offence the prisoner is guilty of³ The Judge should explain to the jury his own view of the law, but should not refer it to the High Court⁴

The discussion of legal matters should be introduced in the charge in appropriate places as and when something occurs in the discussion of the evidence which gives rise to them and necessitates their application⁵

Elements of offence should be explained.—The Judge should draw the attention of the jury to the offence with which the accused is charged and explain to them clearly and fully the various ingredients which should be proved in order to find the accused guilty of that offence⁶ It should not be presumed that the jurors are aware of the necessary elements which constitute an offence or the legal distinction between one offence and another⁷ Wherever necessary the Judge should charge the jury as to the necessity of strict proof of *mens rea* of fraudulent intention, etc⁸ if the evidence discloses that the accused

to justify Judge on very little proof of association in leaving it to jury whether particular accused was member of gang)

Note 8

1 (70) 14 Suth W R Cr 46 (46) *Queen v Dasse Musulmany*

2 (36) 23 AIR 1936 Pat 48 (48) 37 Cri L Jour 370 *Hari Mahto v Emperor*

Note 9

1 (38) 2 Weir 493 (494) *In re Achuta Nallacharia Naidu* (accused was charged in this case with

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v Emperor (A direct

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Bhagwanrao v Sarjoo

(Major and minor offence—Mode of direction)

(41) 28 AIR 1941 Oudh 567 (571) 17 Luck 128 42 Cri L Jour 798 19 Ind Cas 371 *Israr Hussain v Emperor* (Mere reading of sections not enough—Omission by Judge to explain law—Verdict of jury vitiated)

(40) 27 AIR 1940 Lah 87 (88) 41 Cri L Jour 482 *A V Mathews v Emperor* (This is particularly necessary in a case where the main charge is cheating as the definition of cheating is not exactly what an ordinary layman in the ordinary use of the English language would understand by the term)

(39) 26 AIR 1939 Bom 457 (459) 41 Cri L Jour 176 ILR (1939) Bom 648 *Emperor v Jitendra Soni* (But omission to do so does not vitiate trial if it has not occasioned failure of justice)

(37) 24 AIR 1937 Cal 458 (459) 38 Cri L Jour 966 *Mahomed Shariff Khan v Emperor* (Failure of Judge to explain to the jury the implication of a conspiracy to commit an offence under S 306 held amounted to misdirection)

(1864) 1 Suth W R Cr Letters 10 (11)

not a technical defect)

(35) 22 AIR 1935 Oudh 175 (176) 35 Cri L Jour 507 *Jagan v Emperor* (What is meant by term robbery must be explained)

5 (35) 22 AIR 1935 Oudh 175 (176) 35 Cri L Jour 507 (308) *Jagan v Emperor*

6 (37) 24 AIR 1937 Pat 440 (444) 38 Cri L Jour 919 16 Pat 413 *Rameshwar Singh v Emperor* (Charge of kidnapping and abduction—Jury finding accused not guilty of kidnapping and finding guilty

to explain

comes under the exceptions to a particular offence or the general exceptions under chap IV of the Penal Code, he should explain those exceptions also⁷ Section 105, Evidence Act, does not relieve a Judge, even in cases where the accused has not pleaded that his case comes within any particular exception, from pointing out to the jury such facts in the evidence as might justify the jury in taking the view that the accused's case was covered by one or other exception⁸ The Judge is, however, not bound in his charge to the jury to explain exceptions which in his opinion are not applicable and for which there is no foundation laid in the evidence⁹ See the undermentioned cases¹⁰ where the various High Courts have given directions as to how particular sections should be explained

to be over sixteen years — Story of prosecution that girl was taken away for marriage without her consent — Charge to jury not referring to such intention — Held — non direction amounted to serious misdirection)

(89) 1889 Rat 484 (486), *Queen-Empress v Ardesair*.

[See (25) 12 AIR 1925 Cal 494 (496) · 25 Cri L Jour 1386, *Abdul Gani v Emperor* (Unlawful assembly case — Judge must mention any charges that may be in the common objects of the unlawful assembly)]

7. (26) 13 AIR 1926 Cal 1107 (1108) 27 Cri L Jour 1402, *Jahur Shaikh v Emperor*

[See also (38) 25 AIR 1938 Cal 6 (9) 39 Cri L Jour 308, *Emperor v Durga Charan* (Charge in murder case—Attention of jury drawn to positions that on evidence no question of exceptions to S 300, Penal Code, arose — Held there was no misdirection)]

(37) 24 AIR 1937 Bom 60 (61) 38 Cri L Jour 327, *Emperor v Mahomed Adam* (Charge to jury — Intention to cause death and actual death proved — Charge should be of culpable homicide amounting to murder—Jury to determine exceptions under S 300 Penal Code—Judge should not prejudice nature of offence)]

8. (44) 31 AIR 1944 Bom 274 (277 287) ILR (1945) Bom 52 46 Cri L Jour 277 217 Ind Cas 255 (FB), *Emperor v. Hasan Abdul Karim*

9. (44) 31 AIR 1944 Bom 274 (277 287) ILR (1945) Bom 52 46 Cri L Jour 277 217 Ind Cas 255 (FB), *Emperor v. Hasan Abdul Karim*

10. (45) 32 AIR 1945 Cal 467 (470) I L R (1944) 2 Cal 305 (DB) *Asgar Ali Mandal v Emperor* (Charge for murder — Deceased killed with knife — Proper direction to jury would be that accused was guilty under S 302 and not S 301, Part II, if case did not come under S 302 and 301, Part I, Penal Code)

(45) 32 AIR 1945 Cal 432 (433) (DB), *Mansi Mo'la v. Emperor* (Charge under S 366A, Penal Code—Question of intention)

(45) 32 AIR 1945 Cal 421 (423) 221 Ind Cas 493 (DB), *Maktarali v Emperor* (Accused identified as dacoit and found in possession of stolen property—Accused charged under S 393—Jury if not satisfied with evidence of identification but satisfied with identification of stolen property can be directed to convict accused under S 412, Penal Code)

(42) 29 AIR 1942 Cal 239 (240) 43 Cri L Jour 565 199 Ind Cas 610 (DB), *Abu Pramanik v Emperor*, (Explanation of Ss 299 300 and 34 Penal Code)

(42) 29 AIR 1942 Pat 481 (497) 21 Pat 258 43 Cri L Jour 817 202 Ind Cas 331 (DB), *Ramdeo Singh v Emperor* (Per Varma J.—In a case of dacoity where Ss 391, 399, 378 and Ss 22, 23 and 24 of the I P C have been explained, not much is left except explaining the definitions by illustrations)

(41) 28 AIR 1941 Mad 339 (343) 42 Cri L Jour 414 193 Ind Cas 375, *In re Balam Pateyya*.. (Vandalism is one thing and dacoity and theft are quite different Consequently, in a jury trial the failure of the judge to point out the difference between vandalism and dacoity or theft to the jury when asking them to give their verdict on counts relating to dacoity and theft amounts to misdirection.)

(39) 26 AIR 1939 Bom 457 (459) 41 Cri L Jour 176 ILR (1939) Bom 648, *Emperor v. Jhina Soma*. (It is incumbent upon the Judge to explain what is culpable homicide under S 299, Penal Code, and under what circumstances culpable homicide amounts to murder, and under what circumstances it does not, under S 300 Penal Code)

(39) 26 AIR 1939 Pat 536 (539) 41 Cri L Jour 1 18 Pat 693, *Sachinder Rai v Emperor* (Section 366A, Penal Code—Where there is no exact evidence of age, the Judge should strongly emphasize this feature of the case and clearly direct the jury that if they are not completely satisfied that it has been established that the girl was under eighteen they are bound to acquit upon that charge)

(36) 25 AIR 1938 Cal 475 (476) 39 Cri L Jour 751, *Katyayani Dasi v. Emperor* (Section 366 and S 366A, Penal Code)

(37) 24 AIR 1937 Cal 309 (312) 38 Cri L Jour 1067 ILR (1937) 2 Cal 308, *Sahedali Mirzha v. Emperor* (Sections 149 and 304 Penal Code)

(37) 24 AIR 1937 Pat 191 (195) 38 Cri L Jour 129, *Rajendra Nath v. Emperor*. (Sections 411 and 414, Penal Code)

Section not to be merely read — It is not a sufficient compliance with the law if the Judge merely reads the relevant section or sections under which the accused stands

- " cases under S 366 the
me to in relation to L"
- (73) 20 Suth W R Cr 70 (71) 13 Beng L R App 20 *Queen v Nobin Chunder Banerjee* (Section 81 Penal Code—Murder committed while labouring under strong passions and feelings — Insanity cannot be presumed)
- (71) 16 Suth W R Cr 36 (37) 8 Beng L R App 21 *Queen v Zulfukar Khan* (Section 81 Penal Code)
- (28) 15 AIR 1928 Cal 269 (270) *Abd ul Rezak v Emperor* (Section 97, Penal Code)
- (27) 14 AIR 1927 Cal 257 (259) 53 Cal 990 28 Cri L Jour 273 *Aseruddin v Emperor* (Section 96 Penal Code)
- (24) 11 AIR 1924 Cal 776 (777) 26 Cri L Jour 48 *Baseruddin Sheikh v Emperor* (Section 103 Penal Code)
- (23) 10 AIR 1923 Cal 517 (519) 50 Cal 918 25 Cri L Jour 467, *Muhammad Yunus v Emperor* (Sections 100 and 101 Penal Code)
- (21) 9 AIR 1921 Cal 697 (698) 22 Cri L Jour 606 *Abdul Rahim Mir v King Emperor* (Sections 96 to 103 Penal Code)
- (11) 13 Cri L Jour 26 (26) 13 Ind Cas 219 (Cal) *Melar Sardar v Emperor* (Section 99 Penal Code)
- (09) 9 Cri L Jour 413 (444 445) 36 Cal 296 1 Ind Cas 973 *Balnath Dhanuk v Emperor* (Do)
- (08) 7 Cri L Jour 256 (262 264) 85 Cal 389 *Kabiruddin v Emperor* (Do)
- (72) 17 Suth W R Cr 45 (45) *Queen v Mookhtaram Mundle* (Section 100 Penal Code)
- (31) 18 AIR 1931 Cal 757 (759) 68 Cal 1299 33 Cri L Jour 79 (SB) *Emperor v Amode Ali Sider* (Section 109 Penal Code)
- (20) 7 AIR 1920 Cal 868 (867) 47 Cal 48 21 Cri L Jour 775 *Hemanta Kumar v Emperor* (Do)
- (12) 18 Cri L Jour 715 (715) 16 Ind Cas 523 (Cal) *Jamsiruddin Biswas v Emperor* (Section 114 Penal Code)
- (20) 7 AIR 1920 Cal 834 (834) 22 Cri L Jour 448 *Raja Khan v Emperor* (Do)
- (16) 8 AIR 1918 Cal 355 (355) 17 Cr L Jour 92 (93) *Abdul Sheikh v Emperor* (Section 141 Penal Code — It is essentially necessary to mention what an unlawful assembly is)
- (23) 15 AIR 1928 Pat 139 (142) 6 Pat 572 29 Cri L Jour 620 *Nathuni Nonia v Emperor* (Section 141 Penal Code)
- (25) 12 AIR 1925 Cal 494 (497) 25 Cri L Jour 1386 *Abdul Ganai v Emperor* (Do)
- (24) 11 AIR 1924 Cal 771 (772) 51 Cal 79 25 Cri L Jour 915 *Khanuddin Karikar v Emperor* (Do)
- (69) 12 Suth W R Cr 51 (51) *Queen v Rasookoolah* (Do)
- Code)
Barendra Kumar v
- (10) 11 Cri L Jour 15 (16) 3 Sind L R 125 4 Ind Cas 608 *Emperor v Murid* (Section 34 Penal Code)
- (27) 14 AIR 1927 Oudh 102 (103) 1 Luck 180 27 Cri L Jour 846 *Gurdin v Emperor* (Sections 149 and 34 Penal Code)
- (26) 13 AIR 1926 Cal 410 (410) 25 Cri L Jour 1560 *Kasem Molla v Emperor* (Common object — Section 147 Penal Code)
- (25) 12 AIR 1925 Cal 913 (914) 26 Cri L Jour 827 *Aniruddha Mana v Emperor* (Sections 34 and 149 Penal Code)
- (24) 11 AIR 1924 Cal 257 (270) 25 Cri L Jour 817 (FB) *Emperor v Barendra Kumar Ghose* (Section 34 Penal Code)
- (07) 5 Cri L Jour 427 (431) 34 Cal 698 11 Cal W N 666 *Jatindranath v Emperor* (Section 149 Penal Code)
- Code)
- (92) 18 Cal 35 (44 45) *Queen Empress v Jogendra Chunder* (Do)
- (07) 7 Suth W R Cr 29 (30) *Queen v Lahar Mundul* (Section 176 Penal Code)
- (34) 21 AIR 1934 Cal 144 (144 145) 35 Cri L Jour 635 *Nagendra Bhakta v Emperor* (Section 201, Penal Code)

- (cc) 6 Suth W R Cr 84 (84) *Queen v Parbally Churan Sirkar* (Sect on 191 Penal Code)
- (73) 20 Suth W R Cr 41 (44 45) *Queen v Nim Chand Moolerjee* (Sections 194 and 115 Penal Code)
- (94) 1 Cal W N 301 (302) *Tomaji Pramanik v Empress* (Sect on 211 Penal Code)
- (69) 12 Suth W R Cr 66 (66) 4 Beng L R App Cr 4 *Queen v Kola* (Section 193 Penal Code)
- (69) 12 Suth W R Cr 31 (32) 3 Beng L R App Cr 36 *Queen v Mals Khonee* (Do)
- (68) 9 Suth W R Cr 50 (54) *Queen v Denonath Bujjur* (Do)
- (66) 6 Suth W R Cr 15 (15) *Queen v Pran Kisse* (Sect on 211 Penal Code)
- (17) 4 AIR 1917 Cal 123 (126) 18 Cri L Jour 385 (388) 44 Cal 477 (FB) *Fateh Chand v Emperor* (Section 243 Penal Code)
- (33) 20 AIR 1933 Cal 242 (243) 34 Cri L Jour 668 *Sahab Ali v Emperor* (Sect on 304 Penal Code)
- (30) 17 AIR 1930 P C 201 (204) 31 Cri L Jour 701 (PC) *Benjamin Knowles v Emperor* (Section 300 Penal Code)
- (06) 3 Cri L Jour 1 (2) 3 Low Bur Rul 70 (F B) *Hla Gyi v Emperor* (Section 300 Penal Code — Distinct on between murder and culpable homicide should be explained)
- (31) 18 AIR 1931 Cal 345 (349) 58 Cal 1138 37 Cri L Jour 598 *Ifattullah v Emperor* (Section 304A Penal Code)
- (30) 17 AIR 1930 Cal 136 (138) 31 Cri L Jour 570 *Natabar Halder v Emperor* (Sect ons 302 to 304, Penal Code)
- (11) 11 Cri L Jour 293 (298 300) 6 Ind Cas 201 (Cal) *Reasuddin v Emperor* (Section 300 Penal Code)
- (08) 8 Cri L Jour 6 (8) 35 Cal 531 7 Cal L Jour 599 12 Cal W N 774 *Natabar Ghose v Emperor* (Intent on in S 304 Penal Code)
- (85) 11 Cal 80 (90) *Queen Empress v Jacquet* (Section 300 Penal Code)
- (71) 15 Suth W R Cr 17 (18) 6 Beng L R App 86 *Queen v Kali Charan Das* (Section 304 Penal Code—Judge should point out the distinction between two classes of culpable homicide contemplated by S 304)
- (69) *Queen Empress v Jacquet* (Section 300 Penal Code)
- (68)
- (69) —Judge ought to
- (90) 1895 Rat 766 (768) *Queen Empress v Dadubhai* (Sect ons 300 304 Penal Code—It is the Judge's duty to explain distinction between culpable homicide and murder)
- (95) 1890 Rat 735 (735) *Queen Empress v Poshia Hari* (Sect on 304 Penal Code — Judge must point out that S 304 is made up of two parts)
- (90) 1890 Rat 530 (530) *Queen Empress v Ladliya Mahadaya* (Section 304 Penal Code — Judge should draw the attention of the jury to both parts of the section)
- (14) 1 AIR 1914 Low Bur 218 (218) 17 Cri L Jour 154 (155) 8 Low Bur Rul 125 *Kya Nyun v Emperor* (Sections 300 304 326 Penal Code — Jury should be asked to consider question of intention of the accused)
- (12) 13 Cri L Jour 750 (751) 17 Ind Cas 62 6 Sind L R 116 *Emperor v Chagan Pajaram*
- (32) 19 AIR 1930 Oudh 28 (30) 33 Cri L Jour 270 *Emperor v Zamin* (Meaning of knowledge in S 368)
- (7) 14 AIR 1917 Oudh 259 (259 260) 2 Luck 597 23 Cri L Jour 633 *Nahru Mal v Emperor* (Age in cases of S 366A Penal Code)
- 1161 *Abdul Khatique v Emperor* (Age in cases of
- 117 *Fulchand v Emperor* (Section 366 Penal Code will of the girl and not that of the guardian)
- (32) 19 AIR 1932 Cal 417 (417) 33 Cri L Jour 553, *Diola Sardar v Emperor* (Sect on 373 Penal Code — Age of the girl material)
- (30) 17 AIR 1930 Cal 209 (210) 57 Cal 1074 31 Cri L Jour 903, *Frafulla Kumar v Emperor*, (Sect on 366 Penal Code — Force includes force by stress of circumstances)
- v Emperor* (Direct on to jury must be in Penal Code)
- ul Fabinaj* (Sect on 363 Penal Code—
- L Jour 507 *Sahab Ali v Emperor*
- (Sect on 366 Penal Code — Force includes force by stress of circumstances)

(1864) 1 Suth W R Cr 21 (21) *Queen v Albar Aazee* (Section 376 Penal Code — Consent must be free consent)

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enal Code —

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v *Emperor*

(Section 32

Penal Code)

(29) 31 Cri L Jour 451 (451) 122 Ind Cas 600 (Mad) *In re Perumal Theian* (Five persons charged with dacoity of whom one was found not guilty — Judge must point out the effect of acquittal of one of the accused)

(10) 11 Cri L Jour 219 (249) 5 Ind Cas 797 (Mad) *Ennumundu Garu v Emperor* (Section 39 Penal Code)

(03) 1 Weir 446 (447) *In re Moolandi Ma nagaran* (Section 395 Penal Code — Dacoity)

(09) 9 Cri L Jour 311 (312) 1 Ind Cas 546 (Mad) *Sinna Theian v Emperor* (Section 390 — Judge told the jury that dacoity is robbery committed by more than five persons — Accused not prejudiced)

(1864) 1864 Suth W R Cr Gap No 8 (9) *Queen v Bono Mal, Ghose* (Section 395 Penal Code — Judge should direct the jury to convict only if they find that all the prisoners had intent on of causing wrongful loss to the prosecutor)

(31) 18 AIR 1931 Cal 414 (416) 53 Cal 8 32 Cri L Jour 897 *Yehar Sheikh v Emperor* (Section 395 Penal Code)

(33) 20 AIR 1933 Cal 994 (294 990) 34 Cri L Jour 594 (SD) *Vadhu Singh v Emperor* (Section 390 Penal Code)

on 397 Penal Code

on 397 Penal Code

—S 34 Penal Code has no application to provisions of S 397)

(11) 12 Cri L Jour 97 (98) 9 Ind Cas 505 33 Cal 403 *Bonai v Emperor* (Section 400 Penal Code)

(70) 6 Mad H C R 120 (121) 1 Weir 459 *In re Sri Ram Venkateswami* (Section 401 Penal Code)

(27) 14 AIR 1927 Mad 243 (244) 27 Cri L Jour 1369 *In re Munyan* (Section 404 Penal Code)

(82) 6 Bom 731 (733) *Empress v Mulhar* (Section 411 Penal Code — Jury must be told of the necessity of the r being satisfied that the possession of the stolen property was clearly traceable to the accused)

(73) 18 Suth W R Cr 25 (26) *Queen v Sa uruddin* (Section 419 Penal Code)

(67) 8 Suth W R Cr 16 (17) *Queen v Mt Joonnee* (Section 411 Penal Code — Guilty knowledge that the article retained by the accused was stolen must be proved)

(67) 7 Suth W R Cr 73 (74 75) *Queen v Jogesur* (Section 419 Penal Code — Guilty knowledge must be proved)

(91) 15 Bom 369 (370) *Empress v Balya Somya* (Section 411 Penal Code — Guilty knowledge that the property was stolen must be found before conviction under this section)

(30) 1930 Mad W N 249 (284) *Sundaresa Iyer v Emperor* (Section 415 Penal Code)

(24) 11 AIR 1924 Cal 509 (507) 25 Cri L Jour 1034 *Claru Chaidra v Emperor* (Section 415 Penal Code — Decree is not a valuable security)

(15) 2 AIR 1915 Cal 299 (294) 41 Cal 669 15 Cri L Jour 155 *Emperor v Madan Mohal* (Section 441 Penal Code — In this case there was a failure by the Judge to point out the distinction between civil and a criminal trespass)

464 and 471 Penal Code)

v *Asimoddi* (Section 465 Penal Code
fraudulent or dishonest intent on of

the accused)

Code)

Penal Code)

v *Emperor*

(31) 18 AIR 1931 Cal 184 (188) 58 Cal 1051 32 Cri L Jour 836 (T B) *Emperor v Susi Behari* (Section 477 Penal Code)

(81) 8 Cal L Rep 542 (545 546) *Karsled Kasi v Empress* (Fraudulent or dishonest use of documents must be proved in cases under S 471 Penal Code)

charged¹¹ though such reading is usually done and is desirable¹² Mere references to sections unless the jurors are trained men cannot be of much assistance to them to apply the law to the facts it is always desirable that in charges to the jury the law should be sufficiently explained¹³ Their attention should also be drawn to the evidence in the case and the method of applying the law to the facts found on such evidence explained¹⁴ The

- (15) 2 AIR 1915 All 134 (134) 37 All 187 16 Cr L Jour 322 *Emperor v Paras Ram Dube* (Interpretation of English law against the possibility of the offence of rape by a boy under fourteen does not apply to India and the question is one of fact only)
- (35) 1935 Mad W N 1288 (1288) *Chakala Narasa v Emperor* (Charge of dacoity and robbery)
[See (21) 8 AIR 1931 Cal 269 (270) 23 Cr L Jour 41 *Gangadhar v R M L Pe d* (Section 80 Penal Code)
(85) 11 Cal 410 (412) *Actai Luskar v Queen Empress* (Section 300 Penal Code)]
- 11 (41) 28 AIR 1911 Oudh 567 (571) 17 Luck 128 42 Cr L Jour 729 190 Ind Cas 371 *Isar Husain v Emperor*
- (39) 26 AIR 1939 Pat 536 (539) 41 Cr L Jour 1 18 Lat 698 *Sachinder Rai v Emperor* (Charge under S 366 depends entirely on proof of force or deceit — Judge should explain this to jury)
- (37) 24 AIR 1937 Cal 266 (263) 34 Cr L Jour 767 *Madan Titakdas v Emperor* (Sections of law merely read out and explained to jury — What exposition of law actually was not stated — Held there was serious misdirection of charge to jury)
- (1906) 4 Cal W N 193 (196) *Sri Prasad Misser v Empress* (The Judge must explain the law)
- (94) 25 Cal 711 (713) 2 Cal W N 369, *Taju Pramanik v Queen Empress*
- (33) 1933 Mad W N 320 (391) *Arunuga Goundan v Emperor*
- 12 (44) 31 AIR 1944 Bom 274 (276) 1 L R (1945) Bom 52 46 Cr L Jour 277 217 Ind Cas 250 (F B) *Emperor v Hasan Abdul Karim* (Such reading however is not compulsory under the Code)
- 13 (44) 31 AIR 1944 Bom 274 (276 286) 1 L R (1945) Bom 52 46 Cr L Jour 277 217 Ind Cas 250 (F B) *Emperor v Hasan Abdul Karim* (Sections 299 and 300 Penal Code — Distinction between murder and culpable homicide not amounting to murder should be clearly explained)
- (37) 41 Cal W N 573 (576) *Nanda Mallick v Emperor* (Charge under second part of S 304 read with S 34 Penal Code — Matter must be thoroughly explained to jury and evidence bearing on intent on and knowledge must be carefully put before them)
- (37) 1937 Mad W N 737 (739) *Nachappa Goundan v Emperor* (Offence of robbery — Law not explained properly — Misdirected on)
- (98) 25 Cal 736 (738) 2 Cal W N 481 *Abbas Peada v Queen Empress*
- (22) 9 AIR 1922 Cal 124 (125) 23 Cr L Jour 567 *Emperor v Durga Charn* (Meaning of the section should be explained if necessary)
- (26) 13 AIR 1926 Mad 1121 (1122) 27 Cr L Jour 1191 *Venkatagadu v Emperor* (In offence of theft the word 'dishonestly' must be explained to the jury)
[See (39) 26 AIR 1939 Bom 457 (459) 41 Cr L Jour 176 1 L R (1939) Bom 648 *Emperor v Jhina Soma* (The mere reading of the sections to the jury does not amount to an explanation of the law)]
- 14 (45) 32 AIR 1915 Cal 492 (493) 222 Ind Cas 265 (DB) *Adeluddin v Emperor* (Charge under S 412 Penal Code)
- (43) 30 AIR 1943 Cal 47 (48) 44 Cr L Jour 307 204 Ind Cas 565 (DB) *Nasimuddin v Emperor* (No indication as to words used by abettor — No evidence of instigation — Mere explaining law is inadequate in charge under Penal Code Ss 109/304)
- (41) 28 AIR 1941 Pat 362 (367) 195 Ind Cas 107 *Bakhora Gope v Hafiz Abdul Halim* (It will be a more convenient method to state first to the jury the things which the accused are said to have done and to tell them in as concrete terms as possible what offences particular alleged acts will constitute in the presence or absence of the particular intentions imputed instead of giving them an exposition of the law at length and in general terms even at the outset)
- (37) 24 AIR 1937 Cal 756 (759) 39 Cr L Jour 183 1 L R (1937) 2 Cal 315 *Ekalbar Mondal v Emperor*
- (30) 17 AIR 1930 Cal 434 (435) 57 Cal 1162 32 Cr L Jour 111, *Jabanullah v Emperor* (Evidence voluminous — Charge should state salient points — evidence adduced and points for determination with reference to law)
- (30) 17 AIR 1930 Cal 370 (375) 54 Cal 96 37 Cr L Jour 10 *Government of Bengal v Santiram Mondal*
- (25) 12 AIR 1925 Cal 9 6 (37) 26 Cr L Jour 1279 *Abdul Fihim v Emperor*
[See (30) 17 AIR 1930 All 534 (536) 39 Cr L Jour 158 *Surya Prasad v Emperor* (Sections Judge should start taking interest in the case at the very beginning of trial and not when the time comes for writing or dictating the judgment)]

Explanation of the law is not rendered unnecessary by the fact that counsel have addressed the jury—As has been stated in Note 6 the fact that the prosecuting and defence counsel have explained the law to the jury does not relieve the Judge of his duty in that respect. The responsibility of laying down the law for the guidance of the jury rests entirely with the Judge and it is immaterial how much or how often jury have been addressed by pleaders on both sides.²⁵ The reason for this may be stated in the words of a pronouncement of the Privy Council²⁶ Jurors are apt to be suspicious of the law as propounded by the defence they look to the Judge for an authoritative statement of it.

When the jurors state that they do not understand the law it is the duty of the Judge to explain the same to them again.²⁷

The heads of charge should also show how the law was explained to the jury. See Section 367, Note 15.

Besides explaining the particular section or sections of the Penal Code or other Acts under which the accused is charged it is the duty of the Judge to advise and direct the jury on other questions of law and procedure which may arise in the case.²⁸

(A) *Charge for major offence*—The Judge can direct that it is open to the jury to convict the accused of a minor offence though the charge is in respect of a major offence.²⁹

(B) *Approver's evidence — Value of* — The Judge should direct the jury to consider whether a particular witness in the case is or is not an accomplice.³⁰ He can

- 25 (00) 29 Cal 379 (381). 6 Cal W N 297. *Mangan Das v Emperor*
 (39) 26 AIR 1939 Bom 457 (459). 41 Cri L Jour 176. ILR (1939) Bom 646. *Emperor v Jhina Soma*
 (26) 13 AIR 1926 Nag 53 (54). 26 Cri L Jour 1090. *Ram Prasad v Emperor*
 26 (33) 20 AIR 1933 P C 218 (221). 34 Cri L Jour 886 (PC). *Basil Ranger Lawrance v Emperor*
 27 (11) 12 Cri L Jour 140 (141). 9 Ind Cas 783 (Mad). *Palaresa Tevan v Emperor*
 (26) 13 AIR 1926 Cal 695 (697). 27 Cri L Jour 926. *Emperor v G C Wilson*
 (23) 10 AIR 1923 Cal 647 (649). 25 Cri L Jour 313. *Bilaschandra Banerjee v Emperor*
 [See (32) 19 AIR 1932 Cal 118 (119). 58 Cal 133. 33 Cri L Jour 13. *Girischandra Namadas v Emperor*]
 26 See (25) 12 AIR 1925 Cal 491 (496). 25 Cri L Jour 1386. *Abdul Gani v Emperor* (Charge under Ss 147 and 353 Penal Code—Reference to the Calcutta Police Act by the Judge held necessary though the Act was not invoked by the accused)
 (77) 2 Bom 61 (64). *Imperatrix v Pritamder Jina*
 29 (43) 30 AIR 1943 Oudh 322 (325). 44 Cri L Jour 601. 207 Ind Cas 197, *Mt Bhagwanra v Sarjoo* (Charge of dacoity — Jury can be told to convict accused of theft)
 (40) 27 AIR 1940 Pat 417 (418). 41 Cri L Jour 739. *Judagi Gope v Emperor* (Judge should tell the jury that even if they believe that the accused jointly killed the deceased still it is open to them to convict not under s 302 Penal Code but merely under S 304 or even under S 326 or S 305 if necessary intention or knowledge is not established)
 (14) 1 AIR 1914 Mad 425 (428). 13 Cri L Jour 739 (741). 37 Mad 236. *In re Adabala Muthiyalu*
 [See (22) 9 AIR 1922 Pat 321 (322). 23 Cri L Jour 47, *Emperor v Bhimlal Chamar* (Omission to direct is immaterial where offence was either murder or nothing at all)]
 (29) 16 AIR 1923 Nag 295 (296). 31 Cri L Jour 557. *Narayan Singh v Emperor* (Jury can convict for a minor offence without any separate charge for such offence)]
 30 (4) 29 AIR 1942 Oudh 221 (223). 17 Luck 516. 43 Cri L Jour 416. 19 Ind Cas 714. *Jaganrao v Emperor* (The question whether a witness is or is not an accomplice a question for the jury to determine and it would amount to a misdirection on the part of the Judge to say that a witness is not an accomplice)

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He must also tell the jury that the corroboration of the approver's evidence must be independent testimony which affects the accused by connecting or tending to connect him with the crime in other words it must be evidence which implicates him that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it.³³ See also the undermentioned cases.³⁴

(C) *Confessions of prisoner* — The question as to the admissibility of a confession with reference to its being voluntary or otherwise is one for the Judge to decide and he cannot leave it to the jury.³⁵ See also section 203 Note 3

(28) 15 AIR 1928 Oudh 207 (208) 29 Cri L Jour 311, *Mani Ram v Emperor*
(29) 16 AIR 1929 Oudh 321 (326) 30 Cri L Jour 92 *Lala v Emperor* (Corroborative evidence need not be direct)

461 *Jagtes Dhanuk v Emperor*
72 *Ram Sarup Singh v Emperor*
141 *Slash Misser v Emperor*
141 *Pande v Emperor*
141 *Sheikh* (It is pointed out in this case that

(12) 13 Cri L Jour 424 (426) 14 Ind Cas 968 1 Upp Bar Rul 96 *Ah Tal v Emperor* (Especially in excess case corroboration is necessary)

(11) 12 Cri L Jour 132 (137) 9 Ind Cas 778 6 Low Bar Rul 4 *Nga Po Chit v Emperor*
(24) 11 AIR 1924 Rang 173 (174) 1 Rang 609 25 Cri L Jour 381 *Maung Lay v Emperor*

corroborative

evidence)

(11) 12 Cri L Jour 256 (259) 10 Ind Cas 582 38 Cal 529 (FB) *Emperor v Nona Gopal* (The court must be corroboration not only as to crime but as to the identity of each one of the accused and must proceed from an untainted source)

(31) 18 AIR 1931 Oudh 172 (176) 6 Luck 666 32 Cri L Jour 860 *Bhureshwari Pershad v Emperor* (Evidence of a spy or a detective)

(11) 12 Cri L Jour 537 (539) 12 Ind Cas 513 (Oudh) *Mahbul Ahmad v Emperor* (Corroborative required is not the corroboration of the narrative of the offence committed but must be as to the identity of the accused)

(34) 21 AIR 1934 Cal 601 (653) 36 Cri L Jour 70 *Kasim Ali v Emperor* (Saying that statements of two accomplices might be used to corroborate each other if independent was held to be misdirection)
aman Shikram

Sind L R 82 *Khadim v Emperor*
Nur Ahmad v Emperor
115 L T 453 60 J P 416 20 Cor CC

524 60 S J 696 *Reg v Bashertille*

34 (37) 24 AIR 1937 Cal 269 (272) 38 Cri L Jour 1018 *Sanyashin Gain v Emperor* (Judge assumed the statement of approver that he intentionally refrained from identifying the accused to be true and directing jury accordingly while it is for the jury to decide what construction they should put on the apparent failure of approver to identify — This is misdirection)

(86) 8 All 509 (513) 1886 All W N 176 *Queen Empress v Baldeo*

(84) 10 Cal 970 (973) *Queen Empress v Bepin Biswas*

(01) 28 Cal 339 (343) 5 Cal W N 517 *Kamala Prasad v Sital Prasad*

v Emperor (It is not

approver can be regarded as corroborating that made by another approver)

(24) 11 AIR 1924 Lah 727 (728) 25 Cri L Jour 1317 *Hazara Singh v Emperor*

(22) 9 AIR 1922 Nag 172 (173) 23 Cri L Jour 391 *Kisan v Emperor*

(21) 8 AIR 1921 Lah 215 (216) 23 Cri L Jour 158 *Lala v Emperor*

Emperor (Judge must

Vridhichand Sewcar

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- (76) 23 All 196 Cal 22 (214) 35 Cr L Jour 676 (1913) *Pratt v. Emperor* (Where a Judge directs the jury to believe what the confession says are admitted as evidence or not to be admitted as evidence. But the jury is not to believe that the confession is true or false.)
- (76) 21 AIR 1934 Cal 717 (715) 36 Cr L Jour 177 (1913) *Emperor v. Emperor* (Confession not to be admitted as evidence or not to be admitted as evidence.)
- (74) 21 AIR 1931 Cal 671 (672) 35 Cr L Jour 70 (1913) *Emperor v. Emperor*
- 36 (77) 2 South W R Cr 37 (77) *Queen v. Creedy v. Munger*
- (70) 17 AIR 1930 Cal 633 (635) 37 Cr L Jour 100 (1913) *Emperor v. Abdul Kader* (It is a case where the confession has been retracted. It is held that the confession contains the true account of the prisoner's admission with the crime.)
- (76) 25 South W R Cr 25 (26) *Queen v. Hume v. Mundil*
- (73) 20 South W R Cr 33 (73) *Queen v. Farnham v. v.*
- 37 (45) 32 AIR 1915 1 C 141 (194) *Hase v. Hase v. Hase* (The jury should be warned that a confession is not to be taken into the mouth of the accused by a witness and incorrect statement which is made.)
- 38 (46) 50 Cal W N 23 (226) 111 *Ging v. Emperor*
- (46) 33 AIR 1916 Cal 114 (114) 43 Cr W N 713 (1916) *Hase v. Hase v. Hase*
- (46) 2 W N 507 (1916) *In re Hase v. Hase*
- (93) 2 W N 510 (1916) *In re Hase v. Hase* (The confession is not an absolute rule — The confession is not a rule which is not to be taken into the mouth of the accused by a witness and incorrect statement which is made.)
- (91) 2 Weir 507 (307) *In re Hase v. Hase*
- (30) 17 AIR 1930 Lah 357 (354) 11 Lah 106 30 Cr L Jour 1016 (1913) *Singh v. Emperor* (Retraction in this case though very prompt and early confession was acted upon as there was corroborator.)
- (29) 16 AIR 1929 Lah 897 (597) 30 Cr L Jour 610 (1913) *Mt. Miran v. Emperor*
- (21) 8 AIR 1921 1st 337 (334) 22 Cr L Jour 300, *Malind Ali v. Emperor*
- (29) 16 AIR 1929 1st 212 (213) 8 1st 262 30 Cr L Jour 716, *Sheo Narain Singh v. Emperor* (If however the tribunal comes to the conclusion that the confession as a whole is a truthful statement it can act upon the confession.)
- (34) 21 All 1931 Cal 651 (653) 36 Cr L Jour 70, *Aashim Ali v. Emperor*
- (66) 10 Mad 293 (303) 310 *Queen Empress v. Rangai*
- (95) 18 All 78 (81) 1895 All W N 217, *Queen Empress v. Mahabir*
- (78) 2 Cal L Rep 132 (133), *In re Soferuddin*
- 39 (44) 31 AIR 1944 Cal 249 (253) 46 Cr L Jour 131 216 Ind Cas 129 (DB) *Emperor v. Aashim Ali* (Where a retracted confession is the only evidence in the case it is the duty of the Judge to point out to the jury that the only direct evidence in the case is that of the confession that a retracted confession is not as strong as one which the accused adheres to but that even so it is open to them if they believe the confession to found a conviction upon it. It should further be pointed out to them that the evidence of association of the accused in or before its commission and his conduct subsequent thereto, if they believe it is evidence which affords some corroboration of the confession.)
- (41) 28 AIR 1941 Bom 50 (53) 1 L R (1941) Bom 27 192 Ind Cas 671, *Emperor v. Bhagandas Bisesar* (Confession not involuntary merely because it is retracted—Retracted confession may be made basis of conviction.)
- (29) 16 AIR 1929 Mad 837 (939) 53 Mad 160 31 Cr L Jour 768, *Kesava Pillai v. Emperor*
- (93) 2 Weir 510 (511) 512 *In re Chinnu Chengadu* (10 Mad 295 explained.)
- (29) 16 AIR 1929 Oudh 381 (382) 30 Cr L Jour 967, *Nawab v. Emperor* (Retracted confession though not found to be true in certain parts is sufficient for conviction.)

753. *Sanmal Das v Emperor* (Extra judicial con-

- (98) 21 Mad 83 (83) *Public Prosecutor v. Paman* (But the weight to be attached to such confessions depends upon circumstances)

based upon it if the reasons for its retraction appear on the face to be false. See also the undermentioned cases⁴⁰

(D) *Confessions of co accused*—The Judge should tell the jury that a statement of an accused person which does not amount to a confession cannot be considered at all as evidence against a co accused,⁴¹ that a confession of a co accused may, under S 30 of the Evidence Act, be considered against a co accused,⁴² but such confession, without corroboration will be insufficient to sustain a conviction of the co accused⁴³ and a retracted confession of

(21) 8 AIR 1921 Sind 129 (130) 25 Cri L Jour 571 16 Sind L R 67, *Mahmud v Emperor* (Question of corroboration is really be the matter — The Judge has only to decide whether the confession tendered in evidence has been voluntarily made)

Also see S 161, Note 18

(40) (45) 32 AIR 1915 Lah 105 (110) 47 Cri L Jour 4 1LR (1915) Lah 290 220 Ind Cas 467 (FB) *Abdul Rahim v Emperor* (It is for the jury to say whether all or any of the circumstances relied on as corroborating a confession were in fact established by independent evidence and further whether they sufficiently corroborated the confession)

(40) 27 AIR 1940 Mad 699 (700) 41 Cri L Jour 909 190 Ind Cas 415 *In re Bangaru Reddi* (Confession — Mere fact that accused has given wrong description of way in which he killed deceased is no ground for acquitting him)

(40) 27 AIR 1940 Pat 511 (515) 41 Cri L Jour 472, *Emperor v Jale Uraon* (Court is not bound to accept whole confession—It can accept part of it found to be true and reject rest as false—Obiter)

(30) 37 Cal L Jour 976 (976) 164 Ind Cas 721 (Cal), *David Sheikh v Emperor* (It is no good telling the jury first that the accused has made a confession and then sending them out of Court while the question is discussed whether the confession ought to be admitted or not)

(86) 1890 Rat 242 (243 244) *Queen Empress v Bhagi* (Retracted confession — Judge should satisfy him self as to falsity of any allegations as to improper pressure by police and should use every reasonable effort to ascertain to what extent details of confession are corroborated)

(34) 21 AIR 1934 Cal 853 (857) 62 Cal 312 36 Cri L Jour 485 *Kasimuddin v Emperor* (Even after a confession is once admitted in evidence, the Judge can withdraw it from the jury where he finds on the subsequent evidence that it is inadmissible)

41 (25) 12 AIR 1925 Sind 116 (119) 25 Cri L Jour 761, *Topan Das v Emperor*.

(30) 17 AIR 1930 Cal 139 (141) 57 Cal 601 31 Cri L Jour 610, *Bikram Ali v Emperor* (Confession proved by a reply of a witness to a leading question—Judge should tell the jury as to how such evidence should be treated and what weight should be attached to it)

(28) 10 AIR 1929 Cal 416 (417) 29 Cri L Jour 527 *Bhadrenwar Sardar v Emperor* (If the state d)

caused thro
it it is worth

n Ahmed v Emperor

(73)

(67)

(66)

(Failure to warn the

jury is a material error)

(69) 6 Bom H C R 10 (11, 12), *Reg v Sheikh Miya* (One of the accused acknowledged his presence at the scene of occurrence and declared that the co-accused was the instigator of, and principal actor in the commission of offence — Held jury ought to have been told that the statement was no evidence against co accused)

42 (40) 29 AIR 1912 Nag 127 (132) 1 LR (1912) Nag 749 41 Cri L Jour 18 203 Ind Cas 214 (DB) *Government, C P and Berar v Raghuram Poda* (Judge to point this out to jury)

43 (40) 27 AIR 1940 Nag 230 (233) 41 Cri L Jour 553 188 Ind Cas 146, *Maroti Jaga v Emperor*

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ror (Confes

sion to be of any value must implicate the maker of it to the same extent as it implicates the co-accused)

(00) 9 Cri L Jour 308 (309) 1 Ind Cas 547 (Mad), *Kuppan v Emperor*

reasonably be true, and which is consistent with innocence although they were not contrary to the truth, the accused is entitled to be acquitted.⁴⁷ See the undermentioned cases⁴⁸ where the proper mode of charging in such a case is laid down. The jury should be told that the question whether the possession of the article was *recent* enough to attract the presumption of law under S 114, Illustration (a) of the Evidence Act, is a matter to be decided by them from all the circumstances of the case.⁴⁹

(F) *Circumstantial evidence* — In cases where there is only circumstantial evidence against the accused, the Judge should direct the jury to find (i) whether circumstances from which an adverse inference is sought to be drawn against the accused have been proved beyond all reasonable doubt and those circumstances are clearly connected with the fact sought to be inferred therefrom and (ii) whether the circumstances are incompatible with the innocence of the accused and incapable of an explanation upon any other reasonable hypothesis than that of his guilt.⁵⁰ A theoretical discourse on what

47 (43) 30 AIR 1913 PC 211 (214 215) 45 Cri L Jour 241 210 Ind Cas 589 O to George G/le
v The King

(42) 46 Cal W N 51 (56) (DB) *Fatch Ab v The King* (To tell the jury that the burden of proof is on the accused to show his innocence is misdirection (1915) 11 Cr App Rep 45 relied on)

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tion had been transferred by ducoity or that he had dishonestly received or retained it knowing having reason to believe that it was stolen property)

(37) 24 AIR 1937 Pat 191 (1936) 38 Cri L Jour 129 *Rajendra Nath v Emperor* (Case on Ss 411 and 414 Penal Code — Presumption under S 114, Evidence Act, not arising — Judge must tell jury that there is no evidence of guilty knowledge — Omission to so direct amounts to serious error vitiating trial)

(36) 1936 Oudh W N 187 (190) *Behari v Emperor* (Wrong statement of the law—Judge asking jury to presume that accused put stolen property deliberately in a certain place)

(46) 37 Cr L Jour 976 (1977) 161 Ind Cas 721 (Cal) *Daud Sheikh v Emperor* (Judgment
Tord Reading in the case of *Isaac Schen* and *Isaac Schen* v *Emperor* p 45 rel ed c

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accused--Judge ought to have drawn attention of the jury to this lapse of time)

(99) 2 Weir 515 (516) *In re Mammad*: (Charge should make reference to the lapse of time between

(Judge must draw attention of the)

to raise the presumption the possessor

the stolen property should be exclusive as well as recent)

(66) 5 Suth W R Cr 3 (3 4) *Queen v Naram Bagdee* (Direction to convict if accused failed to exp

and f

the prisoner if they believed that the prisoner had shown the stolen property to the police is to exception }

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49 (2J) 30 Cri L Jour 542 (543) 115 Ind Cas 831 (Mad) *In re Muthu Virā Velan*

50 (42) 29 AIR 1942 Cal 524 (526) 43 Cri L Jour 860 202 Ind Cas 604 (DB) *Emperor v Nabu*
(40) 27 AIR 1910 Mad 1 (3 4) 41 Cri L Jour 369, *In re Kanakasabay Pillai* (Case tried by
assessors)

circumstantial evidence couched in a language which would be unintelligible to the jury is quite worthless.⁵¹ The Judge should tell the jury that testimony of eye witnesses is not necessary to the establishment of a charge of murder and if from the circumstances of the case they had no doubt as to the guilt of the accused they must give effect to that decision.⁵² In a case depending on circumstantial evidence the question of motive is of great importance and it is the duty of the Judge to lay emphasis in his charge to the jury on the absence of motive which is a circumstance in favour of the accused.⁵³

See also the unmentioned cases.⁵⁴

(G) *Inferences to be drawn from non-examination of witnesses* — The jury ought to be told that no adverse inference can be drawn against the accused from his non-examination of witnesses.⁵⁵ But the inference to be drawn from the non-examination of prosecution witnesses is a matter to be considered with reference to the circumstances of each particular case and the Judge should direct the jury to consider the question in the light of the circumstances and facts of each case.⁵⁶ Thus, where it is proved that the prosecution had material witnesses who could have given relevant evidence and that they had been deliberately kept back, the Judge should direct the jury to draw an adverse inference against the prosecution.⁵⁷

- (41) 28 AIR 1941 Cal 106 (102) 1 L R (1940) 2 Cal 258 42 Cri L Jour 385 193 Ind Cas 302, *Emperor v. Mujaffar Sheikh*
 (39) 26 AIR 1939 Sind 209 (215 216) 41 Cri L Jour 28 11R (1940) Kar 249, *Shewa Ram Jetthanand v. Emperor*,
 (37) 24 AIR 1937 Cal 459 (459) 39 Cri L Jour 986 *Mid Shariff Khan v. Emperor*
 (31) 18 AIR 1931 Cal 11 (13) 32 Cri L Jour 418, *Jahura Bibi v. Emperor*
 (28) 15 AIR 1928 Cal 551 (552) 30 Cri L Jour 120, *M. D. Sagruddin v. Emperor*
 (18) 5 AIR 1918 Cal 314 (318) 19 Cri L Jour 81 *Ashraf Ali v. Emperor*
 (34) 21 AIR 1934 Cal 124 (126) 60 Cal 1839 35 Cri L Jour 567 *Manar Ali v. Emperor*
 (30) 17 AIR 1930 Cal 370 (374) 55 Cal 98 32 Cri L Jour 10, *Government of Dengal v. Santi Ram Mondal*
 (33) 20 AIR 1933 Pesh 94 (96) 30 Cri L Jour 476, *Nawab Khan v. Emperor*
 (03) 8 Cal W N 278 (286) 1 Cri L Jour 121 (FB) *Hurjee Mull v. Imam Ali*
 [See (26) 30 Cal W N 376 (379) 27 Cri L Jour 1254 98 Ind Cas 102 *Arajais v. Emperor*]
 51 (41) 28 AIR 1941 Cal 106 (103) 1 L R (1940) 2 Cal 258 42 Cri L Jour 385 193 Ind Cas 302, *Emperor v. Mujaffar Sheikh*

52 "The evidence of the eye-witnesses is not necessary to the establishment of a charge of murder and if from the circumstances of the case they had no doubt as to the guilt of the accused they must give effect to that decision."

11R (1937) Lah 371 31

5 *Emperor*

as 352, *Upendra Nath v.*

54 "The evidence of the eye-witnesses is not necessary to the establishment of a charge of murder and if from the circumstances of the case they had no doubt as to the guilt of the accused they must give effect to that decision."
 55 "The evidence of the eye-witnesses is not necessary to the establishment of a charge of murder and if from the circumstances of the case they had no doubt as to the guilt of the accused they must give effect to that decision."
 56 "The evidence of the eye-witnesses is not necessary to the establishment of a charge of murder and if from the circumstances of the case they had no doubt as to the guilt of the accused they must give effect to that decision."
 57 "The evidence of the eye-witnesses is not necessary to the establishment of a charge of murder and if from the circumstances of the case they had no doubt as to the guilt of the accused they must give effect to that decision."

that night is erroneous.)

- (37) 24 AIR 1937 Cal 756 (757) 39 Cri L Jour 182 1 L R (1937) 2 Cal 315 *Ehabbar Mondal v. Emperor* (In conspiracy cases, the inferences which are to be drawn by the jury and which the jury should be directed to consider with regard to their conspiracy verdict must be given if they are mere inferences supported by solid evidence.)

(82) 8 Cal 121 (125) 10 Cal L Rep 151, *Empress v. Dhunno Kasi*

10 Cal 140 (149) 13 Cal L Rep 358 *Hurry Churn v. Empress*

(28) 25 AIR 1938 Pat 579 (581) 40 Cri L Jour 117, *Yusuf Mita v. Emperor* (Held that not have invited the jury to assume that the witnesses who had not been examined had

Cal 297 (299) 46 Cri L Jour 427 218 Ind Cas 229 (DB) *Karamali Sukdar v. Emperor* (that adverse presumption may be drawn from non-examination of material witnesses for such non-examination is not forthcoming — Judge then adding that such non-examination — Held, this

— L Jour 964 *Emperor*
 Jour 615 (616)

(H) *Warning in cases arising out of sexual matters*—The Judge should warn the jury that in charges made by a woman in cases arising out of sexual matters it is unsafe to rely solely upon the testimony of the woman⁵³ and also direct the jury as to whether there is any evidence corroborating the testimony of the woman⁵⁴. At the same time, the Judge should point out to the jury that they are entitled to convict the accused upon the uncorroborated testimony of the woman, if, after proper scrutiny and considering the warning, they are satisfied with the uncorroborated evidence⁶⁰.

- (32) 19 AIR 1932 Cal 474 (477) 59 Cal 1361 33 Cri L Jour 854, *Saroj v Emperor*
 (32) 19 AIR 1932 Cal 118 (119, 120) 58 Cal 1335 33 Cri L Jour 135, *Girish Chandra v Emperor*
 (31) 18 AIR 1931 Cal 752 (755) 33 Cri L Jour 85, *Salih Sheikh v Emperor* (Merely asking the jury to give their due consideration to the absence of material witnesses is not sufficient direction—Jury must be specifically told what is the presumption that they are entitled to draw)
 (30) 17 AIR 1930 Cal 708 (709) 58 Cal 590 32 Cri L Jour 228, *Nababali v Emperor*
 (30) 17 AIR 1930 Cal 181 (484) 32 Cri L Jour 33, *Hachani Khan v Emperor*
 (30) 17 AIR 1930 Cal 134 (135, 136) 31 Cri L Jour 918, *Nayan Mandal v Emperor*
 (26) 13 AIR 1926 Cal 728 (729, 730) 27 Cri L Jour 398, *Hars Charan v Emperor*
 (25) 12 AIR 1925 Cal 872 (873) 52 Cal 595 26 Cri L Jour 1037, *Ledu Molla v Emperor*
 (23) 10 AIR 1923 Cal 517 (519) 50 Cal 318 25 Cri L Jour 467, *Mid Yunus v Emperor*
 (18) 5 AIR 1918 Cal 314 (317) 19 Cri L Jour 81, *Ashraf Ali v Emperor*
 (16) 3 AIR 1916 Cal 355 (357) 17 Cri L Jour 92, *Abdul Sheikh v Emperor*
 (33) 20 AIR 1933 Pat 481 (484) 34 Cri L Jour 828, *Emperor v Kameshwar Lal*

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reasons for not

- (82) 8 Cal 121 (124, 125) 10 Cal L Rep 151, *Empress v Dhunno*
 58 (42) 29 AIR 1942 Bom 121 (123) 43 Cri L Jour 621 200 Ind Cas 261 (FB), *Emperor v Mahadeo Talya* (Rape case)
 (41) 29 AIR 1941 Nag 324 (326) 43 Cri L Jour 129 11LR (1942) Nag 510 197 Ind Cas 133 In re *Harachand Ghiswamal* (Do)
 (41) 45 Cal W N 27 (28) (DB), *Krishna Chandra Sardar v Emperor* (This rule applies to offences of the nature of kidnapping or abduction or sexual offences.)
 (34) 21 AIR 1934 Cal 7 (9) 62 Cal 527 36 Cri L Jour 796, *Emperor v Nur Ahmed* (Corroboration necessary)
 (40) 27 AIR 1940 Cal 391 (392) 41 Cri L Jour 841 190 Ind Cas 150 *Taser Pramanik v Emperor*
 (40) 27 AIR 1940 Cal 461 (462) 11LR (1940) 2 Cal 180 191 Ind Cas 48, *Harendra Prasad v Emperor* (But see the observations of Sen, J.)
 (39) 26 AIR 1939 Pat 536 (538) 41 Cri L Jour 1 18 Pat 698 *Sachinder Rai v Emperor*
 (38) 25 AIR 1938 Cal 658 (661) 40 Cri L Jour 101 1 LR (1938) 1 Cal 636, *Abdul Gafur v Emperor*
 (37) 24 AIR 1937 Cal 321 (321, 322) 39 Cri L Jour 371 11LR (1937) 2 Cal 345, *Sihandar Mian v Emperor* (The Judge usually adds a rider to the effect that nevertheless if after proper scrutiny and considering the caution delivered by the Judge the jurors are satisfied by the uncorroborated evidence they may accept it)

corroboration in

material particulars is essential)

- 59 (36) 23 AIR 1936 Cal 18 (20) 37 Cri L Jour 359, *Chamuddin Sardar v Emperor*
 60 (41) 45 Cal W N 27 (28) (DB) *Krishna Chandra Sardar v Emperor* (If the Judge tells the jury that the girl is obviously lying and therefore her evidence is defective, this direction is clearly most inadequate)
 (40) 27 AIR 1940 Cal 461 (462) 191 Ind Cas 48 11LR (1940) 2 Cal 180, *Harendra Prasad v Emperor*
 (36) 23 AIR 1936 Cal 18 (19) 37 Cri L Jour 359, *Chamuddin Sardar v Emperor*
 (37) 24 AIR 1937 Cal 321 (322) 39 Cri L Jour 371 11LR (1937) 2 Cal 345, *Sihandar Mian v Emperor*.

The failure to warn the jury of the danger of convicting the accused on the woman's evidence amounts to a misdirection which vitiates the trial⁶¹. Where however a part of the woman's evidence which is the crucial part and which, if believed establishes the guilt of the accused is corroborated the failure to give warning cannot be said to have affected the verdict of the jury and is therefore no ground on which the conviction should be set aside⁶².

Where a woman is alleged to be of a bad character the Judge should point out to the jury that the alleged bad character is relevant only so far as it affects the credit of the woman or supports the defence suggestion that the case is not a true one⁶³.

See also the unmentioned cases⁶⁴.

(I) Other cases of warning.—The Judge should also warn the jury that the evidence of an expert should be approached with caution⁶⁵ that suggestions of pleaders do not amount to evidence unless they are partly or wholly accepted by the prosecution witnesses⁶⁶ that evidence of witnesses taken under S 161 must be accepted with a great deal of caution⁶⁷ that they are not to draw an adverse inference against the accused from the fact that they were subjects of a proceeding under S 110 of the Code⁶⁸ and that they should be cautious in acting on a statement of a witness made before the committing Magistrate but denied before the Sessions Judge⁶⁹.

- (37) 24 AIR 1937 Cal 463 (465) 38 Cr L Jour 931 *Sarat Chandra v Emperor*
[See also (44) 31 AIR 1914 Siml 33 (31-35) ILR (1914) Har 123 45 Cr L Jour 650 212 Ind Cas 467 (DB) *Emperor v Kaku Afshargholi* (Difference between evidence of accomplice and evidence of victim in such cases explained — Case of odour)]
61 (39) 26 AIR 1939 Pat 536 (538) 41 Cr L Jour 1 18 Pat 698 *Sachinder Rai v Emperor*
(36) 23 AIR 1936 Cal 18 (19) 37 Cr L Jour 359 *Chamuddin Sardar v Emperor*
[See also (40) 27 AIR 1940 Cal 161 (461-462) 1 L R (1940) 2 Cal 180 191 Ind Cas 18 *Harendra Prosad v Emperor* (Judge warns jury that it was unsafe to convict accused on prosecutrix's uncorroborated testimony — Omission to add that if they believed prosecutrix they could convict on

v Emperor

168 — Charge

- under — Judge must direct jury to find as to accused's knowledge of the girl's being under 16)
(42) 29 AIR 1912 Bom 71 (74) ILR (1912) Bom 394 43 Cr L Jour 529 199 Ind Cas 203 (TB) *Emperor v Kasam Ali* (The rule that the Judge should warn the jury in cases involving sexual intercourse, that corroboration of the woman's story must be obtained does not apply where the only charge is of abduction)
(39) 26 AIR 1939 Pat 536 (539) 18 Pat 698 41 Cr L Jour 1 *Sachinder Rai v Emperor* (In case of sexual offences like abduction Judge should tell jury that if girl was immoral it made her story of abduction less probable — Failure to do this amounts to misdirection)
(33) 20 AIR 1933 Cal 718 (722) 35 Cr L Jour 307 60 Cal 1457, *Shaheba v Emperor* (Trial for offence under S 366 Penal Code — Judge telling jury that fact of accused's previous intimacy with the girl was immaterial amounts to misdirection)
65 (05) 2 Cr L Jour 311 (313) 1 Cal L Jour 335 *Panchu Mandal v Emperor*
[See also (42) 29 AIR 1912 Cal 239 (240) 43 Cr L Jour 565 199 Ind Cas 610 (DB) *Abu Pramanik v Emperor* (Though great weight should be attached to the testimony of an expert (doctor) the Judge is right if he tells the jury that they may discard that opinion if they found that there were good grounds for doing so)]
(36) 23 AIR 1936 P C 289 (299) 37 Cr L Jour 963 (P C) *Seneviratne v The King* (Evidence of medical experts conflicting — Judge should not ask jury on matters involving medical knowledge and skill to come to a conclusion for themselves)]
66 (32) 19 AIR 1932 Cal 373 (377) 33 Cr L Jour 725 *Emperor v Karimuddin Sheikh*
67 (08) 7 Cr L Jour 315 (316) 7 Cal L Jour 246, *Kali Singh v Emperor*
[See (12) 13 Cr L Jour 293 (281) 14 Ind Cas 677 (Cal) *Tufani Sheikh v Emperor* (Section 361, Cr P C — Questions eliciting confessional statement — Jury must be told that such statement is inadmissible)]
68 (39) 26 AIR 1939 Cal 497 (499) 40 Cr L Jour 877, *Moseladdi v Emperor*
69 (38) 25 AIR 1938 Cal 364 (365) 39 Cr L Jour 625 *Ram Gobinda v Emperor* (Witness in Sessions Court denying truth of his statement made before committing Magistrate — Judge should warn jury to be cautious in acting on such statement)]

However important the first information report may be either from the point of view of the prosecution or of the defence, it should not be admitted in evidence or placed before the jury unless it is admissible under one of the provisions of the Evidence Act. If however, it is admissible it should be placed before the jury with proper directions. The jury should not be told to attribute any importance to it merely because it is the fabric on which the whole prosecution case depends. Ordinarily such a report is not substantive evidence but if the first informant had died before the matter came before the Court it is admissible under S 32 (1) of the Evidence Act. In such a case the jury should be informed that the first information report is admissible as a substantive piece of evidence under that provision and at the same time they should be reminded that the statement in question had not been made on oath nor had it been tested by cross examination but that after bearing these points in mind it would be for the jury to attach to it such weight as they consider necessary.⁹ (See also S 154 Note 10)

10 Effect of non-observance of this provision — Laying down the law — It has been held in the undernoted cases¹ that the failure of the Judge to explain properly the law to the jury is not a mere misdirection, but is a failure to comply with an express provision of law vitiating the whole trial. It is a defect which cannot be cured by S 537. In other cases however it has been held that such an omission is not a material misdirection and where the offence charged is a simple one (like theft) and where the jury have understood fully the constituent factors of the offence an omission to explain the law may not of itself justify a reversal of the verdict² though where such an omission to explain the law occasions a failure of justice the verdict will be set aside³.

The cases cited below⁴ show how it is a question depending on the circumstances of each case whether the Judge has failed to lay down the law for the guidance of the jury.

70 (48) 80 AIR 1943 Cal 74 (74 To) I L R (1942) 2 Cal 144 41 Cri L Jour 322 200 Ind Cas 99 (DB) *Emperor v Mohammad Shaikh*

Note 10

1 (07) 5 Cri L Jour 78 (80) 30 Mad 44 *Mari Valayan v Emperor*

(10) 11 Cri L Jour 489 (483) 7 Ind Cas 401 (Mad) *In re Suruttai*

(31) 18 AIR 1931 Mad 427 (429) 54 Mad 583 32 Cri L Jour 1212 *Raman Koratan v Emperor*

Emperor

Birch v Emperor

Emperor]

— *Rol 125 Kya Nyun v*

2 (39) 26 AIR 1939 Bom 457 (459) I L R (1939) Bom 643 41 Cri L Jour 176 *Emperor v Jhina Soma*

Singh v Emperor

36 *Abdul Gani v Emperor* (Describing the common object of unlawful assembly as disturbing public peace, resisting obstructing and overawing the police by criminal force and of assaulting police — was held not likely to prejudice the accused.)

3 (97) 25 Cal 561 (564) *Biru Mandal v Queen Empress*

(96) 13 AIR 1926 Mad 1191 (1127) 27 Cri L Jour 1191 *Venkatagadu v Emperor* (Case of theft — Word dishonestly ought to have been explained but not explained — Held there was no miscarriage)

explain what was the intention necessary to constitute the offence of murder was not in the circumstances of the case a misdirection)

11. Misdirection — Sub-section (2) of s 423 provides that the verdict of a jury cannot be altered or reversed "unless such verdict is erroneous owing to a *misdirection* by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him. There is no definition of the word *misdirection* in the Code. Technically a 'misdirection' is an error of law made by a Judge in charging a jury.¹ But the expression as used in the Code includes not only an error in laying down the law by which the jury are to be guided but also a defect in summing up the evidence.² In *Sundaresa Iyer v Emperor*³ it was observed that a misdirection includes also a defect in summing up the evidence or in not summing it up or summing it up erroneously which may often prejudice the accused more than *not* summing it up at all. Such error and defect are in all cases an infringement of the law as laid down in s 29.⁴ A mere *non-direction* is not necessarily a misdirection though who alleges misdirection must show that something wrong was said or something was said which would make wrong that which was left to be understood.⁵

The proper way of viewing a charge by a Judge to the jury has been laid down by their Lordships of the Privy Council in *Channing Arnold v Emperor*.⁶

A charge to a jury must be read as a whole. If there are salient propositions in law in it the Court will of course be the subject of separate analysis. But in a protracted narrative of fact the determination of which is ultimately left to the jury it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would however not be in accordance either with usual or with good practice to treat such cases as cases of misdirection if upon the general view taken the case has been fairly left within the jury's province.⁶

- (14) 1 AIR 1914 Low Bur 216 (218) 8 Low Bur Rul 195 17 Cri L Jour 154 *Aya Nya n v Emperor* (Murder — Charge held defective in law as it did not sufficiently ask the jury to consider the intention of the accused.)

Note 11

1 Wharton's Law Lexicon

2 (10) 11 Cri L Jour 13 (13 15) 3 Sind L R 102 4 Ind Cas 507 *Imperator v Minhwassayo* (Per Crouch A J C — Omission in summing up is not misdirection unless it be on point of substantial importance.)

3 (30) 1930 Mad W N 249 (250)

4 (42) 29 AIR 1942 Nag 127 (131) 11 R (1942) Nag 749 44 Cri L Jour 18 203 Ind Cas 214 (DB) *Government C P and Berar v Raghuram Rodays* (Non-direction must be of such a nature as would have the positive result of misleading the jury.)

(42) 29 AIR 1942 Oudh 221 (225) 17 Luck 516 43 Cri L Jour 416 198 Ind Cas 714 *Jaganmuth v Emperor*

(49) 29 AIR 1949 Pat 481 (484) 21 Pat 258 43 Cri L Jour 817 203 Ind Cas 331 (DB) *Pandoo Singh v Emperor* (Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the prosecution and defence respectively.)

(16) 3 AIR 1916 Pat 236 (243) 1 Pat L Jour 317 17 Cri L Jour 353 (360) *El'nath Sakay v Emperor*

(15) 2 AIR 1915 Cal 773 (783) 16 Cri L Jour 561 (571) (FB) *Emperor v Upendra Nath* (No evidence of grave and sudden provocation — Omission to lay down the law as to grave and sudden provocation was held not to amount to misdirection.)

Also see Note 12

5 (14) 1 AIR 1914 P C 116 (124) 41 Cal 1093 8 Low Bur Rul 16 15 Cri L Jour 809 41 Ind App 149 1914 A C 614 83 L J P C 299 111 L T 394 (PC)

6 See also (42) 29 AIR 1942 Oudh 221 (925) 17 Luck 516 43 Cri L Jour 416 198 Ind Cas 714, *Jaganmuth v Emperor*

(40) 27 AIR 1910 N 2 203 L J P C 299 111 L T 394 (PC)

(39) 26 AIR 1933 Cal 682 (686) 11 R (1933) 1 Cal 187 41 Cri L Jour 59 *O B Plucknett v Emperor*

(37) 24 AIR 1937 Pat 191 (193) 33 Cri L Jour 129, *Pandura Nath v Emperor* (Summing up of case to jury after lengthy addresses by counsel — High Court should not be too critical in dealing with the summing up.)

It is not enough for the purpose of establishing a misdirection to show that the Judge might have laid much *more stress* than he has laid on the defects in the prosecution case⁷

The following may be given as instances of misdirection

- (1) Instead of asking the jury to find if the case has been legally proved to tell them that if they are morally convinced they may find the accused guilty⁸
- (2) Misreading or misquoting the evidence⁹ It is of the greatest importance that whatever the Judge says to the jury must be true and must be a correct representation of facts appearing from the evidence¹⁰ The Judge should not make suggestions which are absolutely without foundation on the record¹¹
- (3) Grave omissions and vague over statements¹² But the omission to mention before the jury some small items of corroborative or discrepant evidence may be comparatively unimportant particularly in a case where the jury had been addressed by advocates on each side¹³
- (4) Stressing too much on unimportant points¹⁴
- (5) Asking the jury to neglect any portion of the evidence¹⁵ or telling them that if juries were to throw up a case on account of contradictions and falsehoods there would be an end to the criminal law of the land¹⁶

(34) 21 AIR 1934 Cal 757 (758) 35 Cri L Jour 1437 *Hossein Ali v Emperor* (The charge must be taken as a whole and not selected passages on which criticisms might be levelled, to decide whether in the light of the evidence there has been any misdirection or non direction)
Also see S 298 Note 9

7 (26) 13 AIR 1926 Mad 370 (370) 27 Cri L Jour 176 *In re Ambalam* (Charge as a whole was distinctly favourable to the accused in this case)

[See also (20) 12 AIR 1920 Cal 980 (981) 26 Cri L Jour 572 *Sham Lal v Emperor*]

8 (26) 13 AIR 1926 All 759 (753) 28 Cri L Jour 15 49 All 209 *Enayat Husain v Emperor*

9 (30) 17 AIR 1930 All 28 (28) 52 All 207 30 Cri L Jour 1146 *Jagmohan v Emperor*

10 (11) 11 AIR 1927 Cal 200 (200) 28 Cri L Jour 100 (100)

(23) 10 AIR 1923 Pat 158 (159) 23 Cri L Jour 406 *Dasrath Singh v Emperor* (Judge making reference to statement not on record)

(29) 1929 Mad W N 946 (947 948) *Doraiswamy Pillay v Emperor*

(08) 8 Cri L Jour 361 (372 374) 1 Sind L R 104 *Imperator v Vaidatali Shah*

10 (36) 1936 Oudh W N 187 (189) *Dehari v Emperor* (Judge wrongly asserting that witnesses who identified the accused in jail committed no mistakes at the time of their identification — Held it was a serious misdirection)

(27) 14 AIR 1927 Oudh 259 (259) 2 Luck 597 28 Cri L Jour 683 *Nahru Lal v Emperor* (Judge is not justified in stating that there is definite evidence against the accused which as a matter of fact is not on record)

(20) 7 AIR 1920 Cal 527 (528) 21 Cri L Jour 670 *Abdul Gafur v Emperor*

11 (34) 21 AIR 1934 Cal 77 (80) 35 Cri L Jour 483 *Kamireddi Sheikh v Emperor*

(83) 9 Cal 455 (459) 11 Cal L Rep 569 5 Shome L R 47 *Raghunath Singh v Emperor*

12 (27) 13 AIR 1927 Cal 200 (200) 28 Cri L Jour 100 (100)

(mistake at the time of identification of the accused in jail by identifying a wrong person — Mistake

14 (75) 23 Sudh W R Cr 21 (21), *Queen v Gunga Govind*

15 (03) 6 Bom L R 31 (33) *Emperor v Mira Gajbar*

16 (08) 12 Cal W N exl (exl) (PC) *Lol u Nona v The King* (Accomplice's evidence was discrepant in his case)

- (c) Summing that the onus of proof lies on the accused to show that he is innocent¹⁷ or that the onus changes or shifts on the accused¹⁸
- (f) Telling the jury that in capital cases stronger evidence or higher degree of certainty is required than in other cases¹⁹
- (h) Saying that there is a presumption of veracity in favour of a witness as there is the presumption of innocence in favour of the accused²⁰
- (g) Submission of inadmissible evidence to jury²¹ If inadmissible evidence has crept

17. (42) 46 Cal W N 54 (56) (D1) *Patchik v The King* (Offence under s. 411, Penal Code — Accused found in possession of stolen property — Direction to jury that burden lies on accused to prove his innocence is misdirection)
- (39) 26 AIR 1939 Sind 209 (212-214) 41 Cri L Jour 25 I L R (1940) Kar 249 *Shewaram Jethanand v Emperor*
- (37) 24 AIR 1937 Pat 191 (193) 33 Cri L Jour 129, *Rajendra v Emperor* (Charge vitiated through out by the assumption that accused had to prove their innocence)
- (36) 23 AIR 1936 P C 169 (170) 37 Cri L Jour 629 1936 A C 338 105 L J P C 70 154 L T 620 (PC) *Attigalle v The King* (Judge stating that burden of proving certain facts within special knowledge of accused is on accused — Jury likely to think from direction that burden is on accused to prove that no crime has been committed — It amounts to misdirection)
- (36) 23 AIR 1936 P C 289 (300) 37 Cri L Jour 963 (PC) *Stephen Seucivratne v The King*
- (36) 23 AIR 1936 Cal 73 (79, 80) 37 Cri L Jour 394 63 Cal 929, *Benoyendra v Emperor* (Where, the Judge in his charge to the jury repeatedly draws the jury's attention to the fact that the accused have failed to give any explanation of facts adduced in evidence against them, his remarks amount to misdirection. In any case if the Judge intends to make such remarks it is his duty first to give the accused an opportunity of explanation by drawing their attention specifically to the evidence upon which the Judge relies)
- (35) 51 T L R 446 (400) 1935 A C 462 101 L J K L 433 25 Cr App Rep 72 153 L T 232 79 S J 401 *Woolmington v Director of Public Prosecutions* (It is sufficient for accused to raise a doubt as to his guilt he is not bound to satisfy the jury of his innocence)
- (36) 37 Cri L Jour 976 (977) 164 Ind Cas 721 (Cri) *Daud Sheikh v Emperor* (In cases of receiving stolen property, onus never shifts to the accused. All that the accused is required to do is to give an account of his possession and if that account may reasonably be true though nevertheless the jury may not be convinced that it is true he must be acquitted because the Crown has failed to satisfy the onus to prove his guilty knowledge)
- (81) 8 Cal L Rep 542 (546-547) *Khorshed v Empress*
- (1900) 4 Cal W N 576 (591), *Sadhu Sheikh v Empress*
- (10) 11 Cri L Jour 557 (559) 8 Ind Cas 52 (Cal) *Asfar Sheikh v Emperor* (The charge in this case ended with the words 'no evidence adduced for the accused')
- (22) 9 AIR 1922 Cal 505 (505-506) 24 Cri L Jour 76, *Abdul v Emperor* (Judge directing that if the prosecution has supplied better hypothesis than the defence it must be held to have discharged the onus of proof — Held this was a misdirection)
- (81) 8 Cal 121 (124-125) 10 Cal L Rep 151 *Empress v Dhunno Kazi*
- (16) 3 AIR 1916 Mad 582 (583) 16 Cri L Jour 615 *In re Kotagadu* (Murder — Defence not bound to explain presence of mammalian blood on a knife found in accused's house)
- (06) 3 Cri L Jour 1 (3) 3 Low Bur Rul 75 (11) *Hla Gyi v Emperor*
- 18 (25) 12 AIR 1925 Cal 666 (667) 52 Cal 223 26 Cri L Jour 1155, *Satya Charan v Emperor*
- (20) 7 AIR 1920 Cal 342 (343) 21 Cri L Jour 545 24 Cal W N 619 (621), *Hathins Vondal v Em*

proof in criminal cases never shifts))

- 19 (22) 9 AIR 1922 Cal 342 (345) 49 Cal 167 22 Cri L Jour 569, *Legal Remembrancer, Bengal v Lakh Mohan Singh Poy*

[See also (24) 15 AIR 1929 Cal 551 (552, 553) 30 Cri L Jour 120, *Id Sagiruddin v Emperor* (Direction that untrue witness must be believed so far as he deposes to facts spoken to by other witnesses — Misdirection)]

- 21 (44) 31 AIR 1944 Bom 333 (343) (DB), *Sithimaya Mayabhai v Emperor*

into the case, it is the duty of the Judge to warn the jury to exclude that evidence and caution them against being influenced by such evidence²² In the under-mentioned cases²³ the Courts have held that a subsequent exhortation not to rely upon the inadmissible evidence is useless, since the mischief of introducing inadmissible evidence has been already done. See also the undermentioned cases²⁴

- (81) 6 Bom 34 (37), *Imperatriz v. Pandarinnath*. (Improper submission of inadmissible evidence to the consideration of jury — Conviction set aside)
- (31) 18 AIR 1931 Cal 65 (66) : 32 Cri L Jour 421, *Obedat Sheikh v. Emperor*. (Jury influenced by the inadmissible evidence referred to in the charge — Conviction set aside)
- (25) 12 AIR 1925 Cal 161 (163, 164) : 26 Cri L Jour 307, *Harendra Nath v. Emperor*. (Reference to inadmissible evidence in the charge did not influence the mind of jury so as to cause failure of justice there being other sufficient evidence to justify the jury's verdict — Conviction was upheld)
- (19) 6 AIR 1919 Cal 514 (516) : 46 Cal 895 : 20 Cri L Jour 334, *Romesh Chandra v. Emperor*. (In this case the jury were warned not to take certain inadmissible evidence into consideration, yet it was held that jury's verdict was influenced by it and conviction was set aside)
- (69) 3 Ben L R App Cr 43 (43, 44), *Queen v. Gajraj*
- (38) 25 AIR 1938 Cal 364 (365) : 39 Cri L Jour 625, *Ram Gobinda v. Emperor*.
- (37) 24 AIR 1937 Cal 309 (311) : 1 L R (1937) 2 Cal 308 : 38 Cri L Jour 1057, *Sahedat Mirza v. Emperor* (Improper admission of evidence may turn the scale against the accused — Retrial ordered)
- (36) 23 AIR 1936 Cal 73 (79) : 63 Cal 939 : 37 Cri L Jour 394, *Benoyendra Chandra v. Emperor*
- (69) 8 Bom H C R Cr 47 (49, 50, 51), *Reg v. Ramaswami Mudaliar*.
- (03) 27 Bom 626 (632) : 5 Bom L R 599, *Emperor v. Waman*
- (73) 10 Bom H C R 497 (501, 502), *Reg. v. Amrita Gorinda*
- (19) 6 AIR 1919 Cal 514 (516) : 46 Cal 895 : 20 Cri L Jour 334, *Romesh Chandra v. Emperor*.

- (72) 9 Bom H C R 358 (376, 397), *Reg v. Nairaja Dadabhai* Emperor

Emperor

- [See (19) 6 AIR 1919 Mad 222 (222) : 20 Cri L Jour 790, *In re Subba Reddi*. (Omission to caution not

(Jury should be

per.

- 24 (39) 26 AIR 1939 Cal 610 (611) : 40 Cri L Jour 890, *Mohsena Khatun v. Emperor*. (Inadmissible confessions admitted — Held, verdict should be set aside)

- (38) 25 AIR 1938 Cal 399 (401) : 39 Cri L Jour 601, *Asabuddin v. Emperor*. (Prosecution for forging entry in birth register — Direction to jury that they must reach conclusion that entry was false is beside the point — Evidence about real age of person about whom entry was made admitted — Jury not satisfied with it, returning verdict of guilty — There is no misdirection)

- (39) 43 Cal W N 782 (783, 784), *Sik Idris v. Emperor* (Two statements made to police by complainant g prosecution introduction

- (22) 9 AIR 1922 Cal 342 (345) : 49 Cal 167 : 22 Cri L Jour 562, *Legal Remembrancer, Bengal v. Lalit Mohan*. (Do)

- (22) 9 AIR 1922 Cal 106 (106) : 24 Cri L Jour 143, *Superintendent and Remembrancer of Legal Affairs v. Shyam Sunder Bhumi*. (Do)

- (25) 12 AIR 1925 Cal 887 (889) : 26 Cri L Jour 606, *Sheikh Abdul v. Emperor* (Do)

- (81) 2 Weir 762 (762), *In re Vairathalinga Pillai*. (Do)

- (04) 7 Cri L Jour 358 (358) 18 Mad L Jour 230 3 Mad L Tim 263 *In re Achutha Iyer* (Do)
- (75) 24 South W R Cr 77 (76) *Queen v Gauder Kumar*
- (83) 9 Cal 455 (455) 11 Cal L Rep 563 5 Shome L R 47 *Bhoguna Singh v Empress* (Section 162 statement)
- (29) 16 AIR 1929 Pat 268 (270 271) 8 Lat 279 30 Cri L Jour 874 *Jhara Gope v Emperor*
- (23) 10 AIR 1923 Lat 158 (159) 23 Cri L Jour 406 *Dasrath v Emperor* (Section 162 statement)
- (12) 13 Cri L Jour 244 (245) 14 Ind Cas 596 (Mad) *Valliya Bowther v Emperor* (Do)
- (31) 18 AIR 1931 Cal 189 (190) 32 Cri L Jour 841 53 Cal 1009, *Rahajaddi v Emperor* (Do)
- (29) 16 AIR 1929 Cal 448 (448) 31 Cri L Jour 127 *Fulbash Sheikh v Emperor* (Do)
- (26) 13 AIR 1916 Cal 559 (551) 27 Cri L Jour 212, *Bhajarathi v Emperor* (Do)
- (25) 12 AIR 1925 Cal 939 (960 961) 26 Cri L Jour 579 *Kaha v Emperor* (Section 162 statement admitted — Accused not prejudiced — Conviction not liable to be set aside)
- (67) 8 South W R Cr 63 (63) *Queen v Hurdut Sirma* (Irrelevant evidence)
- (66) 6 South W R Cr 2 (3) *Queen v Shobrattee* (Opinion of Judge and jury in a former case)
- (80) 5 Cal 765 (769) 6 Cal L Rep 219 *Roshun Dasadh v Empress* (Evidence as to bad character of the accused)
- (09) 10 Cri L Jour 498 (499) 4 Ind Cas 120 (Cal) *Keshab Pal v Emperor* (Reference to previous trial)
- (21) 8 AIR 1921 Bom 70 (71) 45 Bom 1056 22 Cri L Jour 318, *Dinanath Sunderaji v Emperor* (Confession made under inducement — Evidence apart from confession available — Return ordered)
- (10) 11 Cri L Jour 96 (96) 5 Ind Cas 315 (Cal) *Hazur Ali v Emperor* (Admission by one accused was admitted against the other)
- (74) 11 Bom H C R 146 (148), *Rey v Kahu Patil* (Confession of co accused)
- (16) 3 AIR 1916 Cal 352 (352, 353) 17 Cri L Jour 183 (189) *Emperor v Jushu Dibi* (Confession made to the President of Panchayat under inducement)
- (08) 26 Mad 35 (40) 2 Weir 733 *Thandraya Mudaly v Emperor* (Confession made under inducement)
- (08) 7 Cri L Jour 325 (327 329) 31 Mad 177 18 Mad L Jour 66 *In re Sankappa Das*
- (23) 10 AIR 1923 Pat 103 (104) 23 Cri L Jour 91 *Sumeshwar Jha v Emperor* (Statement of the accused to the police)
- (81) 6 Cal 247 (249) 7 Cal L Rep 74 3 Shome L R Cr 31 *Gogun Chunder Chowdhury v Empress* (Judgment not inter partes)
- (69) 12 South W R Cr 3 (3) 3 Beng L R App Cr 20, *Queen v Bishanath* (Evidence taken in the absence of accused)
- (68) 9 South W R Cr 59 (61) *Queen v Kartick Chunder* (Unproved documents)
- (32) 19 AIR 1932 Cal 293 (294 295) 59 Cal 136 32 Cri L Jour 441, *Trailokyanath Das v Emperor* (Judge telling the jury that they are not bound by the judgment passed in civil litigation between the parties — No misdirection)
- (32) 1932 Mad W N 862 (903) *Asis Khan Sahib v Emperor* (It is wrong to tell the jury that the decision of the Court in other case was relevant)
- (26) 13 AIR 1926 Cal 139 (146) 53 Cal 372 27 Cri L Jour 266, *Ehsyaruddin v Emperor* (Admission of documents without legal proof)
- (99) 26 Cal 49 (50), *Basanta Kumar Ghattia v Queen Empress* (Do)
- (90) 17 Cal 612 (667) *Queen Empress v Ohara* (Statements of the accomplice which had not been admitted in evidence)
- (30) 17 AIR 1930 Cal 706 (707) 57 Cal 940 32 Cri L Jour 180, *Khadem v Emperor* (Evidence not formally tendered)
- (10) 11 Cri L Jour 538 (539) 7 Ind Cas 915 (Cal), *Harendra Pal v Emperor* (Opinion of the Sessions Judge who had directed commitment of the accused who had been previously discharged)
- (20) 7 AIR 1920 Cal 90 (91) 21 Cri L Jour 183, *Emperor v Abdul Sheikh* (Evidence in contravention of S 11 Evidence Act)
- (30) 17 AIR 1930 Cal 756 (757) 32 Cri L Jour 233, *Molshed Sheikh v Emperor* (Evidence in contravention of S 33, Evidence Act)
- (71) 15 South W R Cr 37 (39, 40) 6 Beng L R App 108, *Queen v Mahima Chandra Das* (Evidence of character contrary to S 54, Evidence Act)

(Section 162 statement — Overruled in AIR 1939 P C 47 on another point)

- (24) 11 AIR 1924 Cal 1029 (1036) 52 Cal 172 26 Cri L Jour 350, *Emperor v Abinash Chandra Bose* (Investigation — Particulars derived from witnesses examined on the spot should not be noted on the body of the map)

where the effect of admitting various kinds of inadmissible evidence has been considered

- (10) Referring to prior conviction of the accused contrary to the provisions contained in S 310²⁰
- (11) Improper rejection of evidence²⁶
- (12) Putting forward new explanation on behalf of the prosecution²⁷
- (13) Saying that admissions by accused's pleader are binding on the accused²³
- (14) Directing the jury to accept the statement in the first information report in preference to the evidence given before the Court²⁹
- (15) Erroneous explanation of the law - see Note 6
- (16) Dogmatic expression of opinion by the Judge so as to take the case out of the hands of the jury - see S 298, Note 9
- (17) Omission to put before the jury important facts - see Notes below
- (18) Telling jury that they are bound by his (the Judge's) decision as to the voluntary character of the accused's confession arrived at when admitting in evidence such confession and that they are only to find out the truth or otherwise of the confession on the basis of its being voluntary³⁰
- (19) Telling jury that if they think an exculpatory statement in a dying declaration to be untrue, they should not believe the rest of the dying declaration³¹

See also the undermentioned cases³² for further illustrations of what is and what is not misdirection

(06) 3 Cr L Jour 41 (42) 7 Bom L R 978 *Emperor v Moti Dongarshet Gujar (Panchnama does*

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26 ('40) 1940 Mad W N 97 (100) *Balan Patayya v Emperor*

(30) 17 AIR 1930 Cal 370 (375) 58 Cal 96 32 Cr L Jour 10, *Government of Bengal v Santiram Mondal*

(28) 1st AIR 1930 Cal 370 (375) 58 Cal 96 32 Cr L Jour 10, *Government of Bengal v Santiram Mondal*

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(07) 5 Cr L Jour 427 (429) 34 Cal 698 11 Cal W N 666, *Jatindranath v Emperor*.

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29 (10) 11 Cr L Jour 557 (557) 8 Ind Cas 52 (Cal), *Asfar Sheikh v Emperor*
Also see S 154 Note 10

30 (35) 23 AIR 1935 Cal 308 (309) 36 Cr L Jour 921 *Kishore Kishore v Emperor* (Judge can decide question of voluntariness of confession in its bearing on admissibility - Jury are also entitled to decide independently of the Judge whether confession was voluntary when considering truth of confession)

(34) 21 AIR 1934 Cal 853 (855, 856) 62 Cal 312 36 Cr L Jour 485, *Kasimuddin v Emperor*

31 (36) 23 AIR 1936 Cal 793 (795) 38 Cr L Jour 243 11LR (1937) 1 Cal 475, *Nasimuddin Biswas v Emperor* (Part of dying declaration found untrue - Rest of it corroborated by evidence - Judge tell jury to consider it as such)

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defect in direction to jury)

- (45) 32 AIR 1945 Lah 105 (111) 47 Cri L Jour 4 I L R (1917) Lah 200 220 Ind Cas 467 (FB) *Abdul Latif v Emperor* (Where the Judge does not leave it to the jury to decide whether the evidence of the witness excluded the possibility of the case suggested by the accused and tells the jury that it does, it amounts to misdirection)
- (45) 32 AIR 1945 Cal 482 (483) (DB) *Adeludin v Emperor* (The omission to tell the jury in a trial under S 412, Penal Code that they had to be satisfied that the accused knew or had reason to believe that possession of the property had been transferred by means of dacoity is material and is a serious misdirection in the charge)
- (44) 31 AIR 1944 Cal 339 (340, 346) 45 Cri L Jour 771 I L R (1914) 2 Cal 405 215 Ind Cas 67 (DB), *Ibra Ahanda v Emperor* (Entry in general diary made at instance of one of the accused — Inference to it by Judge to show hostility between all the accused and complainant is not misdirection — *See* Lodge I, Div J, *contra*)
- (44) 31 AIR 1944 Cal 297 (299) 46 Cri L Jour 427 218 Ind Cas 229 (DB), *Emperor v Karamali Sirdar* (Witness identifying accused short sighted — Accused in close contact with witness during occurrence of crime — Omission to emphasise aforesaid fact in charge to jury held did not amount to misdirection)
- (43) 30 AIR 1943 Bom 74 (75-76) 41 Cri L Jour 411 205 Ind Cas 411 (DB) *Mataprasad Shikharai v Emperor* (A failure on the part of the Judge to impress upon the jury clearly and emphatically that they ought not to convict the accused on the evidence of an accomplice without substantial and reliable corroboration of it amounts to misdirection)
- (43) 30 AIR 1943 Cal 32 (34) I L R (1912) 2 Cal 136 41 Cri L Jour 346 205 Ind Cas 439 (DB) *Abas Pasool v Emperor* (Accused and prosecution witnesses present at hospital at same time — Subsequently witnesses identifying accused at parade — Judge while charging jury drawing its attention to defence argument that identification of accused by prosecution witnesses was extraordinary coincidence and expressing that he was not impressed with it — Jury left to form its own opinion — Charge held did not amount to misdirection — Expression by Judge of his opinion on arguments placed before him does not amount to misdirection)
- (43) 30 AIR 1943 Oudh 322 (323) 41 Cri L Jour 604 207 Ind Cas 427 *Mt Bhagwant v Sargoo* (In this case the accused stated that he removed the articles from the complainant's safe without the knowledge of the complainant. The Judge in his charge to the jury said that this amounted to an admission of theft — Held that this amounted to misdirection)
- (43) 30 AIR 1943 Oudh 16 (17) 41 Cri L Jour 12 203 Ind Cas 248 *Emperor v Jai Ram* (Judge saying to jury that evidence of identification should not be accepted unless corroborated by other evidence — This amounts to misdirection)
- (43) 30 AIR 1943 1st 131 (133) 21 Pat 854 41 Cri L Jour 356 205 Ind Cas 241 (DB) *Jamadar Singh v Emperor* (A direction that it is for you to judge whether the accused had in the circumstances the right of private defence, and you have also got to consider whether the right of private defence was exceeded amounts to misdirection)
- (42) 29 AIR 1942 Cal 495 (496) 43 Cri L Jour 797 202 Ind Cas 153 (DB), *Sital Chandra Dutt v Emperor* (In summing up to jury, Judge pointing out that prosecution witness had deposed against prosecution — That his statement before jury was different from that made to Investigating Officer under S 161 — Judge also referring to statement made by witness to doctor — Summing up held infringed Ss 161 and 162 and amounted to misdirection)
- (40) 29 AIR 1942 Cal 277 (279) 43 Cri L Jour 693 200 Ind Cas 328 (DB), *Ayub Ali v Emperor* (Expression of opinion by Judge on materials is not misdirection — Attention of jury drawn to conflict of evidence of witness in previous and subsequent trials and jury asked to decide which version was true — Held, no misdirection)
- (42) 29 AIR 1942 Cal 239 (240) 43 Cri L Jour 565 199 Ind Cas 610 (DB) *Abu Pramanish v Emperor* (Where in a jury trial the question before the jury is whether the injury caused to the deceased is suicidal or homicidal, it is competent for the Judge while explaining the circumstances which militate against both theories, to refer to a standard book on medical jurisprudence. Such reference does not amount to misdirection)
- (40) 29 AIR 1942 Pat 481 (485) 21 Pat 259 43 Cri L Jour 617 202 Ind Cas 331 (DB) *Ramdeo Singh v Emperor* (Judge permitting hearsay evidence of identification to go to jury — Identification witness not called for)
- (42) 29 AIR 1942 1st 444 (446) 43 Cri L Jour 915 203 Ind Cas 159 (DB) *Janak Singh v Emperor* (All accused going to protest against reaping of crops by complainant's party — Cutting of crops abandoned by latter — Some of former party attacking people on other side and others not taking part in it — All accused are not liable — Failure of Judge to point out to jury distinction between two classes of accused held misdirection)
- (41) 29 AIR 1941 Cal 533 (534) 42 Cri L Jour 871 196 Ind Cas 439 (DB), *Abdul Latif v Emperor* (Statements in the petition of complaint filed by a witness can be used to contradict the witness under S 145 or to impeach his credit under S 153 as well as to corroborate him under S 157 Evidence Act.

Consequently a direction by the Judge to the Jury that the petition of complaint could only be used as

stolen property amounted to misdirect on though not serious one)

(41) 28 AIR 1941 Mad 339 (313) 42 Cri L Jour 414 193 Ind Cas 375 *In re Dalam Pateyya* (Fact—Which party started doubtful—Judge must warn jury against acting on uncorroborated testimony of interested prosecut on witness and to treat such evidence with caution — Failure to do so amounts to misdirection)

(41) 28 AIR 1941 Nag 391 (326) 1 L R (1942) Nag 510 43 Cri L Jour 129 197 Ind Cas 133 *In re Harak Chand Ghauarmal* (Rape case — Telling jury that there can be no smoke without fire and that accusation is itself matter of significance amounts to serious misdirection)

(40) 27 AIR 1940 Cal 561 (564) 12 Cri L Jour 285 192 Ind Cas 359 *Upendra Nath v Emperor* (Charge under S 361 Penal Code — Telling jury that it was sufficient if prosecution established that the accused placed the deceased in such circumstances that she was in danger of being murdered — This is misdirection)

(38) 25 AIR 1938 Cal 51 (59) 1 L R (1938) 1 Cal 290 39 Cri L Jour 161 *Golol's Behari v Emperor* (Failing to marshal evidence relating to each element of the charge)

(39) 26 AIR 1939 Cal 290 (291) 40 Cri L Jour 660 *Ekhari Das v Emperor* (Trial for offence under S 9 Bengal Suppression of Immoral Traffic Act — Judge failing to point out to jury that prosecution must prove that the girl was taken to a house for prostitution — Judge telling jury that offence would be committed even if house was not brothel — It amounts to serious misdirection)

(39) 26 AIR 1939 Pat 586 (539) 41 Cri L Jour 1 18 Pat 693 *Sachinder Rai v Emperor* (In case of sexual offences like abduction Judge should tell jury that if girl was immoral it made her story of abduction less probable — Failure to do this amounts to misdirection)

(39) 1 L R (1939) 1 C 1337 (311) *Nitai Koley v Emperor* (Omission by the Judge to caution the jury against the evidence of a witness brought on record of the sessions trial under S 33 of the Evidence Act, that this witness was not cross examined before the committing Magistrate does not amount to misdirection when this defence had an opportunity of cross-examining that witness in the committing Magistrate's

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1 Penal Code — Charge held good)

(38) 25 AIR 1938 Cal 399 (401) 39 Cri L Jour 601 *Asabuddin v Emperor* (Accused prosecuted for forging entry in birth register — Direct on that jury must decide about the real age of person about whom entry is made is beside point — Evidence about real age is admitted — Jury not convinced by it and returning verdict of guilty — There is no misdirection and verdict must be sustained)

(38) 25 AIR 1938 Cal 625 (627) 39 Cri L Jour 964 *Brinchipada v Emperor* (Where the entire evidence is summarized before the jurors by the Judge in which all the main features of the case are exhaustively dealt with non reference to minor matters of detail does not amount to misdirection or non direction)

(38) 25 AIR 1938 Cal 658 (660) 1 L R (1938) 1 Cal 636 40 Cri L Jour 101 *Abdul Gafur v Emperor* (Abduction case — Judge opening charge to jury by saying 'you have before you a simple case of

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pointing out to jury
he was abscond

(38) 25 AIR 1938 Cal 660 (662) 39 Cri L Jour 101

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(34) 21 AIR 1937 Bom 60 (62) 38 Cri L Jour 397 *Emperor v Mahomed Adam Chohan* (Police at once

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men resulting — Judge instead of directing trial of accused for murder, directing jury to consider accused's cases under S 301/149 Penal Code — Held, there was grave misdirection)

- (37) 21 AIR 1937 Cal 463 (166) 38 Cri L Jour 931, *Sarat Chandra v Emperor* (It is a misdirection to tell jury to estimate value of evidence by considering whether it appears to be tutored or to be true)
- (37) 24 AIR 1937 Cal 706 (793) 11 LR (1937) 2 Cal 315 38 Cri L Jour 182 *Lhabbar Mondal v Emperor* (In a conspiracy case if there is no evidence of conspiracy but merely that of motive the Judge should direct the jury to return a verdict of not guilty)
- (37) 24 AIR 1937 Pat 191 (193) 38 Cri L Jour 129 *Lajpat Nath v Emperor* (Case under Ss 411 and 414 Penal Code — Omisison to tell jury that there was no evidence of guilty knowledge was held in the circumstances of case to be misdirection)
- (36) 23 AIR 1936 Cal 429 (430) 38 Cri L Jour 64 *Alkasulla v Emperor* (Committing Magistrate charging accused with common object to take possession — Trial Judge adding common object of assaulting — It is wrong to include contradictory case at the same trial and in one charge)
- (36) 23 AIR 1936 Cal 793 (794) 11 LR (1937) 1 Cal 475 38 Cri L Jour 213 *Nasiruddin Biswas v Emperor* (Jury told that they must be satisfied as to place of occurrence — No misdirection)
- (36) 23 AIR 1936 Cal 796 (800) 62 Cal 956 37 Cri L Jour 701, *Istiaq Khondkar v Emperor* (Accused charged under S 305 Penal Code — Fact proved that dacoity was committed by accused and that they were in possession of stolen goods — No charge framed under S 412 Penal Code — Judge directing jury that if they thought that there was not sufficient evidence of dacoity and that there was evidence that accused were in possession of stolen property knowing it to have been stolen they might find accused guilty under S 412 although not charged under it — Accused convicted under S 412 Penal Code — Conviction held valid — Direction to jury both upon S 412 Penal Code and S 114 Illust (a) Evidence Act held contrary to law)
- (36) 23 AIR 1936 Pat 46 (17) 37 Cri L Jour 370 *Hari Mahto v Emperor* (Case under S 306 — Father of a girl lodging information to police — He not suspecting till then that daughter taken away for illicit intercourse as girl serving as maid servant at accused's — Hence suspecting no foul play — Court asking jury during direction to consider this explanation in arriving at conclusion — Court's statement held no misdirection)
- (36) 23 AIR 1936 Rang 421 (425) 37 Cri L Jour 1030 (FB) *Emperor v Nga E Pe* (Stab wound penetrating abdominal wall — No evidence to show that accused had any other than normal intention — Judge while charging jury did not raise a case not raised before him for accused — No misdirection held in charge)
- (33) 20 AIR 1933 PC 124 (133) 34 Cri L Jour 372 (FC) *Duarla Nath Varma v Emperor* (Several offences of making false entries in diaries charged separately — Judge directing jury that if any one item was established against accused, they could give a general verdict of guilty — Charge amounts to misdirection)
- (20) 12 AIR 1925 Cal 1235 (1236) 26 Cri L Jour 916 *Ahed Faiz v Emperor* (Question of title unimportant in a case — Direction to ignore that question is a misdirection)
- (34) 21 AIR 1934 Bom 200 (201) 58 Bom 493 35 Cri L Jour 1437 *Bhagchand Jasraj v Emperor* (What amounts to possession under S 273 Penal Code is a question of fact but Judge giving jury guidance as to what constitutes possession is not misdirection)
- (34) 21 AIR 1934 Cal 766 (768) 36 Cri L Jour 361 *Superintendent Legal Affairs Bengal v Forhad* (Comment on importance of entries as to age in vaccination and school registers held in the circumstances not to amount to misdirection)
- (34) 21 AIR 1934 Cal 651 (653) 36 Cri L Jour 70 *Kashim Ali v Emperor* (Corroborating confidential statements of accused by referring to statements made by them to the police is misdirection as it is a contravention of Section 167)
- (34) 21 AIR 1934 Cal 717 (718) 36 Cri L Jour 133 *Ram Lal Ghose v Emperor* (Saying something which conveyed the impression that evidence of witnesses was corroborated by statements made before police amounts to misdirection as it contravenes Section 162)
- (34) 21 AIR 1934 Cal 610 (614) 61 Cal 991 35 Cri L Jour 1367, *Superintendent Legal Affairs, Deogul v Dagurath Mahto* (Judge entirely misconceiving the legal position — There is misdirection)
- (31) 21 AIR 1931 Cal 557 (558-559) 36 Cri L Jour 619 *Inayat Ali v Emperor* (Bringing to notice of jury statement of person not examined as witness but warning jury that failure to examine him may give rise to presumption that if examined his evidence would be against the party failing to examine him — No misdirection)
- (35) 22 AIR 1935 All 103 (105) 36 Cri L Jour 612 *Asis Khan v Emperor* (Judge should emphasize that the burden of proving the guilt of the accused is on the prosecution. But where the whole trend of the charge shows that the Judge warned the jury on this point the mere fact that the warning was not mentioned in express terms does not amount to misdirection)
- (35) 22 AIR 1935 All 923 (929) 37 Cri L Jour 173 *Sri Kishan v Emperor* (Telling jury that there

The above instances are only illustrative and not exhaustive. The question in each case will depend upon its own facts and circumstances. The test will be whether the jury were misled and whether they were put on the "wrong track and made to arrive at a wrong conclusion" by reason of what the Judge said.³³

12 Non direction. — As has been seen in the previous Note, non-direction is not necessarily misdirection in every case so as to vitiate the trial.¹ Where, however, the non-direction is with regard to a point of vital importance² especially when it is favourable to the accused,³ and when such non-direction has misled the jury,⁴ the trial will be held to be illegal. A mere failure on the part of the Judge to point out to the jury all the matters which may be considered by them in evidence, does not necessarily amount to misdirection.⁵ If a case is substantially put to the jury, a mere omission to refer to this or that circumstance or suggestion will not make such omission a misdirection.⁶ The test, as to whether an omission in the summing up of the Judge to the jury amounts to a misdirection or not is whether the omission, in the opinion of the appellate or revisional

(38) 1898 Rat 424 (428) *In re Shanker Shobag* (High Court interfered with acquittals when the lower Court erroneously treated a witness as an accomplice requiring corroboration)

33 (2b) 15 AIR 1928 Pat 120 (122) 6 Pat 817 29 Cri L Jour 81, *Bagji Mian v Emperor*

Note 12

203 Ind Cas 214 (DB)

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ngb v Emperor

(Omission to direct jury on one of vital ingredients of S 366, Penal Code, held amounted to misdirection amounting to miscarriage of justice)

(25) 12 AIR 1925 Cal 887 (889) 20 Cri L Jour 606 *Abdul Sheikh v Emperor* (The fact that none of the accused was recognized was not mentioned to the jury)

(26) 13 AIR 1926 Cal 439 (441) 26 Cri L Jour 567, *Chhakari v Emperor*

(10) 11 Cri L Jour 13 (14 15) 8 Sind L R 107 4 Ind Cas 597, *Imperator v Manikwasayo*

3 (41) 28 AIR 1941 Oudh 567 (569) 17 Luck 128 42 Cri L Jour 729 193 Ind Cas 371, *Izhar Hussain v Emperor* (Failure to mention to jury important evidence in favour of accused)

(03) 27 Bom 676 (635) 5 Bom L R 599 *Emperor v Vaman Shitram*

(03) 27 Bom 644 (651) 4 Bom L R 683 *Emperor v Malgonada*

Emperor

or (Motive for prosecution)

4 Cri L Jour 28 203 Ind Cas 214 (DB)

(28) 15 AIR 1924 Pat 326 (334) 29 Cri L Jour 325 *Mt Chamapa Pasin v Emperor* (A non-direction is not a misdirection unless the jury has been misled or such non-direction is of primary importance)

Jath v Emperor
could still find

the accused guilty under S 364 Penal Code was under the circumstances of the case held misled jury on a most vital part of the case)

(26) 13 AIR 1926 Bom 238 (240) 27 Cri L Jour 491, *Autubuddin Khan v Emperor* (Serious

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is not non direction)

(42) 29 AIR 1942 Pat 481 (484) 21 Pat 258 43 Cri L Jour 817 202 Ind Cas 331 (DB), *Ramdeo Singh v Emperor*

(24) 11 AIR 1924 Cal 257 (301) 25 Cri L Jour 817 (DB) *Emperor v Darendra Kumar Ghose*

Court, is of such importance as to have led to an erroneous verdict by the jury.⁷ A grave omission by the Judge to direct the jury on a vital point cannot be made good by the accused's counsel calling attention to it at the termination of the summing up.⁸

The following are some of the instances of non-direction which may amount to misdirection:

(1) Failure to explain the law arising in the case.⁹

(2) Omission of the Judge to direct the jury in cases where several accused are tried together, to consider the case of each accused individually.¹⁰ It is desirable and

- 7 (32) 19 AIR 1932 Outh 23 (25) 71 Luck 390 33 Cri L Jour 167 *Sita Ram v Emperor* (Failure by the Judge to point out that there was no corroboration of approver's evidence as a distinct particular accused—Misdirection)
8. (29) 16 AIR 1929 Cal 617 (626) 30 Cri L Jour 993 (SB) *Padam Prasad v Emperor* (Omission to point out that certain evidence which showed that the accused was of depraved character was irrelevant and inadmissible)
- 9 (41) 28 AIR 1941 Cal 315 (317) 42 Cri L Jour 649 195 Ind Cas 12 (DB) *Kamala Prasad v Emperor* (The failure of the Judge to put clearly to the jury and to indicate that an offence under S 368 Penal Code consists in something more than the wrongful concealment or confinement of a woman amounts to a material non-direction in the charge)
- (40) 27 AIR 1940 Pat 417 (418) 41 Cri L Jour 739, *Judag Gope v Emperor* (Principles of S 34 and S 149, Penal Code not explained)
- (40) 27 AIR 1940 Lah 87 (88) 41 Cri L Jour 482 *A M Mathews v Emperor* (Cheating — Failure of Judge to explain to jury necessary ingredients which constitute cheating in law amounts to misdirection)
- (41) 28 AIR 1941 Mad 339 (343) 42 Cri L Jour 414 193 Ind Cas 375 *In re Balam Pateyya* (Failure to point out difference between vandalism and dacoity or theft in case of dacoity and theft)
- (39) 26 AIR 1939 Bom 457 (460) 1 L R (1939) Bom 618 41 Cri L Jour 176, *Emperor v Jhina Soma*
- (37) 24 AIR 1937 Nag 110 (112) ILR (1937) Nag 123 38 Cri L Jour 580 *Fateh Mahomed v Emperor* (Case under S 301 Penal Code—Judge not giving an explanation of what constitutes an offence under the section but only explaining about private defence—Misdirection)
- (37) 24 AIR 1937 Pat 440 (441) 16 Pat 413 38 Cri L Jour 919, *Rameshwar Singh v Emperor* (Accused charged with kidnapping and abduction — Jury finding accused not guilty of kidnapping and thus finding girl over sixteen years — Story of prosecution that girl was taken away for marriage without her consent—Not a word in charge to jury by Court if accused has such intention — Non-direction to jury by Court on such vital ingredient of S 366, Penal Code, held amounted to serious misdirection and occasioned miscarriage of justice)
- (27) 14 AIR 1927 Cal 207 (238 209) 53 Cil 980 28 Cri L Jour 273, *Asteruddin v Emperor* (The law with regard to the right of private defence as bearing on the facts set up not explained)
- (30) 17 AIR 1930 All 24 (25, 26) 31 Cri L Jour 33 *Emperor v Mahammad Israil* (Necessary ingredients of offences under Ss 380 and 467, Penal Code not explained)
- (13) 14 Cri L Jour 556 (558) 21 Ind Cas 156 (Cal) *Emperor v Neamatullah* (Recent possession of stolen goods)
- (31) 18 AIR 1931 Cal 184 (186 187, 189) 58 Cal 1051 32 Cri L Jour 836 (TB) *Susan Behari Roy v. Emperor* (Section 477 Penal Code—"Secretling" meaning explained by the High Court)
- (24) 11 AIR 1924 Cal 1031 (1033) 52 Cal 112 26 Cri L Jour 11, *Umadas Das v Emperor* (In this case jury were not properly directed as to the application of S 94, Penal Code)
- (20) 7 AIR 1920 Cal 834 (834) 22 Cri L Jour 443, *Raja Khan v Emperor* (Omission to inform the jury that there could be no conviction for abetment of offence when the offence itself was not proved)
- (29) 1929 Mad W N 577 (578) *Mayandi Tetan v Emperor*

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Emperor

- (37) 1937 Mad W N 737 (739) *Nachappa Goundan v Emperor* (If there is no substantial difference between the case as against the different accused it is the duty of the Judge to say so)
- (26) 13 AIR 1926 Cal 139 (147) 53 Cal 372 27 Cri L Jour 266, *Khayruddin v Emperor* (Accused's defences were different in this case)

indeed obligatory that a Judge in summing up to the jury should divide up the evidence as it affects each individual accused ¹¹ (See also Note 7)

- (3) Omission to remind the jury that the statement attributed to individual accused is not evidence against the other accused in the event of the jury finding that individual not guilty ¹²
- (4) Failure to tell the jury that the accused should be acquitted if they had any reasonable doubt about his guilt ¹³ But see the undermentioned cases ¹⁴
- (5) Omission to state that even if the plea of *alibi* set up by the accused is not established, there is no presumption that the accused is guilty ¹⁵
- (6) The failure to inform the jury that the mere fact that the accused had absconded for some time will not give rise to a presumption of his being guilty ¹⁶
- (7) Omission to direct that the jury should reject irrelevant evidence, ¹⁷ that they should not allow the result of prior proceedings to affect their minds ¹⁸ or that

- (33) 20 AIR 1933 Cal 5 (8) 34 Cr L Jour 629 *Majan Das v Emperor* (Evidence against each accused was different)
- (33) 20 AIR 1933 Cal 718 (720) 60 Cal 14, 7 35 Cr L Jour 307 *Shalchali v Emperor*
- (17) 4 AIR 1917 Ind 335 (336) 17 Cr L Jour 19 (20) *In re Sangan* (Case where several accused were concerned and question was purely one of identification)
- (27) 14 AIR 1927 Mad 56 (58) 27 Cr L Jour 1164, *Thangaya Nadar v Emperor*
- (34) 21 AIR 1934 Nag 94 (95) 35 Cr L Jour 957 30 Nag L R 269 *Abdul Aziz v Emperor*
- (28) 15 AIR 1928 Pat 326 (333 335) 29 Cr L Jour 325 *Ut Champa Pasin v Emperor*
- (10) 11 Cr L Jour 15 (16) 4 Ind Cas 608 3 Sind L R 125 *Emperor v Murid*
- (12) 13 Cr L Jour 750 (751) 17 Ind Cas 62 6 Sind L R 116 *Emperor v Chagan Rajaram*

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- 11 (42) 29 AIR 1949 Pat 199 (200) 21 Ind 130 43 Cr L Jour 230 197 Ind Cas 647 (DB) *Arjun Panda v Emperor*

Ind Cas 837 *Subbaraya Ayyar v Emperor*
 6 *Khoda Dux v Emperor*
Madag Gope v Emperor
 * *Mian v Emperor*

guilty of conspiracy against several accused — Omission by Judge to deal with evidence against each accused on charge of conspiracy)

- 12 (36) 23 AIR 1936 Cal 73 (79) 63 Cal 999 37 Cr L Jour 394 *Benoyendra Chandra v Emperor*
- 13 (36) 37 Cr L Jour 17 (18) 158 Ind Cas 172 (Lab) *Harold H Weston v Emperor* (Judge dealing with the question of reasonable doubt when dealing with the law in the case—No misdirection)
- (36) 1936 Oudh W N 201 (203) *Wajid Husain v Emperor*
- (33) 20 AIR 1933 P C 218 (221) 34 Cr L Jour 886 2 All W R 610 (611 615) 1933 A C 699 102 L J P C 148 149 L T 574 (PC) *B R Lawrence v Emperor*
- (06) 4 Cr L Jour 502 (502 503) 1 Mad L Tim 350 *Para Thandan v Emperor* (Evidence against

in doubt in this case)

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evidence overwhelming and the jury not likely to have doubt.)

- 15 (21) 8 AIR 1921 Cal 202 (254) 23 Cr L Jour 344 *Emperor v Taribullah Sheikh*

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they should not consider the conduct of one accused in judging the case of the other¹⁹

- (c) Omission to point out the absence of evidence material to the case for the prosecution²¹
- (d) Omission to point out the discrepancies between the evidence and the first information report²¹ or the discrepancies and contradictions in the evidence²²
- (10) Failure to state that the evidence of a hostile witness should be viewed with caution or should be rejected²³
- (11) Omission to state that the evidence of a witness who deposes without taking the oath should be relied upon with caution²⁴
- (12) Omission to tell the jury that certain evidence is admissible only in corroboration, and leaving them to imagine that it is substantive evidence²⁵
- (13) Omission to place before the jury the inordinate delay in preferring the complaint²⁶

See also the undermentioned cases²⁷

- 19 (33) 37 Bom 636 (634) 5 Bom LR 599 *Emperor v Vaman Shitram*
 20 (75) 23 Suth W R Cr 21 (21) *Queen v Gunga Gound*
 [See (36) 23 AIR 1936 Cal 73 (79) 37 Cri L Jour 334 63 Cal 929 *Benoyendra Chandra v Emperor* (Judge repeatedly stating the case for the prosecution without clearly pointing out to the jury the parts of it which were not supported by evidence)]
 21 (43) 80 AIR 1943 Cri 74 (75) 41 Cri L Jour 322 1LR (1912) 2 Cal 144 205 Ind Cas 92 (DB), *Emperor v Mohammad Shah* (Serious discrepancies between first information report and dying declaration and also between first information report and testimony of prosecution witnesses)
 (26) 13 AIR 1926 All 429 (430 431) 27 Cri L Jour 785 *Dhruvi v Basi*
 (27) 5 Cri L Jour 424 (426) 34 Cal 325, *Dasarath Mandal v Emperor* (Judge should have called attention of the jury to the fact that witnesses examined by the prosecution were not mentioned in the first information report)
 (83) 11 Cal 10 (12 13) *Lau Tu v Queen Empress*
 (23) 12 AIR 1925 Cal 729 (733) 26 Cri L Jour 1009 *Jessarai v Emperor*
 22 (21) 8 AIR 1921 Cal 257 (259) 22 Cri L Jour 475 *Tenaram Mondal v Emperor*
 (41) 28 AIR 1941 Cal 106 (110) 1LR (1940) 2 Cal 259 42 Cri L Jour 395 193 Ind Cas 302, *Emperor v Mujaffar Singh*
 (29) 13 AIR 1926 Cal 139 (144) 53 Cal 372 27 Cri L Jour 266, *Khayiruddin v Emperor*
 (29) 16 AIR 1929 Cal 170 (171) 30 Cri L Jour 942, *Dwarka Das v Emperor*

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Harak Chand Ghiswamal

- (32) 19 AIR 1932 Cal 293 (291) 59 Cal 136 33 Cri L Jour 441 *Traslokyanath v Emperor* (In this

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[See also (38) 25 AIR 1938 Cal 364 (365) 39 Cri L Jour 625, *Ram Gobind Ghose v Emperor*, (Omission to lay stress on the fact that some of the most material witnesses were declared by the pro-

the jury could base its findings, this amounts to misdirection)

- (36) 23 AIR 1936 Cal 186 (189) 37 Cri L Jour 673, *Nabi Khan v Emperor*
 26 (31) 18 AIR 1931 Cal 10 (11) 32 Cri L Jour 186, *Ram Charitar Dubey v Emperor* (Charge under S 467, Penal Code — Delay of 3 years)
 27 (45) 32 AIR 1945 All 182 (184) 1LR (1915) All 127 - 46 Cri L Jour 637 - 270 Ind Cas 411, *Ghulam Hussain v Emperor* (Judge inviting jury's attention to confession by approver — Omission

13. Effect of misdirection. — Under S 423, sub s (2), a verdict of the jury can be altered or reversed only on proof of misdirection by the Judge or misunderstanding of the law by the jury. But it is not every misdirection and non-direction that will be a ground for reversing the verdict of the jury. By S 537, clause (d), when the misdirection does not occasion a failure of justice, the verdict cannot be altered. So, in appeals against the verdict of a jury it must be shown (a) that there was misdirection and (b) that such misdirection resulted in a miscarriage or a failure of justice¹. The same principle will

to mention that approver was caged by police at the time of his arrest about eleven weeks before confession, held did not amount to non-direction)

(44) 31 AIR 1944 Cal 339 (340-346) 1 L R (1944) 2 Cal 405 45 Cri L Jour 771 215 Ind Cas 67 (DB) *Ibra Akanda v Emperor* (Where a Judge in his charge to the jury emphasised the value of the first information report as corroborative evidence but failed to mention that it could also be used to contradict the prosecution evidence—*Held*, per Lodge, J, that the omission was of no importance in a case where no question was put to the first informant indicating that the first information report contradicted his evidence in Court, and per Das J, that the omission was a grave error of law but in the circumstances of the case was not sufficient to vitiate the verdict)

(43) 30 AIR 1913 Pat 163 (167, 168) 21 Pat 865 44 Cri L Jour 507 206 Ind Cas 365 (DB), *Lokhande Sahu v Emperor* (Failure of Judge to warn jury as to necessity for corroboration of opinion of police as to bloodstains — Non-direction)

(42) 29 AIR 1942 Cal 524 (526) 43 Cri L Jour 800 202 Ind Cas 604 (DB), *Emperor v Naiballa* (The failure of the Judge to warn the jury that the confession while in Police custody referred to in the

making over to investigating officer dying declaration recorded by doctor — Failure to refer to such

Emperor (Failure

by effect of all injuries inflicted by several accused combined—Common object specified in charges under Ss 147 and 148 Penal Code, was not to kill deceased but to assault him — Charge under S 309 framed and explained to jury—No alternative charges framed under Ss 304, 328 or 325, nor principles of S 34 or S 149 explained — All accused convicted under S 302 — Conviction is illegal — Whole procedure amounts to misdirection and non-direction)

(41) 28 AIR 1941 Mad 339 (342) 42 Cri L Jour 414 193 Ind Cas 375, *In re Dalam Paleyga* (Failure to lay sufficient stress on fact that all prosecution witnesses were interested—Failure to warn jury against acting on uncorroborated testimony of interested witnesses—Failure to tell jury of non-mention of certain facts in the first report of the occurrence and in charge-sheet—These are all defects in charge which vitiate conviction)

(39) 26 AIR 1939 Cal 497 (499) 40 Cri L Jour 577, *Moseladdi v Emperor* (Failure of Judge to point out to the jury that the deceased had not been cross-examined cannot have much effect as the jury knew perfectly well that the deceased had not been cross-examined and after they had spent several days in hearing the case they knew what cross-examination is and the purpose it serves)

(39) 26 AIR 1939 Pat 536 (538) 18 Pat 698 41 Cri L Jour 1, *Sachinder Rai v Emperor* (Failure of Judge in cases of sexual offences to warn jury of danger of convicting accused on uncorroborated

Jour 1066 10 Luck 119, *Lal Behari Singh v Emperor* viz, point as to applicability of S 149, Penal Code, held

(34) 21 AIR 1924 D + 527 (528) 35 Cri L Jour 1216, *Id Samiruddin v Emperor* (Failure to

(Defective nature of

defence existed at the particular moment of the alleged attack)

(34) 21 AIR 1934 Cal 622 (623) 35 Cri L Jour 1216, *Id Samiruddin v Emperor* (Failure to

Sashi Kanta (Dying declaration as to and efficacy of such dying declara

tion—*Held* directed)

Note 13

I. (44) 31 AIR 1944 Bom 338 (343) (DB), *Savhmiya v Emperor* (If the jurors are placed in possession of material evidence which ought not to have been admitted there is an error of law in the trial

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set a de)
- (43) 30 AIR 1913 P C 211 (21) 1 C L J r 211 210 Ind Cas 549 *Otto George C f ler The King* (M direction as l even re u a ty as cl l ot suff e there ut be on t l n b
wh el n the p t c u l a e l o p re the a case of the sub t nce of fa t l a n l e p r o c t of
the law)
- (43) 30 AIR 1913 P : 163 (166) 21 P 46 44 C L Jo r 507 206 I d C s 36 (DE) *Loh o o
Sul u v Emperor*
- (39) 26 AIR 1939 Bom 4 7 (1 9) 11 R (1939) Bo : 614 41 C L Jo r 176 *Enp e or J a
Soma*
- (36) 23 AIR 1936 P t 46 (4) 37 Cr L Jo 3 0 *Hars Mal to v I p e o*
- (27) 14 AIR 1927 Na 117 (118) 24 C L Jour 1 7 *Sa i a K o v Enp e or* (The n c r o
of just ee when o n s on o r m s v e n e n t s n e l th t t l e j u r y m s p o b a b l y b e m s l e d b y t)
- (2) 15 AIR 19 3 Pat 326 (333) 29 Cr L Jour 325 *M Clampa Pas v En p e r o*
- (33) 20 AIR 1933 P C 215 (1) 34 Cr L Jour 855 1933 A C 699 10 L J P C 144 149 L F 4
(PC) *Das l Panger Lawrence v E p e r o r* (Jury not directed as to o u of p o o f — He d l e e was
sub t a n t i a l m c a r r i a g e of just ee)
- (9) 19 9 Mad W 4 916 (91) *Dorais Am J P la v F p e r o r*
- (15) 5 AIR 1918 Cal 140 (141 14) 19 Cr L Jour 619 *Empe o v Asin oddi*
- (66) 5 Suth W R Cr 80 (9) Ben 1 R Sup Vol 429 *Q e e v El a l s Baz*
- (14) 1 AIR 1914 All 907 (203) 14 Cr L Jour 634 634 21 Ind Cas 648 *Hooper v E p e o*
- (32) 19 AIR 1932 Cal 295 (296) 33 Cr L Jour 477 *Gola Aspla v Emperor*
- (33) 1933 Mad W 4 390 (3 3) *I r n g a G o i d a E p e o r*
- (6) 7 Suth W F Cr 63 (70) *Queen v I a n o n s Seti*
- (01) 5 Cr L Jour 163 (170) 9 Bom L R 133 *En p e r o r v M a l a n e d K l a i* (Death o u e d d u r i n g
course of not—Jud e d i r e c t n th a j u y th a t f r o t w s e a b l h e d r o t e r s w e r e u t y of murder—
Retnal orde d)
- (6) 5 Bom H C R Cr 8 (91 92 91) *Reg v P a t t e c l a d V a s l a c a d* (Verd ct of jury can ba set
as de if accu ed l e p r e j u d e d b y d e f e c t e s n m n g u p)
- (08) 8 Cr L Jour 361 (372) 1 Snd L R 101 *I p e r o r v l l a t a l i S h a l*
- (27) 14 AIR 1927 Pat 370 (375) 7 Pat 15 23 C L Jour 69 *P a m c a r t e S g v E p e o* (No
m d i r e c t o n — V e r d c t of jury could not therefore be reversed)
- (23) 10 AIR 1923 Pat 103 (103 104) 23 Cr L Jour 91 *Su e s w a r J h a v E p e o* (The s as
p r o b a b l y n t h s c a s e of the j u r y s n d b e n g n f l u e n c e d b y n a d m i s s i b l e e v d e n c e s — C o n c t o n s
s e t a d e)
- (10) 8 Ind Cas 719 (719) 11 Cr L Jour 701 (Mad) *S t a s a i P l l a v E p e r o r* (The s w a s n
d i r e c t o n n t h i s c a s e w l c h d d n o t r e u l t f a l s u r e of j u s e e — C o n v t o n m a n t n e d)
- (17) 4 AIR 191 Mad 7 0 (771) 18 C L Jo r 15 (16) *I r e A n a p e P a l l a d u*
- (18) 3 AIR 1916 Mad 1224 (1225) 16 Cr L Jour 618 (618) *I n r e C o n u* (Ch a e c a r e s y o d e d
b u t j u r y n o t m s l e d — V e r d c t n o t r e e r s e d)
- (09) 10 Cr L Jour 11 (12) 2 Ind Cas 431 (Mad) *T o o l p a l l R a n a G o d a n v E n p e r o r*
- (81) 2 We r 488 (489) *I r e G o e r n n e t P l c a d e r*
- (03) 26 Mad 1 (8 9 14 15) 2 We r 501 *En p e r o r v E d w a r d W i l l a n S m i t l e r*
- (76 71) 6 Mad H C R 120 (121) 1 We r 4 2 1 r e S r a m b e k a d a m i (S u m m i n g u p d e f e c t v e —
A c c u s e d n o t p r e u d e d — C o n v t o n w a s m a n t a n e d)
- (24) 15 AIR 1928 Cal 763 (770 771) 30 Cr L Jour 8 5 *A n b a r A l i v E m p e r o r* (Jud e s c h a r g e o p e n
t o c r i t i s m — T h e v e r d c t of j u r y o u g t n o t t o b e i n t e r f e r e d w t h e x c e p t w h e r e c h a r g e t a k e n a s a w h o l e
c a n n o t b e u p p o r t e d)
- (27) 14 AIR 1927 Cal 6 0 (692) 54 Cal 339 28 Cr L Jour 699 *A y u b M a n d a l v E n p e r o r*
- (27) 14 AIR 19 7 Cal 395 (401) 28 Cr L Jour 495 *A z n u d d i v E n p e r o r*
- (22) 9 AIR 19 2 Cal 108 (106 107) 21 C L Jour 143 *S u p e r i n t e n d e n t a n d R e m e m b r a n c e r of L e g a l
A f f a i r s v S h j a m S u n d e r B u n j* (Jury s v e r d c t w a s n o t d u e t o m i s d i r e c t o n — V e r d c t w a s
m a n t a n e d)
- (09) 10 Cr L Jour 493 (493) 4 Ind Cas 120 (Cal) *K e s a l a b P a l v E n p e r o r* (M i s d i r e c t o n n o t r e u l t
n n f a l s e of j u t e e — R a l n o t o r d e r e d)
- (95) 2 Cal 377 (383) *K r s h a D i a i M a d a l v Q u e e t E p r e s s*
- (94) 21 Cal 955 (977 978 979) *W a f a d a r K a n v E n p e s s*
- (75) 24 Suth W R Cr 77 (78 79) *Q u e e v C l u d e r K o o a r M u o o m d a r* (M i s d r e c o n p e d u c i n g
t h e a c c u s e d — R e t r a l o d e d)
- (73) 19 Suth W R Cr 71 (72) 10 Ben 1 R App 36 *Q u e e n v P a j c o o m a r D o s e*
- (2) 18 Suth W R Cr 66 (66 67) *Q u e e v M a l o o r a S n g l*
- (29) 16 AIR 1923 Bom 296 (301 303) 53 Bom 479 31 C i L Jour 65 *Empe or v C L F 7*
- (1900) 2 Bom L R 1123 (1130 1131) — — — — —

apply with regard to a non-direction² What is miscarriage of justice should be judged from the facts and circumstances of each case. In the undermentioned Allahabad case³ the Court remarked that a "miscarriage of justice through misdirection means that there must be a reasonable ground for apprehending that the misdirection may have affected the jury's verdict" It has not been interpreted to mean that the appellate Court must find before setting aside a verdict that the accused was entitled to an acquittal on the evidence. If this were so, there is no object in ordering a new trial. It means that there must be a reasonable ground for apprehending that, but for the misdirection, the jury may have arrived at a different verdict,⁴ or putting it in another way, "whether in spite of the misdirection the conviction and verdict are not justified in law, as they stand," and if they are justified there is no failure of justice⁵ Where the appellate Court finds that there is misdirection, it can under S 423 either acquit the accused setting aside the verdict, or reduce the sentence, or order a new trial with a fresh jury⁶ In trials by the High Court Se - on,

(1900) 2 Bom L R 751 (752), *Queen Empress v. Sangaya* (All the evidence bearing on the charge of murder not recorded in view of admission made by the pleader appointed by Court to defend the accused — Other sufficient evidence to support verdict of murder — Conviction not set aside)
[See ('36) 23 AIR 1936 Bom 52 (53, 55). 60 Bom 599 37 Cri L Jour 366 (FD), *Puttan Hasan v*

v. Emperor (Judg
of law — But failure

Also see S 445, Note 40

2 ('39) 26 AIR 1939 Bom 457 (459) 1 L R (1939) Bom 648 41 Cri L Jour 176, *Emperor v. Jhira Soma* (Held, omission to read and explain the relevant sections was not such as could be said to have occasioned a failure of justice)

1 L Jour 133, *Fakira v. Emperor*.

1 L Jour 1146, *Jagmohan v. Emperor* (Evidence
to benefit of reasonable doubt to the accused was

('68) 10 Suth W R Cr 7 (8 9), *Queen v. Ramgopal Dhur*.

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Jagmohan v. Emperor

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1933 A C 699. 102 L J P C 153 149 LT 571
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the accused the same verdict a substantial miscarriage of

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Emperor v. Emperor

('38) 25 AIR 1938 Cal 51 (59) : 39 Cri L Jour 161 1 L R (1938) 1 Cal 290, *Goloka Behari v. Emperor*
(Retrial not ordered but accused acquitted especially in view of the fact that accused had been in
detention for nearly two years and through no fault of their own had to undergo two trials.)

('30) 17 AIR 1930 Cal 370 (378, 379) . 58 Cal 96 . 32 Cri L Jour 10, *Gott of Bengal v. Santiram Mandal* (In this case the High Court reversed the verdict of acquittal and itself convicted the accused.)

('22) 9 AIR 1922 Cal 505 (506) : 24 Cri L Jour 76, *Abdul Gohur Sikdar v. Emperor*, (Conviction was

ed)

FD)

A. N. N. N. v. Emperor. (There was good *prima facie* case to go to the jury—Retrial ordered)
('09) 9 Cri L Jour 567 (567) . 32 Mad 179 : 2 Ind Cas 307, *Public Prosecutor v. Bomigara Fottigada*
(Acquittal)

-'29) 16 AIR 1929 Cal 617 (622) . 30 Cri L Jour 993 (SD), *Padam v. Emperor*. (Where jury could not
have convicted but for the misdirection, acquittal was ordered)

by virtue of the provisions in Letters Patent of the High Courts the verdict may be reviewed." As to the powers of the High Court in reviewing the decision see the undermentioned case⁸

An appeal would not lie to the Privy Council merely on the ground of misdirection⁹ See also the undermentioned cases¹⁰ where the principles on which the Privy Council would exercise their jurisdiction in criminal cases have been laid down

14 Duty of appellate Court in reviewing a charge—The appellate Court in reviewing the charge to a jury should judge it as a whole. It is sufficient to see whether the tendency of a charge taken as a whole has given a correct or incorrect direction to the

- (1900) 4 Cal W N 576 (581 582) *Sadhu Sheikh v Emperor* (Retrial ordered)
 (1902) 29 Cal 782 (791) 6 Cal W N 553, *Jamirudd Masali v Emperor* (Acquittal)
 (32) 19 AIR 1932 Oudh 23 (25) 7 Luck 390 33 Cr L Jour 167 *Sita Ram v Emperor*
 (26) 13 AIR 1926 Nag 53 (54 55) 26 Cr L Jour 1090 *Ramprasad v Emperor* (No evidence on record to warrant a conviction—Order for retrial will not be justified)
 [See (37) 24 AIR 1937 Pat 263 (274) 38 Cr L Jour 673 15 Pat 817 *Samarendra Kumar v Emperor* (A retrial should not be ordered unless it can be shown that matters which counsel would have placed have not been placed before the jury or that the charge of the Judge is defective and erroneous in material particulars)]
 Also see S 423 Note 40
 7 (36) 23 AIR 1936 Bom 52 (53) 60 Bom 599 37 Cr L Jour 366 (11) *Puttan Hasan v Emperor* (The failure of the Judge to comply with this section is an error of law which brings the case within Cl 26 Letters Patent Bombay)
 (90) 17 Cal 642 (668 669) *Queen Empress v O'Hara*
 8 (36) 23 AIR 1936 Bom 52 (53 54) 60 Bom 599 37 Cr L Jour 366 (11) *Puttan Hassan v Emperor*
 9 (36) 23 AIR 1936 P C 160 (168) 37 Cr L Jour 679 1936 A C 445 105 L J P C 84 155 L T 1 (PC) *D P Renouf v Attorney-General for Jersey* (*Ebrahim v Pex* 1914 A C 599 83 L J P C 185 111 L T 20 followed)
 (36) 23 AIR 1936 1 C 169 (170) 37 Cr L Jour 628 1936 A C 338 105 L J P C 79 154 L T 820 (*IC*) *Attigalle v King* (Misdirection as such will not suffice for granting of special leave to appeal—*Ibrahim v Rex* 1914 A C 599 83 L J 1 C 195 111 L T 20 followed)

Plucknett v Emperor (Unless the High Court is satisfied that the misdirections complained of are material or that they have led to any miscarriage of justice leave to appeal to the Privy Council will not be granted))

- 10 (45) 32 AIR 1945 P C 140 (143) *Daniel Youth v The King* (If there was evidence against the accused on which the jury were entitled to convict its strength is not a matter for the Privy Council to determine in appeal. The jury are sole judges unless some step has been taken which is contrary to natural justice or some grave and substantial injustice has been done)
 (43) 30 AIR 1943 P C 211 (216) 45 Cr L Jour 241 219 Ind Cas 583 *Otto George Gfeller v The King* (Privy Council do not sit as a Court of criminal appeal for them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice)
 (39) 26 AIR 1939 Cal 682 (684) 41 Cr L Jour 59 1 L R (1939) 1 Cal 187, *C B Plucknett v Emperor*
 (37) 24 AIR 1937 P C 179 (180) 38 Cr L Jour 573 64 Ind App 134 1 L R (1937) Lab 371 31 Sind L R 300 (PC), *Margal v Emperor* (It is no part of the duty of the Board of their Lordships of the Privy Council to sit in criminal cases as a Court of criminal appeal but only to correct what they

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accused of the substance of fair trial and protection of law, or which in general tends to divest the due and orderly administration of law into a new course which may be drawn into an evil precedent in future)

- (25) 12 AIR 1905 P C 305 (306) (1 C) *Shafi v Emperor* (Privy Council will not interfere unless there is violation of principles of natural justice or legal forms)
 (13) 15 Cr L Jour 144 (144) 41 Cal 56- 40 Ind App 241 22 Ind Cas 496 (PC) *Clifford v Emperor*.
 Also see S 404 Note 2 and Letters Patent (Cal) Cl 41 Note 3

mind of the jury¹ In a Full Bench case² of the Bombay High Court Beaumont CJ, observed as follows

'It is, in my judgment clearly open to the Court to consider, not so much what effect the misdirection has upon the minds of this Court sitting in place of a jury but what the effect of the misdirection was or may have been upon the minds of the jury which tried the case and in so doing we must I think assume that the jury was a reasonably competent jury, though we must remember that a jury consists of laymen and that a misdirection may have more effect upon the minds of laymen than upon the mind of a trained Judge

15 Record of charge to jury — See Note 15 on S 367

16 Effect of a juror not understanding the charge — Where one of the jurors is unacquainted with the language in which the charge is made and so is unable to follow it, it has been held by the Privy Council that the whole trial is vitiated¹ See also S 278 Note 3

17. Effect of a bad charge — Where a charge is inadequate and insufficient and it does not assist the jury to exercise their function as jurors or place before them clearly the issues to be decided, the whole trial will be bad¹ But the question in each case would be whether there was a failure of justice consequent on such bad charge² See also Note 13

Note 14

1 (69) 12 South W R Cr 80 (80) 4 Beng L R App 50 *Queen v Gogalao*
(40) 27 AIR 1940 Oudh 337 (310) 41 Cri L Jour 515 *Jagadish Dutt v Emperor*
(39) 26 AIR 1939 Cal 682 (686) 41 Cri L Jour 59 1 L R (1939) 1 Cal 167, *C B Plucknett v E*
Emperor

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2 (36) 23 AIR 1936 Dom 5^o (54) 37 Cri L Jour 366 60 Dom 599 (FB) *Puttan Hasan v Emperor*

Note 16

1 (33) 20 AIR 1933 P C 208 (209) 60 Ind App 354 34 Cri L Jour 813 12 Pat 811 (PC) *Faz Behari Lal v Emperor*

[See also (04) 1 Cri L Jour 598 (598) 6 Dom L R 535 *Emperor v Bhavinrao*]

Note 17

1 (28) 10 AIR 1936 Nag 52 (54) 26 C L J 573 evidence for

(1) 30 Cal 822 (830) 7 Cal W N 639 *Birendra Lal Bhaduri v Emperor* (Charge did not show

what the facts were what the evidence was or what the case of the defence was)

(68) 9 South W R Cr 52 (54) *Queen v Denanath D* evidence — Jury's

in *Lemon Reed*

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er *Mukerjee*

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18 When Judge can re charge the jury — In cases where the jury returns an unintelligible verdict the Judge instead of asking questions under § 303 may *again sum up the case to them and direct them to give a fresh verdict* ¹. But the Judge cannot re charge the jury and ask them to return a fresh verdict merely because he disagrees with their first verdict * See also Section 303 Note 5

Duty of Judge

298. (1) In such cases it is the duty of the Judge —

- (a) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties,
- (b) to decide upon the meaning and construction of all documents given in evidence at the trial,
- (c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given,
- (d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors

(2) The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding

Illustrations

(a) It is proposed to prove a statement made by a person not being a witness in the case on the ground that circumstances are proved which render evidence of such statement admissible

It is for the Judge and not for the jury to decide whether the existence of those circumstances has been proved

(b) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed

It is the duty of the Judge to decide whether the original has been lost or destroyed

Synopsis

- | | |
|---|--|
| 1 Scope and object of the section | 6 In his discretion |
| 2 Judge to decide all questions of law arising in the course of the trial | 7 Construction of documents—Clause (b) |
| 3 Relevancy and admissibility to be decided by the Judge | 8 To decide upon all matters to enable evidence of particular matters to be given—Clause (c) |
| 4 Propriety of questions asked by or on behalf of the parties | 9 When and how far a Judge may give his opinion on question of fact—Sub-section (2) |
| 5 To prevent the production of inadmissible evidence whether it is or is not objected to by the parties | |

* 1882 S 298 1872 S 256 1861 — Nil

Note 18

1 (40) 29 AIR 1940 Pat 446 (448) 21 Pat 139 197 Ind Cas 504 43 Cal L Jour 902 (DB) *Jangal Singh v Emperor*

(30) 17 AIR 1930 Cal 300 (370) 37 Cal 61 31 Cal L Jour 761 *Hamid Ali v Emperor*
Also see S 303 Note 1 and S 304 Note 1

2 (37) 29 AIR 1935 All 1070 (1079) 36 Cal L Jour 1377 *Dora v Emperor*

mind of the jury¹ In a Full Bench case² of the Bombay High Court, Beaumont C J, observed as follows

'It is, in my judgment, clearly open to the Court to consider, not so much what effect the misdirection has upon the minds of this Court sitting in place of a jury but what the effect of the misdirection was or may have been upon the minds of the jury which tried the case, and in so doing we must, I think, assume that the jury was a reasonably competent jury, though we must remember that a jury consists of laymen, and that a misdirection may have more effect upon the minds of laymen than upon the mind of a trained Judge'

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Note 14

- 1 (69) 12 Suth W R Cr 80 (80) 4 Beng L R App 50, *Queen v. Gogalao*
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 (21) 8 AIR 1921 Cal 73 (74) 23 Cri L Jour 342 *Hari Charan Das v Emperor*
 (73) 20 Suth W R Cr 41 (42) *Queen v. Nimchand Mookerjee*
 (98) 2 Cal W N 702 (708) *Queen Empress v Bhairab Chunder*
 (18) 5 AIR 1918 Cal 72 (72) 19 Cri L Jour 959, *Emperor v Kabir, Katons*
 (14) 1 AIR 1914 Low Bur 65 (119) 7 Low Bur Rul 143 15 Cri L Jour 80 (FB), *G S Clafford v Emperor*
 [See also (38) 25 AIR 1938 Pat 578 (583) 40 Cri L Jour 147, *Yusuf Mea v, Emperor* (The essential point for determination is whether case against accused has been fairly brought to notice of jury which

Emperor (High Court should

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Pattan Hasan v Emperor

- 1 (33) 20 AIR 1933 P C 208 (209) 60 Ind App 354 34 Cri L Jour 843 12 Pat 811 (PC), *Ras Behari Lal v Emperor*
 [See also (04) 1 Cri L Jour 598 (598) 6 Bom L R 535, *Emperor v. Bhavindrao*]

Note 17

- 1 (26) 13 AIR 1926 Nag 53 (54) 26 Cri L Jour 1090 *Ramprasad v Emperor* (Neither evidence for
 (68) 9 Suth W R Cr 52 (54), *Queen v Denonath Buttur* (C) none of a case taken evidence — Jury's

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 ar v Emperor*

ter Mukerjee

for the same crime — No new charge delivered but the charge to the former jury read out — The former charge being applicable to the present trial, High Court did not interfere)
 [See (70) 14 Suth W R Cr 66 (66) *Queen v Sitwa* (Evidence on both sides not summed up — High Court refused to interfere on this ground alone)]

18 When Judge can re-charge the jury. — In cases where the jury returns an unintelligible verdict the Judge instead of asking questions under S 303 may *again sum up the case to them* and direct them to give a fresh verdict¹ But the Judge cannot re charge the jury and ask them to return a fresh verdict merely because he disagrees with their first verdict² See also section 303 Note 5

Duty of Judge

298.* (i) In such cases it is the duty of the Judge —

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- (b) to decide upon the meaning and construction of all documents given in evidence at the trial;
- (c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given,
- (d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding

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Synopsis

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| 1 Scope and object of the section | 6 'In his discretion' |
| 2 'Judge to decide all questions of law arising in the course of the trial' | 7 Construction of documents—Clause (b) |
| 3 Relevancy and admissibility to be decided by the Judge | 8 'To decide upon all matters to enable evidence of particular matters to be given—Clause (c)' |
| 4 'Propriety of questions asked by or on behalf of the parties' | 9 When and how far a Judge may give his opinion on question of fact—Sub-section (2) |
| 5 'To prevent the production of inadmissible evidence whether it is or is not objected to by the parties' | |

* 1882 S 298, 1872 S 256, 1861 — Nil

Note 18

1 (42) 29 AIR 1942 Pat 446 (448) 91 Pat 133 197 Ind Cas 504 43 Cr L Jour 205 (DB), *Janak Singh v Emperor*

(30) 17 AIR 1930 Cal 320 (320) 57 Cal 61 31 Cr L Jour 761 *Hamid Ali v Emperor*
Also see S 302 Note 1 and S 304 Note 1

2 (35) 22 AIR 1935 All 1070 (1072) 36 Cr L Jour 1377, *Dari v Emperor*

NOTE to the Synopsis See the Notes indicated for the following topics :

competency of witnesses See Note 2	Misdirection See Note 9
evidence to be heard and not prior depositions See Note 3	Objections to evidence to be heard in absence of jury See Note 3
functions of Judge and jury distinct See Note 1	Sufficiency of evidence for jury See Note 1
inadmissible evidence See Notes 3, 5 and 6	Value of confessions See Note 3
Judge's opinion and jury's liberty to form their own See Note 9	Voluntary nature of confessions for Judge See Note 3

1. Scope and object of the section. — This section and the next specify the duties of the Judge and the jury respectively¹ and embody the general principle that the question what the jury are to receive is for the Judge and what they are to believe is for the jury, in other words, the question whether there is any evidence is for the Judge whether there is sufficient evidence is for the jury² (See also s 269)

The provisions of this section show that the Judge should evince an interest in the case even from its beginning³

2 "Judge to decide all questions of law arising in the course of the trial" — The decision on all questions of law arising in the course of the trial is solely for the Judge¹ whose direction thereon is absolute and binding on the jury² In other words the jury is to take the law from the Judge³

The following questions are for the Judge

- (1) Whether, when an adult woman had consented to sexual intercourse it would be an offence of rape within the meaning of the Penal Code⁴
- (2) In a case of defamation whether the imputation found to have been made and the harm found to have been the probable or expected result were such as to satisfy the definition of the offence of defamation⁵
- (3) Whether a particular communication is a privileged one or not⁶

Section 298 — Note 1

- 1 (95) 19 Bom 741 (742, 743) *Queen-Empress v Rego Montopoulo*
 [See (40) 27 AIR 1940 Oudh 337 (340) 41 Cr L Jour 545, *Jagdish Dutt v Emperor* (In this case it was observed that the section does not lay down any principles on the question of misdirection but the direction of a jury both by its content and clearly)]
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 decide)
 (89) 1889 Rat 452 (453) *Queen Empress v Lal Singh*
 3 (30) 17 AIR 1930 All 534 (536) 32 Cr L Jour 158, *Suraj Prasad v Emperor*
 3 809 (FB) or Judge to

Note 2

- 1 (43) 30 AIR 1943 Pat 131 (133) 44 Cr L Jour 356 21 Pat 854 205 Ind Cas 241 (DB) *Jamadar Singh v Emperor* (Judge saying that the jury must decide whether the right of private defence arose in the circumstances of the case and whether such right was exceeded—This amounts to misdirection on as the Judge is not leaving to the jury merely the question of fact arising in the case)
 (39) 26 AIR 1939 Mad 190 (192) 40 Cr L Jour 437, *Emperor v Labbar Kutta*
 (16) 3 A I R 1916 Pat 236 (238) 1 Pat L Jour 317 17 Cr L Jour 353 (355), *Elnath Sahay v Emperor*.

v Emperor (The question

- 4 (35) 19 Bom 735 (736) *Queen Empress v Madhav Rao*
 5 (79) 1879 Rat 140 (140), *In re Pulambar*
 6 (68) 10 Suth W R Cr 14 (14) 1 Beng L R App Cr 8 *Queen v, Chandra Kant*
 [See (98) 25 Cal 736 (741) 2 Cal W N 484, *Abbaspeada v Queen Empress*]

- (4) Whether any evidence has been given on which the jury could properly find the question for the party on whom the onus of proof lies⁷
- (5) It has been held in the case noted below⁸ that the Judge may say that a certain prosecution witness is an accomplice. The High Court of Calcutta has, however, taken the view that it is the duty of the Judge only to put all the facts before the jury and let it be for them to decide whether he is an accomplice whose testimony has to be received with caution⁹. The Chief Court of Oudh has also taken a similar view¹⁰
- (6) Whether there is corroboration¹¹
- (7) Whether a witness is capable of testifying as a witness though after the Judge has decided in favour of his competency it is for the jury to decide on the amount of credit to be given to such a witness¹². So the question whether a child¹³ or a deaf and dumb person¹⁴ or one who is unable to take the oath¹⁵ can be examined as a witness should be decided by the Judge as provided by § 118 of the Evidence Act
- (8) Whether a charge under § 493 of the Penal Code is proper in the absence of a complaint under § 199 of the Criminal Procedure Code¹⁶
- (9) Whether there is any evidence to go before the jury¹⁷

See also the undermentioned cases¹⁸

3 Relevancy and admissibility to be decided by the Judge — It is the duty of the Judge to decide whether a certain piece of evidence is admissible or relevant¹

- 7 (39) 96 AIR 1939 Mad 190 (192) 40 Cri L Jour 437 *Emperor v Laddai Kullu*
 (15) 2 AIR 1915 Cal 773 (777) 16 Cri L Jour 561 (565) (FB) *Emperor v Upendra Nath*
 8 (03) 96 Mad 1 (6-7) 2 Weir 521 *Emperor v Smither*
 9 (27) 14 AIR 1917 Cal 460 (461) 28 Cri L Jour 278 *E St C Moss v Emperor*
 10 (42) 29 AIR 1942 Oudh 221 (293) 17 Luck 516 43 Cri L Jour 416 193 Ind Cas 714 *Jagannath v Emperor* (Judge saying that witness is not accomplice amounts to misdirection — Judge ought to point out to jury whether there is any corroborative evidence or not)
 11 (37) 19 AIR 1932 Cal 295 (296-297) 33 Cri L Jour 477 *Golam Asghar v Emperor*
 [See also (29) 16 AIR 1929 Cal 57 (59) 56 Cal 150 30 Cri L Jour 435 *Rebati Mohan v Emperor* (Cumtong J doubted but followed on authority Lord Williams J contra)]
 12 (14) 1 AIR 1914 Cal 276 (279) 14 Cri L Jour 495 41 Cal 406 *Nafar v Emperor*
 13 (67) 8 Suth W R Cr 60 (60) *Queen v Hosseinee*
 (06) 4 Cri L Jour 412 (413-414) 11 Cal WN 51 *Sheikh Fakir v Emperor*

the evidence is such that if it is believed by the jury it must result in a conviction the case must go before the jury — But if the prosecution evidence is such that even if it is believed by the jury it would not lead to a conviction then, the Judge must under § 239 direct the jury to return a verdict of not guilty)

- 18 (43) 30 AIR 1943 Pat 131 (133) 21 Pat 854 44 Cri L Jour 356 90 Ind Cas 741 (DB) *Jamadar Singh v Emperor* (It is misdirection for the Judge to tell the jury that where both parties are accomplices...)

charge is defective and must lead to a miscarriage of justice)

- (37) 24 AIR 1937 Lab 127 (130) 17 Lab 547 39 Cri L Jour 472 *Mangal Singh v Emperor* (Murder trial — Accused not able to explain suspicious circumstances against him appearing in circumstantial evidence — Question of inference of guilt in such cases is one of fact and not of law)

Note 3

- 1 (43) 30 AIR 1943 Pat 163 (166) 41 Cri L Jour 507 21 Pat 665 206 Ind Cas 365 (DB) *Lallona Salu v Emperor* (Prosecution witness appearing to be no better than accomplice — If evidence requires corroboration in material particulars — Judge should duly warn jury)

NOTE to the Synopsis See the Notes indicated for the following topics

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1 Scope and object of the section — This section and the next specify the duties of the Judge and the jury respectively¹ and embody the general principle that the question what the jury are to receive is for the Judge and what they are to believe is for the jury in other words the question whether there is any evidence is for the Judge whether there is sufficient evidence is for the jury² (See also s 289)

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Section 298 — Note 1

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- 2** *Emperor v Dawood Hasham* (Question whether there is evidence to go before jury is for Judge to decide)

- (89) 1889 Rat 452 (453) *Queen-Empress v Lal Singh*

- 3** (30) 17 AIR 1930 All 534 (536) 32 Cri L Jour 158 *Suraj Prasad v Emperor*

Note 2

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ror (The question)

- (4) Whether any evidence has been given on which the jury could properly find the question for the party on whom the *onus* of proof lies⁷
- (5) It has been held in the case noted below⁸ that the Judge may say that a certain prosecution witness is an accomplice. The High Court of Calcutta has, however, taken the view that it is the duty of the Judge only to put all the facts before the jury and it is for them to decide whether he is an accomplice whose testimony has to be received with caution⁹. The Chief Court of Oudh has also taken a similar view¹⁰.
- (6) Whether there is *corroboration*¹¹
- (7) Whether a witness is capable of testifying as a witness though after the Judge has decided in favour of his competency it is for the jury to decide on the amount of credit to be given to such a witness¹². So the question whether a child¹³ or a deaf and dumb person¹⁴ or one who is unable to take the oath¹⁵ can be examined as a witness should be decided by the Judge as provided by s 118 of the Evidence Act.
- (8) Whether a charge under s 498 of the Penal Code is proper in the absence of a complaint under s 199 of the Criminal Procedure Code¹⁶.
- (9) Whether there is any evidence to go before the jury¹⁷.

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 (23) 10 AIR 1923 Lah 332 (333) 25 Cr L Jour 317, *Hussain Khan v Emperor*
 14 (12) 13 Cr L Jour 271 (271) 14 Ind Cas 655 (Mad) *Yenhattan v Emperor*

not guilty)

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In introducing evidence in a trial with the aid of a jury, the Judge should be very careful to see that there is no miscarriage of justice² He should decide about the admissibility as and when the question arises and should, if the evidence is inadmissible, shut it out from the jury³ The moment to decide the question of admissibility is when the evidence is sought to be admitted⁴ If inadmissible evidence is once let in, any later exhortation to the jury to ignore that will be insufficient (see Note 11 on S 297) It is always desirable that the jury should be asked to retire from the Court when the question as to the admissibility of a particular piece of evidence is being discussed⁵ The Judge should decide that a confession is voluntary before admitting it and placing it before the jury,⁶ although such a question is one of fact. The reason is that all facts preliminary to the admissibility of evidence are for the Court⁷ (See cl (c) and Note 8) The Judge is not concerned with the truth of the confession, even if he is satisfied that it is true, but if its voluntary nature is doubted then the Judge should exclude it under the law⁸ When the Judge has decided on its admissibility, it is for the jury to see whether it is true and can be relied upon, and one test which they will apply is whether it appears to them to have been freely and voluntarily made⁹

(38) 25 AIR 1938 Cal 460 (462) 39 Cri L Jour 674, *Ebad Khan v Emperor* (Admissibility of first information report)

(89) 1889 Rat 452 (453, 456), *Queen Empress v Lal Singh*

(89) 1889 Rat 491 (492), *Queen Empress v Tulsi*

(35) 22 AIR 1935 Sind 115 (126) 29 Sind L R 121 36 Cri L Jour 1310, *Bhurasingh v Emperor* (Evidence of previous conviction)

2 (26) 13 AIR 1926 Cal 147 (149) 27 Cri L Jour 277, *Keramat Mandal v. Emperor*.

3 (43) 30 AIR 1943 Pat 163 (166, 167) 44 Cri L Jour 507 21 Pat 885 205 Ind Cas 865 (DB) *Lekhona Sahu v Emperor* (Judge referring to objections to admissibility of evidence in charge to jury and referring to sections of Evidence Act and to decided cases to show how the objection is not correct — This amounts to misdirection)

(08) 4 Cri L Jour 332 (333) 8 Bom L R 697, *Emperor v Bhagivedu* (Judge to be satisfied that a confession was voluntarily made)

(19) 6 AIR 1919 Lah 184 (186) 20 Cri L Jour 305, *Kapur Singh v Emperor*

(29) 16 AIR 1929 Cal 617(620) 30 Cr L J 993 (SB), *Padam Pd v Emperor* (Admissibility of documents)

of retracted confession) v Emperor
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In this case it is held that the question whether the confession is voluntarily made or not, is a question of law to be determined by the Judge from the facts as a condition precedent to its admission *Burton v State* 107 Ala 108 (American case) followed.—In view of cl (c) of this section the question is only of academic interest.)

(36) 23 AIR 1936 Cal 227 (229) 37 Cri L Jour 676 63 Cal 1089 *Bhakta Bhusan v Emperor* (In this case it was remarked by Cuthbert, J., that the voluntary or involuntary nature of a confession involves a mixed question of both fact and law — But the question is only of academic interest in view

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that, y or not, there is no misdirection in the charge to the jury)

See also the undermentioned cases¹⁰ Similarly, the Judge has to see if the confession is vitiated by any other circumstance mentioned in ss. 24, 25, etc., of the Evidence Act¹¹ He should never leave it to the jury to decide about the admissibility of the confession¹² Where a Judge admits a first information report into evidence he should leave the matter entirely free to the jury as to what weight they should attach to it It is not proper for him to give his reasons for admitting the document He should merely state that he admits the document in evidence and should lay it before the jury¹³

The Judge should see that witnesses depose before the jury the facts known to them, it is irregular to read their deposition in the prior trial and ask them if it is true See also the undermentioned case¹⁴ where the advantage of the jury hearing the evidence as it is deposed to by the witnesses before them is pointed out

See also the undermentioned decision¹⁵ as to whether a Judge's admission of evidence amounts to a decision within the meaning of Letters Patent clause 26 Where certain evidence is wrongly admitted but the course of the trial is not in any way deflected thereby it would form no ground on which an application under clause 30 of the Letters Patent (Rangoon) can be based¹⁶

4 'Propriety of questions asked by or on behalf of the parties' — See ss 148 to 157 of the Evidence Act The Judge should control the examination in chief by the prosecution and allow only legal questions to be put in a legal way¹ Similarly it is his duty to control the cross examination in such a way as to disallow any question which is improper or misleading²

(36) 37 Cri L Jour 1084 (1085) 165 Ind Cas 127 63 Cal 833 (FB) *Badan Ali v Emperor* (The jury may therefore in the exercise of their authority and within their province determine that the confessions are untrue or not entitled to any weight upon the grounds that they were not voluntarily made *Burton v State* 107 Ala 108 (American case) followed)

(36) 23 AIR 1936 Cal 227 (228) 37 Cri L Jour 676 63 Cal 1089, *Bhakta v Emperor*

(35) 22 AIR 1935 Cal 308 (309) 36 Cri L Jour 921 *Kishori Kishore v Emperor*

(18) 5 AIR 1918 Cal 72 (72) 19 Cri L Jour 959, *Emperor v Kabli Katom*

(98) 1898 Rat 959 (952) *Queen Empress v Balya Dagdu*

(34) 21 AIR 1934 Cal 853 (853 856) 62 Cal 312 36 Cri L Jour 485 *Kasimuddin v Emperor* (Judge saying that voluntary nature of confession should be treated by them as concluded by his decision to admit it in evidence commits a misdirection in his charge)

(34) 21 AIR 1934 Cal 636 (640) 61 Cal 399 35 Cri L Jour 1479 *Nayab Shahana v Emperor*

10 (29) 16 AIR 1929 Cal 726 (727 728) 57 Cal 649 31 Cri L Jour 909, *Kharo Mondal v Emperor*

(25) 12 AIR 1925 Cal 897 (888) 26 Cri L Jour 606 *Sherik Abdul v Emperor*

(09) 10 Cri L Jour 65 (66 68) 2 Ind Cas 517 (Bom) *Emperor v Kesari Dayal*

11 (1900) 27 Cal 295 (302) 4 Cal W N 1299 *Queen Empress v Jadub Das* (Confession to police-officer)

(17) 4 AIR 1917 Low Bur 93 (93) 18 Cri L Jour 383 (381) *Nga Ba v Emperor* (Confession caused by inducement)

(21) 8 AIR 1921 Bom 70 (71) 49 Bom 1086 22 Cri L Jour 318, *Dinanath v Emperor* (Do)

(186c) 4 Suth W R Cr 1 (2) *Queen v Gunesh Koormee* (Confession caused by force)

(19) 6 AIR 1919 Cal 11 (13) 20 Cri L Jour 833 *Mohalak Ali v Emperor* (Confession under the influence of police)

(15) 2 AIR 1915 Bom 249 (252) 40 Bom 290 17 Cri L Jour 133, *Fakira Appaya v Emperor* (Do)

(16) 3 AIR 1916 Cal 352 (352 353) 17 Cri L Jour 189 (189) *Emperor v Aushi Bibi* (Confession under

(96) 1896 Rat 842 (842) *Queen Empress v Ganu*

(14) 1 AIR 1914 Bom 305 (306) 38 Bom 156 14 Cri L Jour 625, *Gangapa v Emperor*

13 (38) 25 AIR 1938 Cal 460 (462) 39 Cri L Jour 674 *Ebad Khan v Emperor*

14 (24) 11 AIR 1924 Lah 17 (19) 4 Lah 389 25 Cri L Jour 377, *John Thomas v Emperor*

15 (35) 22 AIR 1935 Mad 486 (495) 58 Mad 523 36 Cri L Jour 1399 (1418 1425) (FD) *Emperor v Ramana Ayyangar* (It does not so amount)

16 (35) 22 AIR 1935 Rang 214 (218) 13 Rang 141 36 Cri L Jour 1239 *Scott v Emperor*

Note 4

1 (18) 5 AIR 1918 Pat 146 (152) 19 Cri L Jour 789 *Ritbaran Singh v Emperor*.

2 (33) 20 AIR 1933 Lah 667 (668) 31 Cri L

5 "To prevent the production of inadmissible evidence, whether it is or is not objected to by the parties"—An erroneous omission on the part of the parties to object to the admissibility of a piece of evidence will not render it admissible; otherwise it is not¹ This section, therefore provides that the Judge may prevent the production of inadmissible evidence, *whether it is or is not objected to* by the parties²

In *Abbas Peada v Queen Empress*³ the Lordships of the Calcutta High Court observed

"This is a wise provision of the law, because in many of these cases tried in the Sessions Court by a jury, sometimes the prisoners are not defended at all and sometimes defended by persons not fully qualified for their work. It is therefore the duty of the Judge to see that evidence, which is not admissible in itself should not be allowed to go in to the prejudice of the accused

The fact that the accused puts forward some particular ground for holding that certain evidence is not admissible does not relieve the Judge of his duty to look into all the circumstances in order to judge whether the evidence is admissible or not⁴ If by accident such inadmissible evidence is let in the Judge must distinctly tell the jury to guard themselves from being influenced by it⁵ It is impossible, however, to say even in such cases that the minds of the jury were not affected in any way by the admission of inadmissible evidence⁶ Where such admission has been prejudicial to the accused the trial will be vitiated⁷

6 "In his discretion"—It is difficult to understand the object of these words in this section. Granted that a piece of the evidence which is about to be let in is inadmissible under law it is impossible to say that the Judge can have a discretion to allow its admission or not. The judicial decisions under this section have in fact held that it is the duty of the Judge to prevent inadmissible evidence going in

Note 5

- 1 (97) 19 All 76 (97) 23 Ind App 106 7 Scr 73 (PC) *A B Miller v Vadho Das*
 (20) 7 AIR 1920 Bom 244 (245) 44 Bom 192 *Narhari Hari v Ambabai Balkrishna*
 (03) 26 Mad 36 (40) 2 Weir 733 *Thandraya Mudali v Emperor*
 2 (74) 11 Bom H C R Cr 44 (45), *Reg v Daya Anand*
 (09) 10 Cri L Jour 65 (67) 2 Ind Cas 517 (Bom) *Emperor v Kesari Dayal Kanji*
 (25) 12 AIR 1925 Cal 587 (588) 32 Cal 67 26 Cri L Jour 782 *Emperor v Panch Kari Dutt*
 (25) 12 AIR 1925 Cal 887 (888) 26 Cri L Jour 606 *Sheikh Abdul v Emperor*
 (30) 19 AIR 1932 Sind 201 (204 205) 26 Sind L R 302 31 Cr L J 147 *Pharho Shahwal v Emperor*
 (67) 7 Suth W R Cr 72 (72) *Queen v Bheelo Singh*
 [See (31) 18 AIR 1931 Pat 345 (345) 32 Cri L Jour 1025 *Phelan Singh v Emperor*
 (67) 7 Suth W R Cr 2 (2) *Queen v Kali Charn Gangooly* (Hearsay evidence)
 (1864 66) 2 Bom H C R 125 (126) *Reg v Tammis* (Evidence of character and previous conduct of a prisoner ought not to be allowed to go to the jury)
 (67) 8 Suth W R Cr 11 (12) *Queen v Plool Chand* (Evidence as to previous conviction and bad character)
 (68) 10 Suth W R Cr 57 (58) *Queen v Ram Gopal Dhur*
 (71) 15 Suth W R Cr 37 (39) 6 Beng L R App 108 *Queen v Mahima Chandra Dass* (Hearsay evidence)
 (68) 10 Suth W R Cr 39 (39) *Queen v Kulur Sheikh* (Evidence as to previous bad character)
 (26) 13 AIR 1926 Cal 793 (794) 27 Cri L Jour 611 *Gohur Howidar v Emperor*
 (97) 1897 Rat 974 (925) *Queen v Soma Dalji* (Judge should not refer to evidence before the committing Magistrate without making the depositions exhibits in his own proceedings.)
 (80) 5 Cal 768 (769) 6 Cal L Rep 219 *Roshun Dossad v Empress*
 3 (98) 25 Cal 736 (740) 2 Cal W N 484
 4 (25) 12 AIR 1925 Cal 587 (593) 52 Cal 67 26 Cri L Jour 782 *Emperor v Panch Kari Dutt*
 5 (69) 10 Suth W R Cr 17 (19) *Queen v Bykant Nath Banerjee*

Ram v Emperor
in Shivram

- (84) 10 Cal 775 (777) *Queen Empress v Uzeer*
 [See (07) 5 Cri L Jour 427 (429) 34 Cal 638 11 Cal W N 686 *Jahindra Nath v Emperor* 1

7 Construction of documents—Clause (b) —It is the duty of the Judge to decide upon the meaning and construction of all the documents given in evidence¹ He will be in error if he leaves the legal construction of a letter or other document to the jury² See also the unmentioned case³

8 "To decide upon all matters . . . to enable evidence of particular matters to be given" — Clause (c) — This clause refers only to a finding on a question of fact which it is necessary to prove to make other evidence admissible¹ Thus, the question whether an accused person was in police custody while making a confession is to be decided by the Judge² Similarly the Court has to find the preliminary facts before admitting secondary evidence or statements under s 32 sub s (1) or s 33 of the Evidence Act³ But where an approver whose pardon has been revoked is tried for the offence as provided for under s 339 and where under that section he pleads that he has complied with the conditions of the pardon the question whether he has forfeited the pardon is one for the jury and not for the Judge⁴

The Judge should always first decide the preliminary point on which the admissibility of other evidence depends. It is always dangerous to give in advance evidence the admissibility of which depends on what other witnesses may say⁵

The Judge has ample powers under s 165 of the Evidence Act to put any question to the witness or to examine any witness⁶

As to the duty of the Judge to decide about the voluntary character of a confession, see Note 8

9 When and how far a Judge may give his opinion on question of fact—Sub-section (2) — It is within the competence of a Judge in charging the jury to express his own opinion on facts and make his own suggestions on any points raised. It is for the jury to accept or reject the view of the Judge¹ In many cases it is not merely

Note 7

- 1 (33) 20 AIR 1933 PC 7 (10) 34 Cri L Jour 500 (PC) *Albert Godamuns v The King*
- 2 (1865) 3 Suth W R Cr 69 (69) *Queen Empress v Setul Chunder*
- 3 (04) 28 Bom 533 (545) 1 Cri L Jour 390 6 Bom L R 379 *Emperor v Bawlatram Lachman*

Note 8

- 1 (15) 2 AIR 1915 Cal 667 (674) 16 Cri L Jour 65 42 Cal 856 *Sashi Rajbanshi v Emperor*
- 2 (08) 7 Cri L Jour 370 (327) 31 Mad 127 18 Mad L Jour 66 *In re Sankappa Rai*
- 3 (71) 15 Suth W R Cr 11 (13 14) *In the case of Sheikh Tenoo*
- 4 (10) 11 Cri L Jour 254 (255) 33 Mad 514 5 Ind Cas 831 *In re Aligariswami Naiche*
- (15) 2 AIR 1915 Cal 667 (674) 16 Cri L Jour 65 (67) 42 Cal 856, *Sashi Rajbanshi v Emperor*
- Also see S 339A Note 3
- 5 (19) 6 AIR 1919 Cal 514 (517) 46 Cal 895 20 Cri L Jour 324 *Ramesh v Emperor*
- 6 (86) 1886 Rat 245 (248) *Queen Empress v Ruyya*

Note 9

- 1 (45) 32 AIR 1915 Lah 105 (109) 1 LR (1915) Lah 290 47 Cri L Jour 4 220 Ind Cas 467 (FB), *Abdul Rahim v Emperor* (Per Division Bench in Order of Reference — But Judge should inform the jury that they can attach as much weight as they think proper to his opinion)
- (40) 27 AIR 1940 Nag 221 (224) 41 Cri L Jour 891 *Bapurao v Emperor*

342 *Emperor v Sheo Das* (Opinion on

- (70) 13 Suth W R Cr 34 (34) *In re Duarakanath Sen*
- (68 69) 5 Bom H C R Cr 85 (97) *Reg v Fattechand* (Impressions on evidence)
- (1864) 1 Suth W R Cr 17 (17) *Queen v Bustee Khan* (Judge warning the jury not to disbelieve a mass

aruddin v Emperor (Suggestion by

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Malton v Emperor (Judge pointing

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The fact that the accused puts forward some *particular ground* for holding that certain evidence is not admissible does not relieve the Judge of his duty to look into all the circumstances in order to judge whether the evidence is admissible or not⁴ If by accident such inadmissible evidence is let in the Judge must distinctly tell the jury to guard themselves from being influenced by it⁵ It is impossible, however, to say, even in such cases that the minds of the jury were not affected in any way by the admission of inadmissible evidence⁶ Where such admission has been prejudicial to the accused the trial will be vitiated⁷

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Note 5

1 (97) 19 All 76 (92) 23 Ind App 106 7 Sar 73 (PC) *A B Miller v Uadho Das*
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(09) 10 Cri L Jour 65 (67) 2 Ind Cas 517 (Bom) *Emperor v Kesari Dayal Ka 131*
(25) 12 AIR 1925 Cal 587 (588) 52 Cal 67 26 Cri L Jour 782 *Emperor v Panch Kar Dutt*
(25) 12 AIR 1925 Cal 587 (588) 26 Cri L Jour 606 *Sheikh Abdul v Emperor*
na 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

Wali v Emperor

(1864 86) 2 Bom H C R 125 (126) *Reg v Timms* (Evidence of character and previous conduct of a prisoner ought not to be allowed to go to the jury)

(67) 8 Suth W R Cr 11 (12) *Queen v Phool Chand* (Evidence as to previous conviction and bad character)

(68) 10 Suth W R Cr 57 (58) *Queen v Paro Gopal Dhar*

(71) 15 Suth W R Cr 37 (39) 6 Beng L R App 108 *Queen v Mahima Chandra Dass* (Hearsay evidence)

(68) 10 Suth W R Cr 39 (39) *Queen v Kulam Sheikh* (Evidence as to previous bad character)

(26) 13 AIR 1926 Cal 793 (794) 27 Cri L Jour 641 *Gokur Howlader v Emperor*

(97) 1897 Rat 924 (925) *Queen v Soma Datta* (Judge should not refer to evidence before the committing Magistrate without making the depositions exhibit in his own proceedings)

(80) 5 Cal 768 (769) 6 Cal L Rep 219 *Roshan Doosad v Empress*

3 (98) 25 Cal 736 (740) 2 Cal W N 484

4 (25) 12 AIR 1925 Cal 597 (599) 52 Cal 67 26 Cri L Jour 782 *Emperor v Panch Kar Dutt*

5 (68) 10 Suth W R Cr 17 (19) *Queen v Bhjant Nath Banerjee*

Emperor

Nath v Emperor 1

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8 "To decide upon all matters . . . to enable evidence of particular matters to be given"—**Clause (c)**—This clause refers only to a finding on a question of fact which it is necessary to prove to make other evidence admissible¹ Thus, the question whether an accused person was in police custody while making a confession is to be decided by the Judge² Similarly, the Court has to find the preliminary facts before admitting secondary evidence or statements under s 12 sub s (1) or s 33 of the Evidence Act³ But where an approver whose pardon has been revoked is tried for the offence as provided for under s 339 and where under that section he pleads that he has complied with the conditions of the pardon the question whether he has forfeited the pardon is one for the jury and not for the Judge⁴

The Judge should always first decide the preliminary point on which the admissibility of other evidence depends. It is always dangerous to give in advance evidence the admissibility of which depends on what other witnesses may say⁵

The Judge has ample powers under s 163 of the Evidence Act to put any question to the witness or to examine any witness⁶

As to the duty of the Judge to decide about the voluntary character of a confession, see Note 8

9 When and how far a Judge may give his opinion on question of fact—Sub section (2)—It is within the competence of a Judge in charging the jury to express his own opinion on facts and make his own suggestions on any points raised. It is for the jury to accept or reject the view of the Judge¹ In many cases it is not merely

Note 7

- 1 (43) 20 AIR 1933 P C 7 (10) 31 Cr L Jour 530 (PC) *Albert Godamune v The King*
- 2 (1865) 3 Suth W R Cr 69 (69) *Queen Empress v Sdul Chunder*
- 3 (04) 28 Bom 533 (545) 1 Cr L Jour 390 6 Bom L R 379 *Emperor v Baulatram Lachiman*

Note 8

- 1 (15) 2 AIR 1915 Cal 667 (674) 16 Cr L Jour 65 42 Cal 856, *Sashi Rajbanshi v Emperor*
- 2 (08) 7 Cr L Jour 375 (327) 31 Mad 127 18 Mad L Jour 66 *In re Sankappa Rao*
- 3 (71) 15 Suth W R Cr 11 (13) 14) *In the case of Sheikh Tenoo*
- 4 (10) 11 Cr L Jour 254 (275) 33 Mad 514 5 Ind Cas 631 *In re Aligirswami Naicken*
- (15) 2 AIR 1915 Cal 667 (674) 16 Cr L Jour 65 (67) 42 Cal 856, *Sashi Rajbanshi v Emperor*
- Also see S 339A Note 3
- 5 (19) 6 AIR 1919 Cal 514 (517) 46 Cal 693 20 Cr L Jour 321 *Ramesh v Emperor*
- 6 (86) 1886 Rat 245 (248) *Queen Empress v Ruyya*

Note 9

- 1 (45) 32 AIR 1945 Lah 105 (109) 1LR (1945) Lah 990 47 Cr L Jour 4 220 Ind Cas 467 (17), *Abdul Rahim v Emperor* (Per Davi on Bench in Order of Reference—But Judge should inform the jury that they can attach as much weight as they think proper to his opinion)
- (40) 27 AIR 1940 Nag 221 (224) 41 Cr L Jour 894 *Bapurao v Emperor*

342 *Emperor v Sheo Din* (Opinion on

- (70) 13 Suth W R Cr 34 (34) *In re Dhanakanath Sen*
- (69 69) 5 Bom H C R Cr 85 (97) *Iqbal v Fattchand* (Impressions on evidence)
- (1864) 1 Suth W R Cr 17 (17) *Queen v Bustee Khan* (Judge warning the jury not to disbelieve a mass

aruddin v Emperor (Suggestion on by

Emperor

Malton v Emperor (Judge pointing

permissible but also desirable that the Judge should tell the jury what view he has taken of the facts in order to enable them to consider the facts properly and arrive at their own decision on them². The jurors have no experience in the matter of sifting evidence and weighing probabilities and consequently stand in need of intelligent guidance from the Judge³. It is, therefore, necessary that all help should be given to them⁴. It has been held that a charge which succeeds in avoiding any expression of opinion by Judge is the most colourless and unhelpful one,⁵ and in a recent case it was observed that if a Judge with all his advantages forms a definite and strong opinion that the evidence is not sufficient for a conviction it is dangerous to leave the matter to the jury without a strong indication of such opinion⁶.

In so expressing his opinion the Judge should remember that the jury are the final judges of fact. The Judge should, in cases where he expresses his opinion, tell the jury in the clearest terms that the responsibility for the decision is theirs and that they have to make up their minds themselves and that they need not rely on any opinion of his on the facts. He must warn them that his opinion is not binding on them⁷. This warning should

- 2 ('38) 23 AIR 1938 Cal 658 (661) ILR (1938) 1 Cal 636 40 Cri L Jour 101, *Abdul Gafur v Emperor*
 (37) 1937 Mad W N 552 (553), *Subba Valayan v Emperor*
 (36) 23 AIR 1936 Oudh 181 (164) 37 Cri L Jour 182 11 Luck 697, *Satdeo v Emperor*
 (36) 23 AIR 1936 Mad 516 (519) 37 Cri L Jour 909 59 Mad 904 *Rathanasabapathy v Public Prosecutor*

- v Emperor
Samiruddin v Emperor
- (Definite case by prosecution — Failure to prove same — Failure of Judge to point out this to jury — Charge is defective)
 ('25) 22 AIR 1935 Cal 81 (32) 36 Cri L Jour 480 *Kasimuddin v Emperor* (Judge thinking that evidence is so weak that there are grave doubts as to guilt of accused — Omission to direct jury to give accused benefit of doubt may amount to misdirection))
 3 ('86) 5 Suth W R Cr 80 (94) Beng L R Sup Vol 459, *Queen v Elahi Buz*
 (1864) 1864 Suth W R Sup 5 (5), *Queen v Abdul Juleet*

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- 4 220 Ind Cas 467 (FB)

- 7 Ind Cas 647 (DB) *Arjun*

- Panda v Emperor* (Judge's opinion as to credibility of witnesses not binding on jury)
 (37) 1937 Mad W N 552 (553), *Subba Valayan v Emperor*
 (36) 23 AIR 1936 Mad 516 (519) 37 Cri L Jour 909 59 Mad 904 *Rathanasabapathy v Public Prosecutor*
 (36) 1936 Oudh W N 201 (203) *Wajid Husain v Emperor* (But where the Judge expressed his opinion by dubbing the accused 'burglars' and remarked 'probably on account of the prompt action of the police all the three accused delivered the property which they had stolen in the aforesaid theft' — Held used was

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 to jury)

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not be given in a formal way either at the beginning or at the end of the charge, but should be given at the moment when the Judge has forcibly or otherwise expressed his opinion to the jury,⁸ though it must be remembered that in the course of a lengthy charge the Judge cannot be expected to pause always to assure the jury that the matters of fact are matters for them.⁹ In a decision of the Chief Court of Oudh¹⁰ Stuart, C. J., observed

'If the Judge attempts to take the case out of the jury's province by something in the nature of imposing his own view upon the jury, it is a case of misdirection, but if a Judge simply states the opinion which the law allows him to state, in such a manner that intelligent jurymen should see for themselves that it is only his opinion and nothing else it is not necessary for him to add as a safeguard a remark that it is only his opinion and that the jury are perfectly at liberty to form their own

The Judge should not usurp the functions of the jury but should allow them to give a finding and for that purpose should present the case to the jury in a dispassionate and impartial manner.¹¹ He should not sum up in too strong and unqualified terms or give a decided opinion on the case,¹² he should not thrust his own opinion on them so as to dictate to them their verdicts¹³ nor should he be dogmatic in his expression of the opinion¹⁴

- (23) 10 AIR 1923 Pat 233 (239) 24 Cr L Jour 495, *Gajo Singh v Emperor*
 (34) 21 AIR 1934 Oudh 122 (123) 35 Cr L Jour 502, *Hadji Hussain v Emperor*
 (29) 18 AIR 1929 Cal 742 (746) 31 Cr L Jour 673 57 Cal 740 *Nagendra Nath v Emperor*
 (28) 15 AIR 1928 Cal 269 (270) *Abdul Razal v Emperor*
 (06) 8 Cr L Jour 0 (8) 35 Cal 531 12 Cal W N 774 7 Cal L Jour 599 *Natabar Ghose v Emperor*
 (06) 8 Cr L Jour 144 (148) 10 Cal W N 153 *Sourendra Nath Mitra v Emperor*
 (98) 25 Cal 230 (231 232) *Ali Fakir v Queen Empress*
 (84) 10 Cal 970 (972) *Queen Empress v Depin Biswas*
 (25) 12 AIR 1925 Cal 872 (874) 52 Cal 595 26 Cr L Jour 1037 *Ledu Molla v Emperor*
 (1864) 1864 Suth W R Sup 5 (a) *Queen v Abdool Juleel*
 (1899) 23 Bom 318 (317) *Queen Empress v Gangia*
 (34) 21 AIR 1934 Pat 309 (311) 13 Pat 529 35 Cr L Jour 1101 *Nanka! Ahu v Emperor*
 (35) 22 AIR 1935 Rang 214 (216) 13 Rang 141 36 Cr L Jour 1232 *Scott v Emperor*
 [See (36) 37 Cr L Jour 17 (18) 158 Ind Cas 172 (Lab) *Watson v Emperor* (Question of reasonable doubt — Judge discussing the question and at the close of the charge warning the jury that they are themselves to weigh the evidence and come to a finding on facts on their judgment — Held there was no misdirection)]
 8 (34) 21 AIR 1934 Cal 77 (79) 35 Cr L Jour 483 *Kamiraddi Sheikh v Emperor*
 9 (31) 18 AIR 1931 Cal 178 (182) 32 Cr L Jour 190 (FB), *Emperor v Panchu Sheikh*
 [See (35) 22 AIR 1935 All 928 (929) 37 Cr L Jour 173 *Srikishan v Emperor* (It is not necessary for Judge on every occasion on which he expresses his opinion on a question of fact to tell the jury that they are sole judges of questions of fact — It is sufficient if he makes that statement quite clearly to the jury at the end of his charge)]
 [See also (1900) 4 Cal W N 196 (200), *Rahamat Ali v Empress*]
 10 (28) 15 AIR 1928 Oudh 376 (327 328) 29 Cr L Jour 721, *Des Raj v Emperor*
 11 (21) 6 AIR 1921 Cal 252 (255) 23 Cr L Jour 244, *Emperor v Taribulla*
 12 (27) 14 AIR 1927 Oudh 259 (259) 2 LucL 597 29 Cr L Jour 633, *Nakru Mal v Emperor*.

(130) 17 AIR 1930 Cal 430 (432) 31 Cr L Jour 1115 *Monohar Mandal v Emperor*
 (31) 18 AIR 1931 Cal 533 (535) 32 Cr L Jour 1101 (SB), *Superintendent and Remembrancer of Legal Affairs v Purna Chandra Das*

(5) 12 AIR 1925 Sind 116 (123) 25 Cr L Jour 761, *Topandas v Emperor*
 [See however (40) 27 AIR 1940 Nag 221 (224) 41 Cr L Jour 891 *Dapurao v Emperor* (Opinion even when it is couched in somewhat dogmatic and a servile language will not vitiate the charge if the

or persuade the jury to accept his opinion¹⁵ He should charge in such a way as not to create any impression in the mind of the jury that it was a direction from the Judge which they should follow¹⁶ or that the opinion was the only opinion that could be arrived at from the evidence in the case¹⁷

If the Judge by his strong expression of opinion takes away the case from the province of the jury, then it will amount to a misdirection¹⁸ But if on a whole review of the charge it appears that the case is left to the jury to decide, it will not amount to a misdirection¹⁹ See also Note 11 on S 297

Duty of jury

299.* It is the duty of the jury —

- (a) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned;
- (b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not,
- (c) to decide all questions which according to law are to be deemed questions of fact,
- (d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning

Illustrations

(a) A is tried for the murder of B

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted

* 1882 S 299, 1872 S 257, 1861 — Nil

Judge cautions the jury, as regards their duty as to the question of fact and their right to disregard his remarks)

(Do)]

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(30) 11 Cal 94- (666) (185), *Queen-Empress v O'Hara*

16 (26) 13 AIR 1926 Cal 996 (997) 27 Cri L Jour 1033, *Nasibulla Shaikh v Emperor*

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17d v Emperor

(30) 11 Cal 94- (666) (185), *Queen v Ramgopal Dhur*

(996) 15 AIR 1926 Cal 996 (997) 27 Cri L Jour 1033, *Nasibulla Shaikh v Emperor*

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence

Each of these is a question for the jury

Synopsis

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|---|--|
| 1. Legislative changes | 4. Voluntariness of confession See S 299 Note 3 |
| 2. Duties of the Judge and jury respectively. | 5. Charge for graver offence — Verdict for smaller offence |
| 3. Meaning of words | 6. Illustration (a) to the section |

NOTE to the Synop is See the Notes indicated for the following topics

Benefit of doubt See Note 2

Questions of law See Note 2

Forfeiture of pardon See S 298 Note 8

Several accused See S 297 Note 7

Provocation See Note 2

Sufficiency of evidence See Note 2

Questions of fact See Note 2

1. Legislative changes.

Changes introduced in 1862 —

(1) The words "(other than terms of law)" were newly added

(2) The words "declared by the Indian Penal Code or by any other law to be questions of fact" were replaced by the words "which according to law are to be deemed questions of fact"

2 Duties of the Judge and jury respectively. —

The different duties of the Judge and the jury are made clear in ss 297, 298 and in this section. Shortly stated, it is the duty of the Judge to lay down the law and it is the duty of the jury to decide which view of the facts is true, in accordance with the directions of the Judge on the questions of law¹. It is not the province of the Judge to decide upon the facts except in cases coming under cl (c), s 298 (1). Nor is it the province of the jury to decide questions of law². It is for the Judge to give direction to the jury on the following questions

Section 299 — Note 2

1

See v. Nga E Pe.

vs to a jury upon the

** v. Jamalul Fakir*

(29) 16 AIR 1929 Cal 57 (60) : 50 Cal 150 : 30 Cri L Jour 435, *Pebati v. Emperor*. (What amounts or does not amount in law to evidence is a question of law)

(33) 20 AIR 1933 Pat 273 (273) : 34 Cri L Jour 731, *Emperor v. Sitalu*. (Whether witnesses are to be believed or not is a question for jury)

is privileged or not is a point of law)

(70) 13 Buth W R Cr 26 (26), *Queen v. Shurffuddin*

(See (24) 11 AIR 1921 Cal 321 (322) : 51 Cal 347 : 25 Cri L Jour 753, *Emperor v. Dhananjay Row*)

confession,¹⁷ or the evidence of an accomplice,¹⁸

- (2) the question whether fraud or negligence is established by the evidence in the case¹⁴ or whether a thing was done with a particular intention¹⁵ or knowledge¹⁶ in forming an opinion as to this the jury may draw such a presumption about facts as S 114 of the Evidence Act allows a Court to do¹⁷
- (3) the question whether the accused has sufficient maturity of understanding, to judge the nature and consequences of his conduct¹⁸
- (4) the question whether a provocation was so grave and sudden as to be sufficient to bring the case within the exceptions recognised by law¹⁹
- (5) the question as to whether the accused intended to convey any imputation by his words and whether he believed or had reason to believe that the imputation would produce a particular effect²⁰
- (6) whether particular fact or facts have been proved²¹

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- (32) 19 AIR 1932 Bom 406 (409) 56 Bom 301 33 Cri L Jour 666 *Emperor v. Ranirao*
 (67) 8 Suth W R Cr 60 (60), *Queen v. Hosseinee*
 (14) 1 AIR 1914 Cal 276 (279) 41 Cal 406 14 Cri L Jour 485 *Nafar Shesh v. Emperor*
 (33) 20 AIR 1933 Cal 167 (188) 34 Cri L Jour 369 *Baidoo v. Emperor*
 (35) 22 AIR 1935 Pat 433 (434 435) *Emperor v. Bhagrat Sahu* (Verdict depending upon credibility of witnesses—Considerable weight to be given to verdict)
 (33) 20 AIR 1933 Pat 273 (273) 34 Cri L Jour 731 *Emperor v. Sitalu Ahr* (Do)
 [See also (04) 1 Cri L Jour 772 (773) 6 Bom L R 671 *Emperor v. Mahomad Ismail* (Verdict of the jury should be taken upon the evidence actually adduced at the trial and not upon the Judge's view of the strength of the evidence)]
 12 (45) 32 AIR 1945 Lah 105 (110) 1 L R (1945) Lah 290 47 Cri L Jour 4 220 Ind Cas 467 (F B), *Abdul Rahim v. Emperor* (Per Division Bench in Order of Reference—It is for the jury to say whether all or any of the circumstances relied on as corroborating the retracted confession were established and further whether they sufficiently corroborated the confession)
 (66) 1666 Rat 311 (312) *Queen Empress v. Bayaji*
 (77) 1 Cal L Rep 275 (277), *Empress v. Mukhun Kumar* (The voluntariness of a confession is for the jury)
 (16) 5 AIR 1916 Cal 72 (72) 19 Cri L Jour 959, *Emperor v. Kabali Katom*
 (18) 5 AIR 1918 Cal 66 (91) 45 Cal 557 19 Cri L Jour 305 *Amiruddin Ahmed v. Emperor*
 (20) 12 AIR 1925 Cal 587 (589) 52 Cal 67 26 Cri L Jour 782 *Emperor v. Panchkari Dutt* (Truth or falsity of confession is for the jury)
 (27) 14 AIR 1927 Cal 993 (400) 26 Cri L Jour 485 *Azimuddy v. Emperor*
 (96) 20 Bom 215 (221), *Queen Empress v. Devji Govindji*
 13 (42) 29 AIR 1912 Oudh 221 (223 224) 17 Luck 516 43 Cri L Jour 416 198 Ind Cas 714, *Jagannath v. Emperor* (Question whether a witness is an accomplice and whether his evidence should be relied upon are questions for jury)
 (78) 1 Mad 394 (395) 2 We r 799 *Reg v. Ramasami Padayachi*
 (33) 20 AIR 1933 Cal 509 (511) 34 Cri L Jour 841 *Chittiya Ranjan Das v. Emperor*
 (30) 17 AIR 1930 Pat 513 (515) 9 Pat 606 32 Cri L Jour 72, *Ramsarup v. Emperor*
 14 (100) 12 B 111 (111) 12 B 111

Iya Molla
 v. Ali Raza.

In murder cases, the question of inference of guilt of the accused to be drawn from the circumstantial evidence appearing against him is a question of fact and not of law and should be left to the jury to decide²³ In such cases, the jury must first decide whether the facts proved exclude the possibility that the deed was done by some other person and if they have doubts they must let the prisoner have the benefit of it²³

See also the undermentioned cases²¹

3 Meaning of words — It is for the jury to decide the meaning and effect of words except the meaning of terms of law. Thus, to ascertain the effect of certain articles in a newspaper alleged to be seditious is for the jury. But the meaning of the word 'disaffection' as used in S 121A, Penal Code, which is a term of law¹ as well as the legal effect and bearing of a document,² are for the Judge to decide

4 Voluntariness of confession — See Section 298, Note 3

5. Charge for graver offence — Verdict for smaller offence. — A jury may find the accused guilty of a smaller offence than that with which he is charged¹

- 22 (87) 24 AIR 1937 Lah 127 (130) 17 Lah 547 88 Cri L Jour 472, *Mangal v Emperor*
 23 (11) 12 Cri L Jour 329 (333) 10 Ind Cas 929 (Low Bur), *Emperor v Ali Cassim Triff* (In a case of murder depending upon circumstantial evidence the jury should not convict the accused unless they are convinced upon the evidence before them so as to leave no reasonable doubt that the accused alone and no body else was guilty of the offence)
 (17) 4 AIR 1917 Lah 3(48) 18 Cr L J 482 (483 484) 1917 Pun Re No 7 Cr, *Emperor v Browning*
 24 (45) 32 AIR 1945 Lah 105 (110) ILR (1945) Lah 290 47 Cri L Jour 4 220 Ind Cas 467 (FB) *Ibdui Rahim v Emperor* (Per Division Bench in Order of Reference — The question whether a certain witness was inimical towards, accused is for jury to decide)
 (87) 88 Cri L Jour 442 (443) 167 Ind Cas 748 (Nag), *Gangabisa v Emperor* (The jury alone have the power to determine the question of fact whether the accused committed the offence under S 307 or S 325 or S 328 Penal Code)
 (29) 16 AIR 1929 Cal 57 (61) 56 Cal 150 80 Cri L Jour 435, *Rebais Mohan v Emperor* (Whether one witness corroborates another)
 (10) 11 Cri L Jour 234 (255) 5 Ind Cas 831 33 Mad 514 *In re Aligiriswami Natchen* (It is the duty of the jury and not of the Judge to decide whether the approver has forfeited his pardon or not)
 (08) 8 Cri L Jour 859 (860) 8 Cal L Jour 253 *Emperor v Kamar Ali* (The verdict of the jury after seeing the physical condition of the accused is to be preferred to the testimony of witnesses. The jury were competent to decide whether a person in physical condition was capable of taking part in a riot and could have had the courage to be at a place where a riot took place)
 (29) 16 AIR 1929 Cal 1 (7) 30 Cri L Jour 494, *Basur Rahman v Emperor* (It is for the jury to decide whether prisoner when he committed offence was incapable of distinguishing right from wrong)
 (05) 2 Cri L Jour 311 (313) 1 Cal L Jour 385 *Pannar Mondal v Emperor* (Questions as to the identity of thumb impressions on two or more documents being of the same person)
 (15) 2 AIR 1915 Cal 667 (674) 16 Cri L Jour 65 (67) 42 Cal 856, *Sashi Rajbanshi v Emperor* (Whether the pardon was forfeited)
 (03) 26 Mad 467 (468) 2 Weir 517, *Guzala Hanuman v Emperor* (Whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence was a matter entirely for the jury)

Note 3

- 1 (98) 22 Bom 112 (132), *Queen Empress v Bal Gangadhar Tilak*
 (1900) 2 Bom L R 286 (298) *Empress v Luzman Narayan*
 (1900) 2 Bom L R 304 (307, 308) *Empress v Vinayak Narayan*
 (92) 19 Cal 25 (45) *Queen Empress v Jogendra Chunder*
 2 (1865) 3 South W R Cr 69 (70) *Queen v Setul Chunder*

Note 5

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6. Illustration (a) to the section. — It is not in every case of murder that the Judge should point out to the jury the difference between murder and culpable homicide, where in a trial for murder a verdict of culpable homicide not amounting to murder cannot properly be come to, under any aspect of the case before the Court the Judge is not called upon to explain the distinction between murder and culpable homicide not amounting to murder.¹

300. In cases tried by jury, after the Judge has finished his charge, Retirement to consider the jury may retire to consider their verdict.

Except with the leave of the Court, no person other than a juror shall speak to or hold any communication with, any member of such jury.

Synopsis

- 1 Retirement to consider verdict
- 2 Prohibition of communication with non-jurors.

NOTE to the Synopsis See the Notes indicated for the following topics

Charge before verdict—Essential See S 297, Note 2
Court — Directions by, during deliberation See Note 2

Dispersal of jury before verdict See Note 1

Enquiry as to acts of jurors—Statements of jurors See Note 1

Opinion expressed beforehand — Fresh trial and fresh jury See Note 2

Police—Presence of See Note 2

Separation of jury before verdict See Note 1

Verdict See Notes on S 301

1. Retirement to consider verdict.—After the Judge has finished his charge, the jury may retire to the jury room immediately. The section does not contemplate that the jury should be allowed to disperse and then re-assemble in the jury room to consider their verdict. Hence, where owing to the indisposition of the foreman of the jury, the jurors were allowed to disperse for a few hours and then they returned to the Court and considered and delivered their verdict, it was held that the procedure was illegal.¹

The jury must not separate until they have considered and delivered their verdict. They should all be in the retiring room together during the whole of the time between the moment of their retirement and the moment when their verdict is taken by the presiding Judge. Hence, where out of nine members who constituted the jury, five first came out of the jury-room and sat in the Court but the remaining four stayed in the jury room for half an hour more when they came and sat in the Court and the foreman delivered the verdict, it was held that the verdict was vitiated.²

In considering their verdict, the jury ought to be guided, on questions of law, by the directions of the presiding Judge. They are not entitled to consult a commentary on the law during their deliberation.³

When the verdict is attacked on the ground of anything that happened in the jury-room while the jurors were considering their verdict, it is not desirable to receive in evidence the statements of individual jurors in order to impeach the verdict.⁴

* 1882 : S 300 ; 1872 : S 263 ; 1861 : S 352

Note 6

1. (36) 23 AIR 1936 Rang 421 (424, 425) : 37 Cri L J 1050 . 14 Rang 716 (FB), *Emperor v. Nga E Pe*.
(16) 3 AIR 1916 Low Bur 114(116) 17 Cri L J 49 (50) 8 Low Bur Rul 306(FB), *Nga Mya v Emperor*.

Section 300 — Note 1

1. (25) 12 AIR 1925 Pat 595 (596) : 26 Cri L Jour 861, *Sariman Ahir v. Emperor*

2. (30) 17 AIR 1930 Cal 446 (447) : 31 Cri L Jour 1090, *Kasherruddin v Emperor*.

301.* When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

Synopsis

- 1 Delivery of verdict
- 2 Verdict as to offence not specifically charged
- 3 Special verdict
- 4 Verdict arrived at by casting lots

NOTE to the Synopsis See the Notes indicated for the following topics

Individual opinions of jurors See Note 1

Jury's observations after verdict See Note 1

Several accused — Verdict See Note 1

Several charges — Verdict See Note 1

Verdict as to minor offence See Note 2

Verdict — Meaning of See Note 1

Verdict of benefit of doubt See Note 1

Verdict of not guilty — Effect See Note 1

Verdict — Repugnancy in See Note 1

1 Delivery of verdict — By verdict should be understood the collective opinion of the jury as a body, arrived at after mutual consultation and ascertained and announced by the foreman¹ A recommendation made by the jurors in the verdict is however, not a part of the verdict² In cases where an accused person is tried for various offences arising out of a single act or series of acts the word verdict means the entire verdict on all the charges and is not limited to the verdict on a particular charge³

As said already, the verdict is the opinion of the jury as a body⁴ In case of disagreement, the individual opinions of the members of the jury should never be disclosed and the Judge commits an irregularity in recording the individual opinions of the jurors⁵

The jury must return a verdict on all the charges on which an accused is tried see S 303 Where there are several accused persons in a case, the jury must return a verdict as against each⁶ Where there are several charges it would be a convenient course to follow to take the verdict of the jury upon each charge separately this would obviate the difficulty in ascertaining what their verdict is on the various charges⁷ A verdict that the jury gave the accused the benefit of doubt is not a verdict according to law although such a verdict is often returned A verdict of "not guilty" covers every condition from mere hesitating doubt to conviction of innocence⁸ But it is a very dangerous principle to adopt to regard a verdict of "not guilty" as not fully establishing the innocence of the person to whom it relates⁹ Mere repugnancy in a verdict is not sufficient to quash a

* 1882 S 301, 1872 S 263, 1861 — Nil

(29) 16 AIR 1929 Cal 343 (345) 56 Cal 1032 31 Cri L Jour 366, *Abdur Rashid v Emperor* (A jury having once been discharged should not be recalled to do duty as jurors in the same case as it is reasonable to suppose that after discharge those jurors might have mixed freely with the people and talked about the case with others)

Section 301 — Note 1

1 (14) 1 AIR 1914 Mad 319(321) 36 Mad 585(589) 15 Cri L J 197, *Public Prosecutor v Abdul Hameed*

(25) 12 AIR 1925 Oudh 746 (746) 26 Cri L Jour 1346 *Jagannath v Emperor*

2 (34) 21 AIR 1934 Oudh 34 (35) 147 Ind Cas 689, *Emperor v Vidya Sagar*

3 (95) 22 Cal 377 (392) *Krishna Dhan Mandal v Queen Empress*.

4. (01) 24 Mad 523 (536) 2 Weir 340, *King Emperor v Tirumal Reddi*

Abdul Hameed

* accused charged

(See (38) 25 AIR 1939 Cal 460 (462 463) 39 Cri L Jour 674 *Ebad Khan v Emperor* (Accused charged under Ss 366 and 376, Penal Code—Jury can convict accused under S 366 and acquit them

Arkar

vs Behari v Empe

conviction based on such verdict.¹⁹

Where, after delivering the verdict the foreman attempted to add something and the Judge stopped him from doing so, it was held that it was not proper to stop the jury at such a stage because it may so happen that before the verdict is recorded the foreman of the jury may make some observations in respect of that verdict which may show that the jury have not properly understood the case, in which case it would be necessary to re charge the jury so as to lay the case properly before them ¹¹ See also Notes on ss. 301 and 303

There is no particular form in which the jury are to deliver their verdict¹² The mere fact that the jury add to their verdict their finding on the facts on which the verdict is based does not vitiate the verdict¹³

As to interpretation of verdicts, see the undermentioned cases ¹⁴

A verdict of the jury after they have been discharged is not legal¹⁶

2 Verdict as to offence not specifically charged — Sections 23¹ and 238 lay down the circumstances under which an accused person who is charged with one offence can be convicted of a different offence though not specifically charged with it. The principle of these sections applies also to the verdict of a jury and the jury can return a verdict of guilty in respect of an offence different from that specifically charged against the accused provided the circumstances of the case fall within the purview of these sections. Thus, where on a charge of murder the jury finds that the accused was deprived of his self control by grave and sudden provocation, they can return a verdict of culpable homicide not amounting to murder¹ (see S 238). Similarly on a charge of rape the jury can return a verdict of attempt to commit rape (S 238)². On a charge of dacoity the jury can return a verdict of theft (S 238)³ or of abetment of dacoity or robbery (S 237)⁴. On a charge under S 140 read with S 325 Penal Code, it is open to the jury, if it disbelieves the evidence as to the unlawful assembly, to convict the accused under S 395 alone though there was no separate charge under that section⁵. See also the undermentioned cases⁶.

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Also see D 204 Note 1

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14 (06) 10 Cal W N xxxvii (xxxviii) (P C) *Wehner v The King* (Where jury found that accused had caused death but that he was not responsible for his actions owing to influence of liquor held this did not amount to verdict of guilty)

(08) 7 Cr L Jour 362 (305) 12 Cl W N 530 (F B), *Emperor v Khudiram Dass* (A verdict such as

Emile

language of a jury in explaining the reasons for their verdict ought not to be construed too narrowly)

15 (31) 21 AIR 1931 P C 227 (227) 151 Ind Cas 529 (PC) *Warren Dugane Smith v The King*

Note 2

FOR

S F Ghosh

5 (80) 5 Cal 871 (873) *Govt of Bengal v Mahaddi*

[But see (15) 2 AIR 1915 Cal 292 (294, 295) 15 Cri L Jour 155 (158) 41 Cal 662 *Emperor v. Madan Mondol*]

6 (33) 25 AIR 1939 Cal 51 (49 63 63) 39 Cri L Jour 161 I L R (1938) 1 Cal 290 *Golaka Behari v Emperor* (Charge under S 302 read with S 120B—Jury cannot return a verdict of guilty either under

Where the jury returned a verdict of not guilty on the charges framed, but by the same verdict found the accused guilty of an offence triable with assessors only, and the Judge convicted the accused on such finding it was held that in the absence of any miscarriage of justice the conviction will not be set aside⁷

3 Special verdict — A special verdict is one where the jury merely state certain facts as proved and leave it to the Judge to draw the legal inference from them¹. Such a verdict is recognised as a proper verdict under the English law². But there is a conflict of decisions as to whether a special verdict would be a legal verdict under the Code. On the one hand it has been held by the Bombay High Court that a special verdict would be a legal verdict under the Code³. The High Court of Calcutta is inclined to the same view⁴. On the other hand the Madras High Court has held that such a verdict is not a legal verdict⁵.

In dealing with special verdicts a Judge is confined to the facts positively stated in the verdict and cannot himself supply by intendment or implication any defect in the statement⁶. But if the special verdict is ambiguous or incomplete it is open to him to question the jury under S 303 and have their verdict supplemented⁷.

4. Verdict arrived at by casting lots — As seen in Note 1 the verdict of a jury is the collective opinion of the jury as a body arrived at after mutual consultation and ascertained and announced by the foreman. Hence a verdict arrived at by casting lots among the jurors would not be legal. But the sworn statement of a juror is not admissible for the purpose of showing that a verdict was arrived at by casting lots¹.

S 306 read with S 120B or under S 326 as these offences are not minor to the offence of conspiracy to murder)

(37) 24 AIR 1937 Pat 602 (661) 39 Cri L Jour 156 *Emperor v Haria Diobi* (Accused tried under S 397 — Jury returning verdict of not guilty — Jury can find accused guilty under S 303 or S 305 even in absence of charge)

(32) 19 AIR 1932 Cal 297 (298) 59 Cal 1040 33 Cri L Jour 246 *Durlav Namasidra v Emperor* (Persons charged under Ss. 302 and 201 Penal Code — Jury while acquitting them under S 303 can find them guilty of minor charge under S 201)

(14) 1 AIR 1914 Mad 425 (428) 13 Cri L Jour 739 (741) 37 Mad 236 *In re Adabala Mutiyalu* (Charge under S 397 — Verdict of guilty under S 306)

(75) 23 Suth W R Cr 61 (62) *Queen v Lakhinarain Agoori* (Charge under Ss 304 305 303 — Verdict of guilty under S 335)

(1865) 3 Suth W R Cr 41 (41) *Queen v Saloo Sheth* (Verdict of guilty for a minor offence when offence charged is a major offence)

7 (198) 15 AIR 1918 Mad 275 (275) 29 Cri L Jour 351 *Arumuga Kone v Emperor* (16 Mad 943 distinguished)

Note 3

1 (94) 19 Bom 735 (736) *Queen-Empress v Madhav Rao* (If in a charge of rape the jury returned a verdict that the accused did the act but with the consent of the woman it is not necessary to ask them to return a verdict of guilty or not guilty)

(95) 20 Bom 215 (217) *Empress v Devji Goundji*

2 (129) 13 Cri L Jour 586 (587) 15 Ind Cas 1002 (Mad) *Arunachala Thevan v Emperor*

v Darendra Kumar

5 (12) 13 Cri L Jour 586 (597 598) 15 Ind Cas 1002 (Mad) *Arunachala v Emperor*

6 (94) 191 Rat 710 (714) *Queen-Empress v Abdul Rasal*

7 (94) 191 Rat 710 (713) *Queen Empress v Abdul Rasal*

(76) 14 Suth W R Cr 59 (62) *Queen v Hurry Prosad Gangooj*

(06) 3 Cri L Jour 1 (3) 3 Low Bur Rul 75 11 Bur L R 236 (12) *Ila Gji v Emperor*

Note 4

1 (13) 14 Cri L Jour 392 (393) 40 Cal 693 20 Ind Cas 216 *Hara Kumar v Emperor*

302.* If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous

1 Scope of the section — This section empowers the Judge when the jury are not unanimous in their verdict to require them to retire for further consideration.¹ Hence when the jury differ in their opinion, the proper course for the Judge is to direct them under this section to re consider their verdict.² But the section is intended to be applied as soon as the Judge ascertains that there is a difference of opinion among the jurors and before the verdict is delivered. The section does not apply to cases where the verdict has actually been delivered.³ When directing the jury to re consider their verdict under this section it is open to the Judge to give them fresh directions on matters of law.⁴

If the jury are unanimous their verdict must be received unless it is contrary to law.⁵ Hence where the verdict is ambiguous the proper procedure is to question the jury under S 303 and clear up the matter and not to direct the jury to re consider the verdict.⁶ But where the verdict is not in accordance with the law⁷ or where from the observations of the foreman of the jury it is clear that the jury have not understood the case⁸ the Judge can give them fresh directions and ask them to retire for further consideration of the verdict

Verdict to be given
on each charge

Judge may question
jury

Questions and answers
to be recorded

303.† (1) Unless otherwise ordered by the Court the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is

(2) Such questions and the answers to them shall be recorded

* 1882	S 302	1872	S 263,	1861	S 352
† 1882	S 303	1872	S 263	1861	— Nil

Section 302 — Note 1

1 (98) 1898 Rat 987 (983 984) *Empress v Chunilal Vitthal*

7 Low Bur Rul 140 *Kya Nyun v*

Emperor (Section does not prevent mere ascertainment of actual majority)

(84) 10 Cal 140 (144) 13 Cal L Rep 358 *Hurri Churn v Empress* (After asking what is the actual majority and their opinion Judge cannot proceed under Section)

4 (95) 1895 Rat 738 (737) *Empress v Bharmia*

(01) 1 Cr L Jour 265 (268) 6 Bom L R 258 *Emperor v Bharmia*

5 (80) 5 Cal 871 (873 874) *Government of Bengal v Maladdi*

(23) 15 AIR 1929 Cal 229 (28) 29 Cr L Jour 298 *Superintendent & Legal Remembrancer v Jahay Sikkh*

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of guilty

Synopsis

- 1 Verdict to be on all the charges
- 2 Form of verdict
- 3 "May ask them such questions as are necessary to ascertain what their verdict is"
- 4 Questions and answers to be recorded
- 5 Re-consideration of the verdict

NOTE to the Synopsis See the Notes and cited for the following topics

Effect of no finding on some charges See Note 1

Object of the section See Note 3

Questions as to nature in a finding of provocation See Note 3

Question only when the verdict is ambiguous See Note 3

Reasons for the verdict See Note 3

1 **Verdict to be on all the charges** — Where there are several charges against an accused and evidence has been heard on all the charges the jury should submit a verdict on *all* the charges¹ A failure to give a verdict on one of the charges framed does not, however amount to an acquittal on that charge and the accused can be ordered to be re tried again on the charge on which the verdict was silent²

2 **Form of verdict.** — The law does not prescribe any special form in which the jury are to return their verdict They are at liberty to deliver it in any form they like and if that finding is not exhaustive as to the facts in issue which go to make up the charge it is the duty of the Judge to put such questions as shall elicit a complete finding³ In a trial for an offence under s 408 Penal Code in respect of a gross sum said to have been misappropriated within a year and composed of more than three items, the proper form in which the verdict should be given is a verdict in respect of an offence under s 408 and not in respect of each of the items alleged to be misappropriated²

3. "May ask them such questions as are necessary to ascertain what their verdict is" — It is not open to the Judge to make summaries or conjectures as to what is the verdict of the jury¹ A Judge is therefore, empowered to put questions to the jury where they are necessary to ascertain *what their verdict is*² It is only in cases where

Section 303 — Note 1

1 (39) 26 AIR 1939 Cal 321 (323) 40 Cri L Jour 619, *Nanda Ghosh v Emperor* (Accused charged

charged is proper)

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Note 2

1 (70) 14 Suth W R Cr 59 (62) 8 Beng L R 557, *Queen v Hari Prosad Gangooly*
2 (06) 3 Cri L Jour 1 (3) 3 Low Bar Rul 75 11 Bar L R 293 (FB) *Ila Gyi v Emperor*

2 (30) 17 AIR 1930 Cal 717 (719) 32 Cri L Jour 321 *Nahim Buz v Emperor*

Note 3

1 (36) 23 AIR 1936 Oudh 164 (165) 37 Cri L Jour 182 11 Luck 697, *Saldeo v Emperor*

2 (36) 23 AIR 1936 Oudh 164 (165) 37 Cri L Jour 182 11 Luck 697, *Saldeo v Emperor*

(35) 22 AIR 1935 All 1020 (1022) 36 Cri L Jour 1377, *Dora v Emperor* (Beyond putting questions the Judge has no jurisdiction to enter into a discussion of the facts of the case with the jury)

(05) 2 Cri L Jour 259 (264) 32 Cal 759 9 Cal W N 520, *Emperor v Abdul Hamid*

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v Emperor.

(33) 9 Cal 53 (61) 11 Cal L Rep 169 *In re Dhunum Kasee*

the jury have failed to return a complete verdict on all the charges or heads of charge³ or the verdict returned is ambiguous and not clear⁴ that the Judge may ask questions in order to find out what exactly the verdict is. Thus, where the verdict is not exhaustive as to the facts in issue which go to make up the charge or charges, it is competent to the Judge to ask questions so as to elicit a complete finding⁵. Similarly, where the jury return a verdict of guilty of an offence under S 304, Penal Code, the Judge can ask questions for the purpose of finding out under which part of the section they find the accused guilty⁶. So also, where, in a charge of murder the verdict was "guilty of murder under grave and sudden provocation, the Judge can ask questions under this section for the purpose of ascertaining if the provocation was sufficient to destroy self control⁷. Likewise, where in a charge under S 326 Penal Code, the jury returned a verdict of "guilty but not voluntarily the Judge can ask the jury to explain their verdict inasmuch as voluntariness of the act is the gist of the offence under that section⁸. Where the jury return a verdict of not guilty of culpable homicide it is the duty of the Sessions Judge to require the jury to find expressly whether or not any minor offence had been committed⁹. Where in a trial under S 489B Penal Code for uttering forged notes, the jury returns a verdict that the accused uttered the notes the Judge should ascertain from the jury their opinion as to whether the said notes had been uttered with the knowledge of their being forged¹⁰. In a trial under S 306 Penal Code, it is the duty of the Judge to put a specific question to the jury as to the conclusion they have come to in relation to the age of the girl whose maltreatment has been the subject of the charge¹¹.

On the other hand, where the verdict is clear, complete and unanimous the

3 (86) 1886 Rat 289 (290) *Queen Empress v Sida*

(24) 11 AIR 1924 Cal 47 (47) 50 Cal 658 24 Cri L Jour 838, *Eran Khan v Emperor* (Incomplete verdict)

(70) 14 Suth W R Cr 59 (62) 8 Beng L R 507, *Queen v Hari Prosad Gangooly*

4 (35) 29 AIR 1935 All 1020 (1022) 38 Cri L Jour 1377, *Dori v Emperor*

(04) 21 Cal 955 (973, 974), *Wafadar Khan v Queen-Empress* (Jury leaving it uncertain what the common object of unlawful assembly was)

(70) 14 Suth W R Cr 59 (62) *Queen v Hari Prosad Gangooly*

(31) 18 AIR 1931 Cal 636 (636) 33 Cri L Jour 29 *Emperor v Karim Das*

(04) 1 Cri L Jour 331 (332) 24 Bom 412 6 Bom L R 361 *Emperor v Kondiba*

(26) 13 AIR 1926 Cal 895 (896) 27 Cri L Jour 926 *Emperor v G C Wilson* (Verdict was confused and unintelligible)

(03) 7 Cal W N 135 (137), *King Emperor v Chudghan Gossain*

(25) 12 AIR 1925 Cal 260 (262) 26 Cri L Jour 532 *Khurde Kumar v. Emperor* (Case under S 408, Penal Code—Jury's verdict as to amount embezzled is not definite—Judge bound to question jury)

(05) 2 Cri L Jour 259 (261) 32 Cal 759 9 Cal W N 520 *Emperor v Abdul Hamid* (The verdict in this case was held to be clear and not perverse)

(98) 20 Bom 215 (217), *Queen Empress v Deji Govindji*

(31) 18 AIR 1931 Mad 775 (776) 55 Mad 256 32 Cri L Jour 1276, *Sundaram Iyer v Emperor*

5 (70) 14 Suth W R Cr 59 (62), *Queen v Hari Prosad Gangooly*

Emperor
ask a question to
14, Penal Code)

(71) 15 Suth W R Cr 17 (18) 6 Beng L R App 86, *Queen v Kali Churn Dass*

(1865) 2 Suth W R Cr L 11 (11)

(69) 12 Suth W R Cr 35 (35 36) 6 Beng L R App 87n, *Queen v Amir Khan* (Otherwise it will be

Tin Gyn

8 (03) 7 Cri L Jour 362 (365) 12 Cal W N 530 (FB), *Emperor v Khudiram Dass*

9 (1900) 2 Bom L R 374 (134) *Queen-Empress v Pandulal Patil*

(27) 14 AIR 1927 Rang 64 (70) 4 Rang 498 29 Cri L Jour 213 (FB), *Emperor v Nga Tin Gyn*

10 (36) 23 AIR 1936 Oudh 164 (165) 37 Cri L Jour 182 11 Luck 687, *Saldeo v Emperor*

11 (36) 23 AIR 1936 Cal 675 (676) 38 Cri L Jour 176, *Samarali v Emperor*

Judge is bound to accept the same¹² or if he disagrees with it to make a reference to the High Court under s 307¹³. He has no power to ask questions of the jury¹⁴ as to their reasons for the verdict¹⁵. As to whether for the purpose of making a reference under s 307 the Judge can question the jury as to their reasons for the verdict see s 307 Note 13.

The mere fact that the jury were unable to give reasons for their verdict cannot be held to show that they had no adequate reasons for their verdict¹⁶.

4 Questions and answers to be recorded — A Judge who does not record the questions put to the jury and their answers thereto but gives only a substance of the result cannot be deemed to have complied with the direction of law under this section¹. The provisions of this and the next section imply that the jury are cognizant of the record as made by the Judge of the questions put to them and answers given by them. It is extremely desirable that such record should be immediately read over to the jury and this should always be done². The omission to record the verdict of the jury in the terms prescribed by the Code is not however such an irregularity as requires the trial to be quashed and a new one to be ordered³.

5 Re-consideration of the verdict — Where the jury have delivered a clear and legal verdict the Judge cannot ask them to reconsider their verdict if he disagrees

12 (83) 9 Cal 53 (61) *In re Dhunum Kasee* (The verdict if simple and clear may be erroneous but it cannot be ambiguous)

(07) 6 Cri L Jour 373 (373 374) 30 Mad 469 17 Mad L Jour 476, *In re Seranadu*

13 (35) 22 AIR 1935 All 1070 (1077) 36 Cri L Jour 1377 *Dori v Emperor*

(14) 1 AIR 1914 Low Bur 244 (214) 7 Low Bur Rul 140 1 Cri L Jour 678 *Kya Nyun v Emperor*

(34) 21 AIR 1934 Cal 173 (174) 61 Cal 206 35 Cri L Jour 496 (SB) *Sadeh Mandal v Emperor*

(31) 18 AIR 1931 Mad 77 (776) 33 Mad 206 37 Cri L Jour 1276 *Sundaram Iyer v Emperor*

14 (35) 22 AIR 1935 All 1020 (1022) 36 Cri L Jour 1377 *Dori v Emperor*

(20) 7 AIR 1920 Cal 406 (407) 21 Cri L Jour 829 *Fdon Karikar v Emperor*

(08) 3 Cri L Jour 371 (372) 29 Mad 91 *Emperor v Chellan*

(89) 1899 Rat 442 (448 449) *Queen Empress v Desai Daji*

(05) 2 Cal L Jour 75n (75n) *Emperor v Anu Paru*

(91) 15 Bom 452 (466) *Queen Empress v Dada Ana*

(06) 2 Cri L Jour 357 (308) 2 A L J 475 *Emperor v Chirliua* (The unanimous verdict was neither ambiguous nor perverse in this case)

(23) 10 AIR 1923 Cal 647 (648 649) 25 Cri L Jour 343 *Bilaschandra Danerjee v Emperor*

(28) 16 AIR 1928 Cal 228 (228) 29 Cri L Jour 228 *Superintendent and Legal Remembrancer v Jahay Sheikh* (The Judge questioned the jury and he proceeded to recharge them—This was held to be illegal)

(84) 10 Cal 140 (144) 13 C L R 359 *Hurry Charan Chuckerbutty v Empress* (If the jury are not unanimous the Judge should not make enquiries to learn the nature of the majority and its opinion)

(30) 17 AIR 1930 Lat 208 (208) 31 Cri L Jour 54 *Emperor v Bhukhan Dubey* (Clear verdict giving benefit of doubt — Judge cannot question as to nature of doubt)

15 (28) 15 AIR 1928 Pat 203 (203) 7 Pat 55 29 Cri L Jour 466 *Ranjay thir v Emperor*

(31) 18 AIR 1931 Mad 775 (776) 55 Mad 256 32 Cri L Jour 1276 *Sundaram Aiyer v Emperor*

(30) 17 AIR 1930 Cal 443 (444) 31 Cri L Jour 1150 *Emperor v Derajitullah Sheikh*

(04) 1 Cri L Jour 331 (332) 28 Bom 412 6 Bom L R 361, *Emperor v Kondaba*

(73) 20 South W R Cr 50 (50) *Queen v Meagan Sheikh*

16 (25) 12 AIR 1915 Cal 525 (529 530) 26 Cri L Jour 805 *Emperor v Nisha Kanta*
Note 4

1 (80) 6 Cal 739 (754) 12 Cal L Rep 233, *In re Jhaloo Mahlon*

with the verdict he should act under S 307¹. Thus, where in a case of robbery the jury disbelieving the evidence as to the use of force gave a verdict of guilty of theft only, it was held that such a finding was not contrary to law and that the Judge could not direct a reconsideration of the verdict². Similarly, where the jury returned a verdict of guilty under S 325, Penal Code, although it was not the subject of a separate charge but was entered in a charge coupled with S 149 of that Code, it was held that the verdict was according to law and that the Judge could not direct reconsideration of the verdict³.

But where there is no *legal verdict* at all⁴ or where the verdict is silent on a particular part of the case, as where the foreman replies that they have not considered a particular part of the case as to which the Judge wanted their opinion,⁵ they can be sent back to reconsider the verdict. In the case of an obviously and admittedly inconsistent verdict, the Judge can make a further charge to the jury instead of referring the case to the High Court under S 307⁶. So also, where in a trial for murder the jury at first stated that their unanimous verdict was 'guilty of culpable homicide not amounting to murder' and the Judge, in order to ascertain which degree of the offence the jury intended, asked them questions and from their answers found that they were in doubt as to what they meant and sent them back to reconsider their verdict, it was held that until the jury had intimated under which part of S 304, Penal Code, their verdict fell, there was no complete verdict capable of being accepted and recorded, that their subsequent answers showed that they had come to no unanimous verdict and that it was the duty of the Judge to send them back for further consideration of their verdict⁷.

See also the undermentioned cases⁸.

304.* When by accident or mistake a wrong verdict is delivered, Amendm^t verdict the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

1 Grounds for amendment. — A verdict can be amended by the jury only where by *accident or mistake* a wrong verdict is delivered. The section contemplates cases where the verdict delivered is not in accordance with what was really intended to be delivered by the jury. Where there is no mistake or accident in the delivery of the verdict but the verdict is erroneous by reason of the jury having misunderstood the law, it can be

* 1882 S 304, 1872 and 1861—Nil

Note 5

1 (14) 1 AIR 1914 Low Bur 244 (215) 7 Low Bur Rul 140 15 Cri L Jour 678 *Kya Nyun v*

Emperor

or v Abdul Hamid
Asyer v Emperor
verdict is clear the

- v *Emperor*]

Also see S 301, Note 1

5 (27) 14 AIR 1927 AH 721 (723) 50 AH 365 28 Cri L Jour 950 *Sur Nath v Emperor*
6 (42) 29 AIR 1942 Pat 416 (448) 21 Pat 138 197 Ind Cas 504 43 Cri L Jour 205 (DB) *Janak*

Singh v Emperor

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corrected only under S 307 by a reference to the High Court¹ Similarly where the jury delivered a verdict of not guilty of murder but guilty of culpable homicide not amounting to murder and the Judge asked them under what part of S 301 Penal Code they found the accused guilty, it was held that the jury could not review their former verdict or amend it unless by mistake or accident a wrong verdict had been delivered² So also where the jury delivered a unanimous verdict of not guilty but in answer to some questions by the Judge they said that they had been misled by the notes of their foreman and wanted to reconsider their verdict it was held that the verdict could not be said to have been delivered by accident or mistake and could not be amended under this section³

But where there has been no legal verdict at all as where the jury gave a verdict to the effect we have no doubt that the accused killed the deceased we think that the deceased gave no provocation but we do not think it murder because the prisoner had no object in killing the jury could be asked to reconsider their verdict⁴ It has also been held that the Judge will not be acting wrongly in asking the jury to reconsider their verdict where it is absurd or confused or not clear and definite⁵

All the evidence on both sides should be concluded before the case can be submitted to the jury There is no power in the Judge to present a case to the jury subject to any conditions and once they deliver the verdict they cannot reconsider the same except under this section Thus, where a Judge presented a case to the jury before the defence evidence was heard and they gave a verdict of guilty and then further defence evidence was taken and the jury submitted a fresh verdict it was held that the second verdict was a nullity and the judgment thereon was without jurisdiction⁶

Even after formally delivering the verdict the jury ought to be allowed if they wish to do so to say immediately after their verdict what they had in their mind in order that the delivery of the verdict may be complete⁷

2 Time for amendment — This section provides for an amendment of a wrong verdict but it clearly contemplates that such a verdict can be amended only *before or immediately after it is recorded* in other words before the jurors have left the Court and while they are still under the observance of the presiding Judge¹ Where the foreman publicly announced the verdict as the unanimous verdict of all the members in the hearing of all and without any dissent on the part of any of them and the verdict was

Section 304 — Note 1

1 (41) 11 Cr L Jour 331 (339) 28 Bom 412 6 Bom L R 361 *Emperor v Kondiba*
(31) 18 AIR 1931 Mad 775 (776) 55 Mad 256 32 Cr L Jour 1276 *Sundaram v Emperor*

2 (98) 1898 Rat 982 (983) *Queen Empress v Chumilal Vithal*

3 (12) 13 Cr L Jour 285 (285) 14 Ind Cas 669 (Mad) *In re Raza Nasser*

4 (1864) 1 Smith W R Cr 50 (50 51) *Queen v Uchoor Gloze*

Also see S 303 Note 5

5 (42) 99 AIR 1912 Pat 446 (448) 21 Pat 138 43 Cr L Jour 205 197 Ind Cas 504 (DE) *Jand Singh v Emperor*

(30) 17 AIR 1930 Cal 320 (320) 57 Cal 61 31 Cr L Jour 761 *Hamid Ali v Emperor* (Absurd verdict cannot be taken as a verdict of not guilty)

(94) 2 Weir 514 (514) *In re Veerappan* (Jury confused — Verdict can be reconsidered)

(34) 21 AIR 1931 Oudh 84 (35) 147 Ind Cas 689 *Emperor v Idya Sagar* (Verdict not clear and definite may be sent to jurors for a clear one)

(39) 19 AIR 1932 Cal 118 (118 119) 58 Cal 1335 33 Cr L Jour 135 *Criselandra Namadas v Emperor* (Convict on basis of fresh verdict is not illegal where the original one was based on a misconcept on)

Also see S 297 Note 18 and S 302 Note 1

6 (24) 11 AIR 1924 Lah 17 (19 21) 4 Lah 359 25 Cr L Jour 377 *John Thomas Lyne v Emperor*
(It is immaterial that the second verdict is in effect the same as the first)

7 (43) 30 Cal 485 (487 488) *Narayan Changa v Emperor*

Note 2

1 (12) 13 Cr L Jour 815 (817) 1913 Pun Re No 6 Cr 17 Ind Cas 550 (FB) *Emperor v Drein Donlam Carler*

(31) 18 AIR 1931 Cal 345 (346 349) 58 Cal 1139 32 Cr L Jour 592 *Ifatullah v Emperor*

recorded and the accused acquitted the Court refused to set aside the verdict when it was learnt some days after that the verdict was not the unanimous verdict of the jury.²

3 Final verdict to stand — Where there is some uncertainty in the minds of the jury the Judge can question them. In such a case there is no verdict delivered and there could be no verdict formally recorded until the last of the questions has been answered¹ and it is the verdict as ultimately amended that should stand. An amendment of the charge under S 227 can be made at any time till the final verdict of the jury in this sense is returned.² See also S 227 Note 6

305. (1) When in a case tried before a High Court the jury are

Verdict in High Court unanimous in their opinion, or when as many as six are when to prevail of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

Discharge of jury in other cases (3) If the Judge disagrees with the majority, he shall at once discharge the jury

(4) If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the jury

1. Scope of the section — Under this section if the jury return a unanimous verdict the Judge must pass judgment in accordance with it, whether or not he agrees with the opinion of the jury.¹ If the jury are not unanimous but six of them are of one opinion and the Judge agrees with them such opinion has the same legal force as a unanimous verdict of the jury and the Judge must pass judgment in accordance therewith.² When the Judge disagrees with the opinion of the majority of the jury under sub s (3) it is competent to him to express his view as to the innocence or guilt of the accused.³ When the verdict of the jury is a majority verdict of only five to four it is ineffective either to acquit or convict the accused even if the Judge agrees with the verdict.⁴ In such cases the Judge shall discharge the jury under sub s (4)

As to the procedure to be adopted when the Judge discharges the jury under this section see S 308

306.† (1) When in a case tried before the Court of Session the

Verdict in Court Judge does not think it necessary to express disagreement of Session when to prevail with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

* 1882 S 305, 1872 and 1861 — Nil

† 1882 S 306, 1872 S 263, 1861 S 380

2 (12) 13 Cr L Jour 815 (871) 17 Ind Cas 509 1913 Pun Re No 6 Cr (FD) *Emperor v Briti Bonham Carter*

Note 3

1 (74) 21 Sat W R Cr 1 (2) *Queen v Sustiram Mandal*

2 (84) 8 Bom 200 (1911 212) *Queen Empress v Appa Subhana*

Section 305 — Note 1

1 (15) 2 AIR 1915 Low Bur 39 (41) 8 Low Bur Rul 274 16 Cr L Jour 676 (679) *S P Ghosh v Emperor*

2 *Jyendra Nath Das*
3 (Judge disagreed)

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 562, pass sentence on him according to law.

Synopsis

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|--|---|
| 1 Legislative changes | 3 Judgment to be according to the verdict |
| 2 Verdict to prevail where Judge does not disagree with it | 4 Sentence to be according to law |
| | 5 Judgment of acquittal |

1 Legislative changes — The words unless he proceeds in accordance with the provisions of S 562 were added by the Code of Criminal Procedure (Amendment) Act 19 [XVIII] of 1923.

2 Verdict to prevail where Judge does not disagree with it — In a trial by jury the position of a Judge in India differs from that of a Judge in England who is merely an instrument for passing a sentence or directing a release once a verdict is given. In India the Judge must under this section and the next *make up his mind whether he agrees or disagrees with the verdict*¹ and the duty of deciding whether the verdict is to be accepted or not lies upon him alone². In the former case he should act under this section and in the latter case under the next section³. This does not mean that whenever he disagrees with the verdict he is bound to make a reference to the High Court. He must be of opinion that it is necessary in the ends of justice to submit the case to the High Court⁴. The Judge may disagree with the verdict and yet not think it necessary to express disagreement and in such a case this section requires that he shall accept the verdict⁵.

Where the Sessions Judge does not think it necessary to express disagreement it would be proper for him not to advertise the fact of his disagreement as it would be unnecessary and irrelevant⁶. He cannot record evidence in the absence of the jury and rely on it for the purpose of determining whether or not he should disagree with the verdict⁷.

The Judge has no power to control the jury and direct them to give a specified verdict. It is for the jury alone to convict or acquit the accused as they think proper⁸ and where the verdict entirely depends on oral evidence weight should be attached to the verdict of the jury whose function it is to decide the questions of fact⁹.

Section 306 — Note 2

1 (32) 19 AIR 1930 Lah 345 (348) 13 Lah 573 33 Cri L Jour 290 *Emperor v Bartwick* (The provisions of Ss. 306 and 307 are mandatory)

2 (37) 24 AIR 1937 Cal 540 (541) 1 L R (1937) 2 Cal 694 33 Cri L Jour 1075 *Afsar Shaikh v*

Emperor

(37) 24 AIR 1937 Cal 540 (541) 1 L R (1937) 2 Cal 694 33 Cri L Jour 1075 *Afsar Sheikh v Emperor*
(35) 22 AIR 1935 Bom 165 (166) 37 Cri L Jour 26 *Mhaske Malu v Emperor* (Section 306 does not require that the Judge should agree with the verdict before accepting it but only that he should not think it necessary to express disagreement.)

6 (37) 24 AIR 1937 Cal 540 (541) 1 L R (1937) 2 Cal 694 33 Cri L Jour 1075 *Afsar Shaikh v Emperor*
(29) 16 AIR 1929 Cal 415 (415) 56 Cal 473 30 Cri L Jour 1036 *Ibrahim Molla v Emperor* (See

NOTE to the Synopsis See the Notes indicated for the following topics :

Acceptance of verdict on some charges See Notes 3 and 5.
 Applicability of S 537 See Note 11.
 Considerations for High Court See Note 11.
 Contents of reference See Note 7.
 Conviction for offence not charged See Note 16.
 District Magistrate—Reference by See Note 2.
 High Court on reference whether exercises original jurisdiction See Note 14.
 High Court's direction to refer a case See Note 1.
 Irregular references—No interference. See Note 1.
 Judge's speculations about jury's conclusions See Note 13.
 Legislative changes See Notes 2 and 11.
 No reference—No interference by High Court See Note 1.
 No reference to materials not placed before jury. See Note 7.

Questions of fact — Findings See Note 11.
 Reasons for opinion of jury See Note 13.
 Reference—When made See Notes 1 and 4.
 Reference — When not to be made See Notes 1 and 4.
 Reference of whole case See Notes 5, 6 and 15.
 Reflections on jurors See Note 7.
 Relative weight to Judge's and jury's views. See Note 13.
 Right to begin See Note 17.
 Several accused—Reference as to same See Note 6.
 Sind Judicial Commissioner — High Court and not Sessions Court See Note 2.
 "Subject thereto" — Effect See Note 11.
 Trial Judge and his successor. See Note 2.
 Verdict and opinion. See Note 11.

1. Scope and object of the section. — This section provides for a reference to the High Court, in cases tried by jury, where the Judge —

(1) *disagrees* with the verdict, and

(2) is *clearly of opinion* that it is necessary for the ends of justice to submit the case to the High Court¹

If these two factors are in the mind of the Judge when he makes the reference, a misdirection in the charge to the jury does not render the reference incompetent²

A Judge in this country is not, like a Judge in an English Court, an instrument for passing a sentence or directing a release once the verdict is given (compare provisions of S 305, in regard to Sessions trials in High Court), he must make up his mind whether he agrees or disagrees with the verdict, and, in the latter case, he must form an opinion whether in the interests of justice it is necessary to submit the case to the High Court³. To this extent the matter may be said to be in the discretion of the Court. But where the two conditions are satisfied, the section requires that the Judge *shall* make the reference, the reference is no longer a matter of discretion, but is one of *obligation*⁴. The object of the section is really to provide a safeguard, in trials by jury, against possible miscarriage of justice⁵.

Section 307 — Note 1

1. (40) 27 AIR 1940 Nag 17 (26) : 41 Cr L Jour 289 1 L R (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*.
 (37) 24 AIR 1937 Cal 540 (541) : 38 Cr L Jour 1075 1 L R (1937) 2 Cal 694, *Afsar Shah v. Emperor*.

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 Jagprasad Shukla

- v. Emperor*.
 (40) 27 AIR 1940 Nag 17 (26) : 41 Cr L Jour 289 1 L R (1940) Nag 394 (FB), *Dattatraya Sadashiv v. Emperor*.

at a Judge

3. (31) 18 AIR 1931 Ca
 (31) 18 AIR 1931 Ca
 - v *Emperor*.

Where the Judge either does *not disagree* with the verdict or is *not clearly of opinion* that it is necessary in the ends of justice to make the reference, he is neither bound⁶ nor entitled⁷ to submit the case to the High Court under this section. Where a reference is made in such cases, the High Court will not act on it or interfere with the verdict on the basis of such reference.⁸

Where no reference is made by the Sessions Judge under this section the High Court cannot interfere with the verdict of the jury⁹ unless it is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him in which case the High Court can interfere on appeal (s 423 (2)) or in revision¹⁰. Nor can the High Court direct the Judge to make a reference.¹¹

Where the jury have returned a clear and unambiguous verdict it is not open to the Judge to re-charge the jury and ask them to return a fresh verdict merely because he disagrees with their verdict. The Judge can only refer the case to the High Court under this section if he thinks fit to do so.¹² But where the jury return an unreasonable or absurd verdict the Judge is entitled to re-charge the jury and to ask them to return a proper verdict and need not make a reference to the High Court.¹³ (See also section 303, Note c)

If the charge is not supported by any evidence the reference under this section should never arise because according to s 250 the duty of the Judge is to direct the jury to return a verdict of 'not guilty' and such a direction is binding on the jury.¹⁴

(34) 21 AIR 1934 Cal 847 (849) 62 Cal 337 36 Cri L Jour 358 *Ilu v Emperor* (The powerful weapon conferred by this section is not available even to a Judge trying a sessions case with a jury in the High Court)

6 (26) 15 AIR 1928 Pat 120 (123 124) 6 Pat 817 29 Cri L Jour 81 *Bajit Mian v Emperor* (No disagreement with the verdict — Judge not bound to make a reference)

(26) 13 AIR 1926 Cal 729 (729) 27 Cri L Jour 398 *Hari Charan v Emperor* (Mere disagreement without considering that it is in the ends of justice to make a reference)

(97) 2 Cal WN 49 (54) *Queen Empress v Chatradhari Goala* (Judge thinking that it was not necessary for the ends of justice to submit the case is not bound to submit)

(24) 11 AIR 1924 Cal 47 (48) 50 Cal 658 24 Cri L Jour 838 *Eran Khan v Emperor*

(See (91) 14 Mad 86 (37) 2 Weir 390 *Queen Empress v Chinna Tetan* (Judge disagreed with the verdict but not submitting the case under S 307 — High Court has no power to interfere with the verdict when there is no misdirection)

(09) 9 Cri L Jour 93 (94) (Mad) *In re Kanyan*]

7 (13) 2 AIR 1915 Cal 292 (294) 41 Cal 662 15 Cri L Jour 155 *Emperor v Madan Mondal*

(See also (30) 17 AIR 1930 Pat 208 (208) 31 Cri L Jour 54 *Emperor v Bhukhan Dubey* (Different view taken by Sessions Judge is no ground for reference)]

8 (23) 10 AIR 1923 Cal 453 (455) 50 Cal 41 24 Cri L Jour 763 *Emperor v Profulla*

9 (24) 15 AIR 1928 Pat 120 (123 124) 6 Pat 817 29 Cri L Jour 81, *Bajit Mian v Emperor*

(26) 13 AIR 1926 Cal 728 (729 730) 27 Cri L Jour 398 *Hari Charan Das v Emperor* (Where the verdict is vitiated by misdirection causing a failure of justice the High Court will interfere)

(37) 21 AIR 1937 Pat 440 (443) 38 Cri L Jour 919 16 Pat 413 *Rameshwar Singh v Emperor* (All 1926 Cal 795 26 Cri L Jour 1006 dissented from)

(24) 11 AIR 1924 Cal 47 (49) 50 Cal 658 24 Cri L Jour 838, *Eran Khan v Emperor*

Emperor
ran Mishra v Emperor]

13 (42) 29 AIR 1942 Pat 446 (448) 21 Pat 138 197 Ind Cas 504 43 Cri L Jour 205 (DB) *Janal Singh v Emperor* (Jury acquitting accused under Ss 147 and 148 and finding them guilty under Ss 376/149 and 324/149)

14 (45) 32 AIR 1915 Oudh 48 (50 51) 47 Cri L Jour 66 220 Ind Cas 417 (DB) *Emperor v Shro Nandan*

As to applicability of the section to cases erroneously tried by jury, see Note 1.

2. Who can refer. — The words "in any such case" refer to cases tried before a Court of Session and consequently the word "Judge" must mean the Sessions Judge.

A reference under this section is not invalid in consequence of its having been made by a Judge who held the trial, but who, at the time of the reference, had ceased to be a Judge¹.

It has been held by the Judicial Commissioners Court of Sind that the Judicial Commissioner's Court of Sind is a *High Court* and not a Court of Session for the purposes of this section and that consequently, a Judge of that Court holding a sessions trial by jury has no power to make a reference under this section².

Under the Code as it stood before 1923, there were certain provisions such as s 451, under which a District Magistrate was empowered to make a reference under this section to the High Court³. These have now been repealed.

3 "Disagrees with the verdict." — As has been seen in Note 1, the Judge cannot make a reference under this section unless he *disagrees* with the verdict. Under the Code of 1882 the disagreement was required to be *so complete* that it was necessary in the ends of justice to make a reference. The words "so completely that" have been omitted in the present Code, with the result that the fact that the Judge disagrees with the verdict need not always involve the proposition that it would be in the ends of justice to make a reference. The words "ends of justice" mean something more than mere disagreement, and the necessity of submitting the case depends upon the gravity of the offence, and its prevalence and other considerations of a similar nature⁴. A contrary view, namely, that unless the disagreement is such as to involve the necessity of making, in the ends of justice, a reference under this section, it is not a disagreement at all, has however been taken in the undermentioned cases⁵. It is submitted that this view is not correct.

The word *disagrees* in this section means that the Judge thinks it necessary to *express* disagreement. In other words, the section requires that the Judge must not only disagree, but must think it necessary to express disagreement, for, otherwise, he would be bound to give judgment according to the verdict under Section 306⁶. Cases can be conceived of in which the Judge thinks it necessary for the ends of justice to submit the case but yet does not think it necessary to *express* disagreement with the verdict. Thus,

(41) 28 AIR 1941 Mad 763 (763) 43 Cri L Jour 106 197 Ind Cas 71 (DB), *In re Chitravathi Thevar*

Note 2

1 (05) 2 Cri L Jour 386 (387) 2 Cal L Jour 48 *Emperor v Dul Mohammad Sheikh* (The Judge who makes a reference must be one who heard the evidence and held the trial and not his successor)

2 (39) 26 AIR 1939 Sind 209 (218) 41 Cri L Jour 28 ILR (1940) Kar 249 *Shewaram Jethanand v Emperor*

(28) 15 AIR 1928 Sind 140 (152, 157, 161) 22 Sind L R 349 29 Cri L Jour 945 (FD) *Emperor v Jnanand*

(25) 12 AIR 1925 Sind 34 (34, 35) 25 Cri L Jour 428, *Emperor v Mittoo*

[But see (21) 8 AIR 1921 Sind 145 (146) 26 Cri L Jour 609 (609) 16 Sind L R 143 *Emperor v Pir Mohamed Buz*

Also see S 266 Note 4

3 (02) 29 Cal 128 (132) 6 Cal W N 253, *Emperor v Lyall*,

(14) 1 AIR 1914 Low Bur 23 (24) 7 Low Bur Rep 319 15 Cri L Jour 243, *Emperor v A J Cooke*
[See (87) 9 All 420 (423) 1887 All W N 39, *Queen v McCarthy* (Clause 6, S 8 of Act 3 [III] of 1894 confers upon the District Magistrate the same powers of reference as the Sessions Judge)]

Note 3

Emperor

where the jury bring in a verdict of guilty but the Judge feels satisfied of the innocence of the accused, it may be said that the ends of justice require a reference to be made. But still, the Judge may think that the High Court is not likely to interfere as the verdict is not perverse and may therefore refrain from expressing disagreement with the verdict of the jury and proceed under S 306⁴. Thus, the mere fact that the ends of justice may, in the opinion of the Judge, require a reference to be made, does not mean that the Judge should think it necessary to express disagreement with the verdict of the jury. But at the same time, it may be taken that if the ends of justice do not require a reference to be made, the Judge will not think it necessary to express disagreement with the verdict. See also the case cited below⁵.

The disagreement contemplated by the section is with the verdict and not merely with the grounds on which the verdict was given. Thus where the jury gave a verdict of acquittal and the Judge was of the opinion that the jury ought to have given the benefit of doubt to the accused rather than have believed the defence version, it was held that this did not amount to disagreement with the verdict⁶. But where the jury return a verdict of guilty and the Judge is doubtful about the absolute innocence of the accused but is distinctly of opinion that the benefit of doubt should be given to the accused, there is sufficient disagreement so as to entitle him to make a reference⁷.

Where the Judge directs the jury that if they find the accused not guilty of the offence charged, they might find him guilty of a lesser offence, and the jury give a verdict of not guilty but the Judge is of opinion that the accused is guilty of the minor offence, it has been held that it is sufficient disagreement within the meaning of this section⁸.

Where, however, on a charge of an offence under S 326, read with S 140, Penal Code, the jury acquitted the accused on the charge of nothing, and the Judge agreed with such verdict, it was held that the Judge could not say that he disagreed with the verdict so far as an offence under S 326 alone was concerned, and make a reference under this section⁹.

Where once the verdict is accepted, the Judge cannot, at the time of passing the sentence, change his mind and disagree with the verdict, so as to make a submission under this section¹⁰.

See also Note 4

4 "Is clearly of opinion that it is necessary for the ends of justice."—There is a difference of opinion on the question whether the power of the Judge to make a submission under this section is limited to cases where he is satisfied that the verdict is *perverse* or *manifestly wrong* or is *unreasonable*. According to the High Courts of Lahore¹ and Patna,² the power is not so limited but it is sufficient if he be clearly of

4 (37) 24 AIR 1937 Cal 510 (541, 542) 38 Cri L Jour 1075 ILR (1937) 2 Cal 694, *Afsar Shaikh v. Emperor*

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sion in question)

in Sarkar
Manjia v. Emperor,
Tamboli
Itra.

v. Madan Mondal

Also see S 306, Note 3

Note 4

1 (32) 19 AIR 1932 Lah 315 (316) - 13 Lah 573 : 33 Cri L Jour 220, *Emperor v. Darwick*

2, (29) 16 AIR 1929 Pat 313 (314) : 8 Pat 344 : 30 Cri L Jour 721, *Ramdas Das v. Emperor*.

(32) 19 AIR 1932 Pat 246 (247) - 11 Pat 669 : 33 Cri L Jour 877, *Emperor v. Raji Man* (Case-law discussed)

opinion that a reference is necessary *for the ends of justice*. A Full Bench of the High Court of Madras has on the other hand, held that in order to enable the Judge to make a submission he should come to the conclusion that the verdict is one which is *unreasonable*.¹ A Full Bench decision of the Nagpur High Court also contains an opinion that the condition as to the Judge being clearly of opinion that it is necessary for the ends of justice to submit the case would be satisfied only if in the opinion of the Judge, the jury had arrived at a perverse verdict.² The decisions of the Calcutta High Court are conflicting.³ See also notes. It may be conceded that when the verdict is perverse or unreasonable or is not supported by evidence it should ordinarily be in the ends of justice to make a submission. In such cases the Judge *should* always make a reference.⁴ It may also be stated as a rule of guidance that where a verdict cannot be said to be unwarranted by the evidence in the case⁵ or is one which reasonable men might find on the evidence placed before them⁶ no reference *should* be made. But to say that the power is limited to cases where the verdict is considered *perverse* or *unreasonable* is to import conditions which are not found in the section and is not correct.

In view of the provisions of this section it is necessary that the trial Judge should for himself appreciate the evidence and form his own opinion on the case so as to see whether it is necessary for the ends of justice to make a reference against the verdict of the jury.⁷

Where the same body of persons sit as jurors as well as assessors in a case (see s 969 sub s (3)) the Judge ought not to use their reasons given for their opinions delivered

(37) 24 AIR 1937 Pat 440 (449) 38 Cri L Jour 919 16 Pat 413 *Rameshwar Singh v Emperor* (Judge must apply his mind to case and decide whether ends of justice demand reference—No hard and fast rule can be laid down)

3 (28) 15 AIR 1928 Mad 1186 (1190) 51 Mad 956 30 Cri L Jour 317 (FB) *Veerappa Gourdan v Emperor*

4 (40) 27 AIR 1940 Nag 17 (26) 41 Cri L Jour 289 ILR (1940) Nag 394 (FB) *Dattatraya Sadashiv v Emperor* (Per Stone C J and Grille J—Per Niyogi and Bose JJ in the Order of Reference—Judge not entitled to disagree unless the verdict is such that no reasonable jury would return it)

[See however (37) 24 AIR 1937 Nag 50 (52) ILR (1937) Nag 277 38 Cri L Jour 303 *Sahabul Imam v Emperor*]

5 (31) 16 AIR 1928 Cal 1000 (1001) 30 Cri L Jour 1000 (FB) *Emperor v Surnamojee Biswas of Macpherson J in*

(32) 17 AIR 1928 Cal 1000 (1001) 30 Cri L Jour 1000 (FB) *Emperor v Surnamojee Biswas of Macpherson J in*

(36) 23 AIR 1936 Cal 451 (451) 38 Cri L Jour 174 *Emperor v Abdul Hussain* (Verdict of jury must not be disturbed unless it is perverse)

6 (43) 30 AIR 1943 Bom 74 (76) 44 Cri L Jour 411 905 Ind Cas 411 (DB) *Mataprasad Shukla v Emperor* (If a jury convicts in defiance of a well settled rule of practice e.g. on uncorroborated testimony of accomplice and the Judge feels that the conviction was wrong it follows that it is necessary for the ends of justice that the case should be submitted)

(76) 13 AIR 1926 Mad 370 (370) 27 Cri L Jour 176 *In re Ambalam* (Trial of several accused for the same offence before the same Judge and jury—Evidence the same against all and summing up of Judge for the acquittal of all—Jury giving verdict of not guilty to one only and guilty to the rest—Verdict is perverse and reference should be made)

(93) 13 Mad 343 (344) 2 Weir 399 *Queen Express v Guruvadu* (Verdict not supported by evidence)

38 Cri L Jour 452 *Jogi Kar v Emperor* 1114 *Emperor v Lal Mohammad* (Verdict which

32 Cri L Jour 1276 *Sundaram Aiyar v Emperor*

9 (31) 21 AIR 1934 Cal 847 (849) 62 Cal 337 36 Cri L Jour 358 *Ilu v Emperor*

as assessors as material for saying that their verdict as jury is perverse.¹⁰

Where the jury consider the accused guilty of offence X while the Judge considers him guilty of offence Y but is punishable with the same amount of punishment as X, the question whether the accused should be convicted of the one or the other offence is in the nature of an academic one and hardly worth a reference under this section.¹¹

5. "Submit the case."—Sub section (2) of this section provides that where a case is submitted under this section the Judge shall not record a judgment on any of the charges on which a particular accused has been tried. It is clear from this that a submission must be of the *whole case* against the particular accused and not merely of those charges on which he disagrees,¹ since, by this limited reference the High Court will be precluded from considering the entire evidence on the record against such accused.² In other words, the Judge should not divide the verdict of the jury, accept a part and make a submission with reference to the other part.³ See also Note 15.

6 "In respect of such accused person"—This section does not intend that when there are several accused and the Sessions Judge is not prepared to accept the verdict of the jury against *all* but only against *some*, he should refer the whole case to the High Court. It contemplates only a reference in the case of those persons in respect of whom the Judge declines to accept the verdict. In respect of any other accused against whom the Judge agrees with the verdict of the jury, the Judge should convict and sentence or acquit him as the case may be.¹

7. Grounds of opinion to be recorded. — The Judge referring a case under this section must first of all record *his opinion*. If he does not record it, it is not possible

10. ('29) 1929 Mad W N 241 (241) (FB) Sessions Judge of South Arcot v Jaitabuddin
11. ('40) 27 AIR 1940 Nag 17 (25) 41 Cri L Jour 249 ILR (1940) Nag 394, Dattatraya Sadashiv v Emperor (Per Muzoga and Bose, JJ in Order of Reference—Where Judge can award suitable punishment reference not necessary although he may consider that the conviction should be for a different offence)
(37) 24 AIR 1937 Bom 60 (61) 38 Cri L Jour 327 Emperor v Md Adam Chohan (Jury finding accused guilty under S 326, Penal Code—Court disagreeing and holding offence under S 304)

Note 5

- 1 ('44) 31 AIR 1944 Cal 306 (307) 46 Cr L Jour 220 217 Ind Cas 179 (DB), *Emperor v Mukhtari*
(A reference on some charges after recording an order in respect of other charges against the accused
person is not in order. The defect, however, is not fatal, and the High Court can deal with the
reference on the merits, considering the entire evidence and giving due weight to the opinions of the
Sessions Judge and the jury.)
(17) 4 AIR 1917 Cal 833 (835) 15 Cr L Jour 551 (553) *Emperor v Anuad Charan*
(33) 20 AIR 1933 Cal 47 (48) 60 Cal 427 34 Cr L Jour 161 *Empr v Dwarika Nath Goswami*
(33) 20 AIR 1933 Cal 665 (666, 667) 34 Cr L Jour 918 (SI) *Empror v Dismoo Chandra*
(28) 15 AIR 1924 Pat 596 (596) 30 Cr L Jour 390, *Emperor v Wazira Mahto*
(30) 17 AIR 1930 All 489 (489) 52 All 881 32 Cr L Jour 81 *Emperor v Nawal Bahari*
(32) 19 AIR 1932 Pat 156 (157) 11 Pat 395 33 Cr L Jour 505, *Empror v Hazari Lal*
(99) 27 Cal 144 (144), *Queen Empress v Doodhar Singh*
(26) 13 AIR 1926 Cal 925 (925) 27 Cr L Jour 617, *Lmp rar v Ekabho*
[See (35) 22 AIR 1935 1st 357 (357) 14 Pat 717 36 Cr L Jour 536, *Ramjanam Tewari v Em-
peror*]]

2 Charan Roy
r v Hazari Lal

- (35) 22 AIR 1935 Pat 357 (357). 36 Cri L Jour 656. 14 Pat 717. *Ramjanam v Emperor*.

Note 6

π v *Mu¹htara'*:

.. Balar Ali

for the High Court to pass orders on the reference¹ The letter of reference should further state the case, the verdict of the jury and concisely the *ground* upon which the Judge differs from the jury and considers it necessary for the ends of justice to submit the case to the High Court² It should, in other words, be complete in itself and the High Court should not be required to refer to the order sheet in order to gather the particulars the section requires to supply³ It was observed in the undermentioned case⁴ that the referring order should be in the nature of a judgment which would give the High Court a proper summary of the evidence and reasons of the learned Judge for holding it to be credible or otherwise Merely repeating remarks made in the charge to the jury and adding such vague remarks as 'for these and other reasons I submit the case for the orders of the High Court' are not sufficient⁵ The Judge should state exactly what material portion of the evidence he believes to be true and his reasons for arriving at his conclusions⁶ The reference should, further, be based upon the *evidence placed before the jury* and not on case not so presented to them The High Court should not be asked to consider the case on matters not placed before the jury⁷

Where a reference shows that the Judge's opinion is that the verdict is perverse but this is not clearly stated, the High Court will presume that the reference has been made on the ground that the verdict is perverse⁸

It is unfair for the Judge to make reflections on the conduct of the jurors which are not supported by the record⁹

8. Reference against verdict of acquittal. — Where the Judge disagrees with a *verdict of acquittal* he should in his letter of reference state the *offence which*

Note 7

1 (21) 9 AIR 1921 Cal 252 (253) 23 Cri L Jour 244, *Emperor v Taribullah Sheikh* (It is impossible

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Mean-
ings to

have been committed]]

2 (31) 19 AIR 1931 Cal 15 (16 17) 57 Cal 1183 32 Cri L Jour 452, *Jogikar v Emperor*
(05) 9 Cal W N 1xvi (1xvi), *Rajewars Bairagi v Emperor* (Session Judge not stating whether reference is necessary for ends of justice and whether he agrees with the verdict — Reference bad in law)
(29) 16 AIR 1929 Pat 16 (16 18) 50 Cri L Jour 210 *In re Sakhi Chand Kumhar* (Referring Judge should state his opinion regarding the evidence and especially that part on which he relies for conviction)

(08) 10 Bom L R 173 (173) 7 Cri L Jour 192 *Emperor v Chandra Krishna*

as Judge to record

[See (07) 7 S. W. 2d 100 (100) 10 Cal 1000
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Sheo Din

v *Dyamanark Annappanark*

v *Chandra Krishna* (Judge's view of the

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take the charge as part of the letter of reference is insufficient)

(27) 9 AIR 1922 Pat 348 (350) 23 Cri L Jour 421, *Emperor v Punat Chaim*

(04) 1 Cri L Jour 743 (744) 6 Bom L R 599, *Emperor v Irya Doddappa*

(29) 16 AIR 1929 Pat 16 (17) 30 Cri L Jour 210 *In re Sakhi Chand Kumhar*

7 (99) 27 Cal 295 (304) 4 Cal W N 129, *Queen Empress v Jadub Das* (In reference under S 307, High Court has to consider the correctness of the verdict on the evidence before the jury)

[See (04) 1 Cri L Jour 743 (744) 6 Bom L R 599 *Emperor v Irya Doddappa* (Result of another

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... ..

(24) 11 AIR 1924 Cal 321 (322) 51 Cal 347

remarking that verdict of jury had been

able influence and position)

v *Emperor*
v *Emperor*

he considers to have been committed by the accused¹ but a mere omission to do so will not entail a rejection of the reference² It has been held that where the verdict of the jury is one of acquittal there is a much greater onus on the Judge to satisfy the High Court as to the necessity of interference than in cases of a verdict of guilty³ and that unless the verdict is manifestly wrong or perverse or unreasonable the Judge is not entitled to submit the case to the High Court in such cases⁴ In some cases it has been held that a submission on a pure question of fact is not permissible where the verdict is one of acquittal⁵ It is apprehended that this also means that unless the verdict is unreasonable or perverse (in which case it will be bad in law⁶) the case cannot be submitted to the High Court The question raised forms part of the larger question discussed in Note 4 viz whether the power of reference under this section is limited to cases where the verdict is perverse or unreasonable and as there does not seem to be any special rule of law applicable to cases of acquittal alone in this respect it is submitted that the considerations set forth in the above Note will also apply to such cases if the matter is regarded as one of law although special considerations may arise in the case of acquittals, as a matter of practice⁷

9 Charge under section 310 — Prior to the amendment of the section in 1932, it was held that in cases of reference under this section there was no conviction or acquittal in the Sessions Court and that it was for the High Court to convict or acquit the accused and that therefore it was not until after conviction by the High Court that the accused could be asked to plead to prior conviction¹ The present section as amended makes provision for proceeding under s 310 where there is a charge under that section even before the decision of the High Court

10 "Shall not record judgment of acquittal or of conviction" — It was held under the Code of 1861 in which there was no section corresponding to this that the Sessions Judge was bound to pass judgment even though he disagreed with the jury¹ It is now clear that no judgment should be recorded where the Judge refers the matter to the High Court

10a Bail pending reference to High Court — Where the jury returns a unanimous verdict of guilty on a serious charge like that of murder but the Judge disagree

Note 8

- 1 (33) 20 AIR 1933 Cal 404 (406) 31 Cri L Jour 609 *Emperor v Panchanon Sarkar*
(78) 3 Cal 623 (624 625) 2 Cal L R 301 *Empress v Sahae Rae*
(21) 8 AIR 1921 Cal 250 (253) 23 Cri L Jour 244 *Emperor v Tari Bulla Sheikh*
2 (33) 20 AIR 1933 Cal 404 (406) 34 Cri L Jour 608 *Emperor v Panchanon Sarkar*
3 (36) 23 AIR 1936 Cal 407 (409) 37 Cri L Jour 1149 *Emperor v Gostho Sardar*
4 (37) 38 Cri L Jour 758 (759) 169 Ind Cas 347 (Cal) *Emperor v Sherali Badyahar*
5 (37) 41 Cal W N 610 (612) *Emperor v Monibala Dasa*
(36) 23 AIR 1936 Cal 407 (408) 37 Cri L Jour 1149 *Emperor v Gostho Sardar* (Jury holding state-

this case distinction is made as a matter of practice between cases of acquittal and conviction as regards the powers of the High Court on reference under this section.)

Note 9

- 1 (57) 5 Cri L Jour 400 (413) 30 Mad 134 *Emperor v Kandasami Goundan*
(1900) 2 Bom L R 336 (337) *Queen Empress v Gotind Jhatarya*

Note 10

- 1 (72) 18 Suth W R Cr 45 (46) *Queen v Andheeram Bagdee* (The remedy was to apply to the Local Government for remission of sentence.)
(1864) 1 Suth W R Cr L 9 (9) (Do)
(66) 6 Suth W R Cr 6 (6) *Queen v Dassanath Mitter* (Do)

ing with the verdict thinks it proper to refer the case to the High Court it is desirable that the accused is kept in custody pending the reference and not released on bail¹

11. Powers of the High Court under this section — Sub section (1) specifies the powers which the High Court may exercise where a reference is made to it under this section. The High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it.

The words *subject thereto* were introduced into the section only in the year 1970. Before the said introduction it had been held that the powers of the High Court on a reference were not in any way affected or curtailed by S 418 or S 423 of the Code which limit the powers of the appellate Court in cases tried by jury, to interference on matters of law and that therefore the High Court could go into questions of fact as well as questions of law.¹ It has been held that the introduction of the words *subject thereto* is not inconsistent with the said view the object of such introduction being to clothe the High Court when acting under this section with all the powers as regards procedure, of a Court of appeal if for good reasons it desires to exercise any of them.*

There is however a difference of opinions as to the extent of the powers of the High Court to interfere on matters of fact. One view is —

- (1) that the guiding principle in exercising this power should be that the decision of the tribunal appointed by law to determine the guilt or innocence of the accused should not be touched except under strong circumstances.²

Note 10a

- 1 (3a) 27 AIR 103; Cal 407 (410) 62 Cal 900 36 Cri L Jour 944 (SB) *Emperor v Bent Permalick* [See however (41) 28 AIR 1941 Mad 763 (764) 43 Cri L Jour 106 197 Ind Cas 71 (DB) *In re Chitrabati Thevar* (Judge finding jury's verdict of guilty under S 39 of Penal Code to be perverse and unjust making reference under S 307 for setting it aside — Judge held ought to have released accused after verdict on bail)]

Note 11

- 1 (87) 9 All 470 (425) 1897 All W N 39, *Queen Empress v McCarthy* (73) 20 Sat W N Cr 1 (4) 11 Beng L R 14 *Queen v Koonjo Leth*

Also see S 418 Note 1

- 2 (40) 27 A

v Emperor
this section

Sadasi v
ers under

- (40) 27 AIR 1940 Pat 513 (514) 41 Cri L Jour 457 (458) *Emperor v Dilli Kuer* (Power of the High Court in a reference under S 307 are not limited by S 423 (1))

- (39) 25 AIR 1938 All 207 (229) 39 Cri L Jour 559 ILR (1933) All 493 *Emperor v Basu* (Powers

is power

v Emperor
ishna

- (28) 15 AIR 1938 All 207 (210) 50 All 625 29 Cri L Jour 353 (TB) *Emperor v Shera* (33) 20 AIR 1933 Cal 47 (48) 60 Cal 477 34 Cri L Jour 164 *Emperor v Dwarika Nath* (When a case is referred under S 307 High Court is entitled to open the whole case)

- 3 (87) 9 All 420 (425) 1887 All W N 39 *Queen Empress v McCarthy*

- (36) 23 AIR 1936 Cal 451 (451) 38 Cri L Jour 174 *Emperor v Abul Hossain Suddar* (When the only ground for making reference was that giving effect to the verdict of the majority of the jury will be trial for a petty should be rejected)

(The test to be applied in setting aside the verdict is to see whether it was impossible for the jury to have arrived at the verdict)

(2) that where two views are possible on the evidence and the jury has taken one of such views, the High Court has no power to interfere even though it may itself take a contrary view *

(3) that therefore the High Court cannot interfere unless the verdict is —

(a) perverse *

(33) 20 AIR 1933 Cal 665 (668) 31 Cri L Jour 913 (DB) *Emperor v Bimoo Chandra* (Interference with verdict of jury except in cases of flagrant and patent miscarriage of justice is liable to lead to condemnation of the innocent)

(28) 15 AIR 1928 Pat 120 (124) 6 Pat 817 29 Cri L Jour 81 *Dajal Maan v Emperor*

(25) 12 AIR 1925 Cal 394 (395) 26 Cri L Jour 677 *Emperor v Farattulla Mondal* (Evidence fully oral — Opinion of jury should be held final)

[See also (28) 15 AIR 1928 Cal 444 (446) 29 Cri L Jour 819 *Bepin Chandra Mondal v Emperor* (Sessions Judge when referring a case should pay due regard that the constitutional tribunal to decide questions of fact is the jury and not the Judge)]

4 (46) 33 AIR 1946 Bom 24 (25) *Emperor v Shanjar Ganpat*

(44) 25 Pat L T 141 (143 144) (DB) *Emperor v Bisan Gop*

(14) 1 AIR 1914 Cal 65 (69) 14 Cri L Jour 660 41 Cal 621, *Emperor v Sumaniojee Bhuwas* (View of Macpherson J in 20 South W R Cr 73 emphasized and endorsed)

(73) 20 South W R Cr 73 (73) 13 Beng L R App 19 *Queen v Sham Bagdee* (If the High Court were to interfere in every case of doubt in every case in which the evidence should have properly warranted a different verdict then real trial by jury is at an end and the verdict of a jury would have no more weight than the opinion of assessors)

(00) 2 Cri L Jour 357 (358) 2 All L Jour 470 *Emperor v Charhwa*

(24) 11 AIR 1924 Cal 317 (320) 24 Cri L Jour 897 *Emperor v Nristya Gopal Roy*

(24) 11 AIR 1924 Cal 411 (411) 46 All 265 25 Cri L Jour 991 *Emperor v Panna Lal*

(32) 33 Cri L Jour 745 (745) 139 Ind Cas 272 (Bom) *Emperor v Bai Lal*

(24) 11 AIR 1924 Cal 956 (959) 25 Cri L Jour 1284 *Emperor v Golam Kadar*

(22) 9 AIR 1912 1st 349 (351) 23 Cri L Jour 421 *Emperor v Punni Chann* (Something more than mere estimate of the evidence of fact is necessary)

(24) 11 AIR 1924 Cal 449 (451) 51 Cal 271 25 Cri L Jour 773 *Emperor v Albar Moola*

(29) 16 AIR 1929 1st 313 (314) 8 Pat 344 30 Cri L Jour 721 *Ramdas Rai v Emperor*

5 (46) 33 AIR 1946 Bom 24 (25) *Emperor v Shanjar Ganpat*

(40) 27 AIR 1910 Mad 509 (509) 41 Cri L Jour 581 *In re Boya Lingadu* (Fact that record does not disclose reason for disbelieving prosecution witnesses or Judge disagrees with jury's opinion does not render verdict perverse or unreasonable)

(38) 25 AIR 1938 Cal 297 (296) 39 Cri L Jour 479 *Emperor v Anbharesh Mandal*

(37) 38 Cri L Jour 758 (758) 169 Ind Cas 342 (Cal) *Emperor v Sherah Dadayalar*

(36) 23 AIR 1936 Cal 451 (451) 39 Cri L Jour 174 *Emperor v Abul Hossain Sikdar*

(32) 19 AIR 1932 Mad 21 (22) 33 Cri L Jour 215 *Venkatachala v Emperor* (Waller J however pointed out that in disposing of references under the section the High Court should not be influenced by any conventional regard for the verdict of a jury)

(28) 15 AIR 1928 Mad 1186 (1190) 30 Cri L Jour 317 51 Mat 946 (TR) *Veerappa Coundan v Emperor* (The Sessions Judge must be assumed to consider that the verdict of the jury is unreasonable or perverse when he makes the reference under this section and the High Court in disposing of such reference is only concerned with the question whether the Sessions Judge is correct in his view that the verdict is perverse or unreasonable)

(29) 16 AIR 1929 Nag 36 (37) 29 Cri L Jour 963 *Pamadhan Brahma v Emperor*

(00) 2 Cri L Jour 357 (358) 2 All L Jour 475, *Emperor v Charhwa*

(24) 11 AIR 1924 All 411 (412) 46 All 265 25 Cri L Jour 991 *Emperor v Panna Lal*

(75) 1 Bom 10 (13) *Roy v Khanderav*

(36) 20 AIR 1933 Bom 144 (144) 34 Cri L Jour 660 *Emperor v Dogadu Kondaji* (The verdict must be perverse before the High Court can interfere. But in dealing with the weight and volume of the evidence the two cases (of acquittal and conviction) differ because of the presumption of innocence. Where a jury have convicted the High Court has to see not merely that there is evidence of guilt but that the evidence is strong enough to preclude any reasonable doubt in the minds of the jury as to the guilt of the accused)

(b) manifestly wrong,⁶ or(c) unreasonable,⁷ or

(24) 11 AIR 1924 Cal 1029 (1030) 52 Cal 172 26 Cn L Jour 350, *Emperor v Abinash Chandra Bose*

(29) 16 AIR 1929 Oudh 86 (86, 87) 3 Luck 456 29 Cn L Jour 452, *Emperor v Behari*

(33) 20 AIR 1933 Oudh 181 (181, 182) 8 Luck 439 34 Cn L Jour 795, *Emperor v Ohhada*

(32) 33 Cn L Jour 745 (745) 139 Ind Cas 272 (Bom), *Emperor v Bai Lal*

(19) 6 AIR 1919 Cal 1016 (1017) 20 Cn L Jour 20, *Emperor v Asgar Mandal* (Verdict not perverse—No interference)

(23) 10 AIR 1923 Cal 579 (581), *Emperor v Akarannessa Bibi* (Do)

[See (33) 20 AIR 1933 All 94 (95) 34 Cn L Jour 432, *Harischandra v. Emperor*

(36) 23 AIR 1936 Cal 407 (408) 37 Cn L Jour 1149, *Emperor v Gostho Sardar* (Verdict not perverse or unreasonable—High Court refused to interfere)]

[See also (1900) 27 Cal 295 (304) 4 Cal W N 129, *Queen Empress v Jadub Das*

(02) 1902 All W N 143 (144), *King Emperor v Rahmatullah* (Verdict not perverse)

(11) 12 Cn L Jour 193 (197) 10 Ind Cas 684 (Cal) *Rashidazzaman v. Emperor*. (Do)]

6 (46) 33 AIR 1946 Bom 24 (25) *Emperor v Shankar Ganpat*

(45) 32 AIR 1945 Bom 277 (280) 46 Cn L Jour 635 220 Ind Cas 1 (1 B), *Government of Bombay v Inehya Farnandey*

(38) 25 AIR 1938 Cal 295 (296) 39 Cn L Jour 479, *Emperor v Nibharesh Mandal*

(29) 16 AIR 1929 Nag 86 (37) 29 Cn L Jour 963, *Ramadhan Brahmin v Emperor*

(24) 11 AIR 1924 All 411 (412) 46 All 265 25 Cn L Jour 981, *Emperor v Panna Lal*

(91) 15 Bom 452 (458, 475 486), *Queen Empress v Dada Ana*

(99) 20 Bom 215 (218), *Queen-Empress v Deoji Govindji*

(04) 1 Cn L Jour 285 (268) 6 Bom L R 258, *Emperor v Bharmia*

(29) 16 AIR 1929 Bom 296 (302) 53 Bom 479 31 Cn L Jour 65, *Emperor v G E Ring* (Verdict not manifestly wrong—No interference)

(78) 20 Suth W R Cr 33 (33) *Queen v Rapchurn Ghose*

(73) 20 Suth W R Cr 70 (71) *Queen v Nobin Chunder*

(73) 20 Suth W R Cr 73 (73) 13 Beng L R App 19, *Queen v Sham Bagdee* (Verdict not clearly wrong—No interference)

(74) 21 Suth W R Cr 4 (4) 14 Beng L R App 2n, *Queen v Hurro Manji* (Do)

(76) 25 Suth W R Cr 25 (27), *Queen v Wuzir Mandal* (Do)

(84) 11 Cal 85 (91) *Queen Empress v Jacquet*

(74) 14 Deog L R App 1 (3), *Queen v Mt Itwarya* (Verdict not patently wrong—No interference.)

(14) 1 AIR 1914 Cal 65 (69) 41 Cal 621 14 Cn L Jour 660, *Emperor v Surnamoyes Biswas* (Verdict of the jury not in defiance of the probabilities of the case—Verdict not disturbed)

opal (Do)

v Dhananjay Roy (Do)

(Jury justified in bringing a

Ghose (Verdict not wrong—

Reference rejected)

(13) 10 Cal 111 (111) 10 Cal 111 (111) 10 Cal 111 (111)

(13) 10 Cal 111 (111) 10 Cal 111 (111)

(13) 10 Cal 111 (111) 10 Cal 111 (111)

(13) 10 Cal 111 (111) 10 Cal 111 (111)

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(13) 10 Cal 111 (111) 10 Cal 111 (111)

(13) 10 Cal 111 (111) 10 Cal 111 (111)

wrong—No

nLaya (Do)

(Accused charged

of interfered with

in appeal)

(86) 10 Bom 497 (502) *Queen-Empress v Mama Dayal*

(13) 10 Cal 111 (111) 10 Cal 111 (111)

(13) 10 Cal 111 (111) 10 Cal 111 (111)

(13) 10 Cal 111 (111) 10 Cal 111 (111)

(13) 10 Cal 111 (111) 10 Cal 111 (111)

(13) 10 Cal 111 (111) 10 Cal 111 (111)

(13) 10 Cal 111 (111) 10 Cal 111 (111)

(13) 10 Cal 111 (111) 10 Cal 111 (111)

(13) 10 Cal 111 (111) 10 Cal 111 (111)

ious verdict of jury there being

{Obiter}}

B), *Government of Bombay v*

Inehya Farnandey

(29) 16 AIR 1929 Nag 86 (37) 29 Cn L Jour 963, *Ramadhan v Emperor*.

(d) definitely contrary to evidence⁸ or

(e) not supported by any evidence⁹

The second view is —

(1) that the sanctity of a verdict really rests on the absence of the disagreement of the Judge and that if that disagreement is expressed (as it must be where a reference is made under this section) the special sanctity of the verdict disappears and it has no greater force than the decision of any other tribunal of fact¹⁰

- (78) 2 Cal L R 518 (519) *In re Hurree Narain Mookerjee* (Verdict of jury not unreasonable — No interference)
- (25) 12 AIR 1905 Cal 876 (884) 52 Cal 937 76 Cr L Jour 1206 *Emperor v Premananda Dutt* (Do)
- (31) 18 AIR 1931 Cal 15 (16) 57 Cal 1183 32 Cr L Jour 452 *Jogilar v Emperor* (Do)
- (28) 15 AIR 1909 Mad 1186 (1190) 51 Mad 956 30 Cr L Jour 317 (FB) *Veerappa Goundan v Emperor* (Verdict must be confirmed if not unreasonable)
- (29) 16 AIR 1929 Mad 135 (137) 30 Cr L Jour 843 *Mottaya Pillai v Emperor* (Do)
- (29) 1929 Mad W N 291 (290) (FB) *Sessions Judge of Arcot v Jailabuddin* (Do)
- (28) 15 AIR 1928 Pat 497 (500) 8 Pat 74 29 Cr L Jour 1035 *Emperor v Vidyasagar*
- (34) 35 Cr L Jour 985 (986) 147 Ind Cas 53 (Oudh) *Emperor v Chupai*
- (34) 35 Cr L Jour 33 (33) 146 Ind Cas 303 (Oudh) *Emperor v Ashgar Hussain* (Verdict not unreasonable—No interference)
- (29) 16 AIR 1919 Cal 287 (288) 56 Cal 132 30 Cr L Jour 584 *Emperor v Nagarali* (Do)
- (29) 30 Cr L Jour 804 (806) 117 Ind Cas 600 (Cal) *Isasuddin v Emperor* (Do)
- (29) 16 AIR 1909 Oudh 230 (231) 30 Cr L Jour 570 *Emperor v Bhagwandin* (Do)
- (27) 14 AIR 1927 Oudh 607 (607) 23 Cr L Jour 895 *Emperor v Shaikat Hussain* (Do)
- (29) 30 Cr L Jour 120 (120) 113 Ind Cas 285 (Cal) *Emperor v Khuday Gazi* (Verdict such as reasonable men properly instructed would come to—Reference rejected)
- (27) 14 AIR 1927 Cal 848 (850) 54 Cal 708 23 Cr L Jour 903 *Emperor v Har Mohan Das* (The test that has to be applied in estimating the weight of the verdict of the jury is whether the opinion is such as could on the particular facts and evidence of the case have been held by reasonable men however much the Judge may differ from that view)
- (24) 11 AIR 1924 Cal 956 (959) 25 Cr L Jour 1284 *Emperor v Gulam Kadar* (Verdict not unreasonable—No interference)
- (20) 7 AIR 1900 Cal 78 (79) 21 Cr L Jour 266 *Emperor v Prannatha Nath* (Unanimous verdict of jury not unreasonable — No interference)
- (89) 1889 Rat 440 (446 447), *Queen Empress v Desai Daji*
[See (36) 23 AIR 1936 Cal 407 (409) 37 Cr L Jour 1143 *Emperor v Gostio Sardar*]
- 8 (46) 33 AIR 1946 Bom 21 (25) *Emperor v Shankar Ganpat*
- (28) 15 AIR 1928 Mad 1186 (1190) 51 Mad 956 30 Cr L Jour 317 (FB) *Veerappa Goundan v Emperor*
- (29) 16 AIR 1929 Cal 737 (739) 31 Cr L Jour 693 *Meagan Houladar v Emperor*
- (29) 16 AIR 1929 Pat 313 (314) 8 Pat 344 30 Cr L Jour 721 *Ramdas Rai v Emperor*
- 6 (6) 22 AIR 1927 Cal 100 (100) 51 Cal 100 22 Cr L Jour 100 22 Cr L Jour 100
v *Emperor* (Verdict not support

ally by jury not supported by evidence but no reference was made by Sessions Court — The High Court could not interfere in appeal since there could be no appeal on facts)

- (26) 13 AIR 1926 Pat 535 (536) 5 Pat 573 27 Cr L Jour 1308 *Emperor v Govind Singh* (Verdict of jury not unsupported by evidence—Reference rejected)
- 10 (40) 27 AIR 1940 Nag 17 (98) 41 Cr L Jour 289 11LR (1940) Nag 394 (FP) *Dattatraya Sadasiv v Emperor* (Per Stone C J and Grille, J — 10se J dissenting)
- (30) 19 AIR 1932 Pat 216 (217) 11 Pat 669 33 Cr L Jour 671, *Emperor v Rafi Mian*
- (30) 19 AIR 1932 Mad 21 (21, 22) 33 Cr L Jour 215, *Venkatachala Goundan v Emperor* (Sessions Judge expressing opinion that verdict of jury plainly unjust—Verdict set aside.)
- (66) 3 Cr L Jour 371 (372 374 375) 29 Mad 91, *Emperor v Chellan* (It becomes then only a mere opinion)
- [See also (88) 15 Cal 269 (278 279) *Queen Empress v Itarsi Sahu* (The opinion of the Judge who has also had an opportunity of watching the whole course of trial must have due weight given to it)]

- (2) that the *whole case* is opened up on a reference,¹¹ that the functions of both the Judge and the jury are cast upon the High Court¹² and that the High Court is entitled to act up to its *own view* of the case, though in forming its view it should give *due weight* to the opinions of the Judge and the jury,¹³
- (3) that, therefore where the verdict appears to the High Court to be one which ought not to be upheld it is entitled to interfere even though the verdict is *neither unreasonable nor perverse*¹⁴ It has, however, been held that in case

11 (40) 27 AIR 1940 Nag 17 (28 37 38) 41 Cri L Jour 289 ILR (1940) Nag 394 (IE) *Dattatraya Sadashiv v Emperor* (Per Stone C J and Grille J Per Bose J—The High Court must decide in the first instance whether the verdict is perverse or not and the whole case is opened up to the extent that it is necessary to enable it to reach such a conclusion but it cannot reach its own decision on the facts unless and until it comes to the conclusion that the verdict was perverse or that it otherwise

Dattu Deoman v Emperor

330 I L R (1937) Nag 277 *Salawat Imam v*

Emperor

(22) 9 AIR 1932 Bom 368 (369) 23 Cri L Jour 315 47 Bom 31 *Emperor v Shanlar*

Krishna

v Annada Charan

(33) 20 AIR 1933 Cal 47 (48) 60 Cal 427 34 Cri L Jour 161 *Emperor v Dwarika Nath*
(See (37) 24 AIR 1937 All 195 (196 197) ILR (1937) All 419 38 Cri L Jour 465 *Manjia v Emperor*
(In reference under S 307 High Court can consider the case on its merits and substitute its own verdict and pass suitable orders—*Obiter*))
(See also (24) 11 AIR 1924 Cal 960 (963) 25 Cri L Jour 1217 *Emperor v Sagarmal Agarwal*
(Where there is a misdirection by Judge to jury the High Court is not to consider as to what would have been the verdict in absence of such direction but to consider the verdict on evidence in the case))

12 (31) 15 Bom 452 (476 480) *Queen Empress v Dada Ana*

(75 77) 1 Bom 10 (13) *Reg v Khanderao*

(28) 15 AIR 1928 Pat 596 (597) 30 Cri L Jour 390 *Emperor v Wazira Mahto*

13 (38) 66 Cal L Jour 500 (510) *Emperor v Maza Khan* (Section 307 (3) imposes upon the High Court in the clearest terms the duty of considering the entire evidence and of giving due weight to

Abdul Rahman

v Punit Charn (Per Coates J)

v Narain Prasad (Verdict set aside)

v Nishi Kanta

v v Mofizul Peada

Tulasam (Verdict of jury set aside)

v Mit Zohra (In case of divided verdict)

(Verdict set aside)

— 261 *Emperor v Bhulalan S*

Suar Gola

v Kottya

Cri L Jour 4 220 Ind Cas 467 (IE)

S 307
Court
was
to be
set

(40) 27 AIR 1940 Nag 17 (29)

41 Cri L Jour 289 ILR (1940) Nag 394 (IE) *Dattatraya Sadashiv v Emperor* (Per Stone C J and Grille J)

(38) 15 AIR 1928 All 227 (229) 39 C

Dattatraya Sadashiv v

v Datta (Verdict

able though it is not perverse or

v Annada Charan

where there has been a verdict of not guilty, it is the practice not to reverse the verdict unless it is perverse or manifestly wrong¹⁵ A Full Bench of the High Court of Nagpur has held that even though the whole case is open on a reference under the section the High Court *ought* not to interfere with the verdict of the jury unless the High Court considers such verdict to be wrong beyond any reasonable doubt¹⁶

It is submitted that the first view is not correct There is nothing in the section to limit the power of the High Court to interfere in cases where the verdict is perverse or unreasonable Where the High Court considers on the evidence that the verdict ought not to be upheld it will in fact amount to a miscarriage of justice if the verdict is to be upheld by reason of a sort of conventional respect for the jury Further it may be noted that the section speaks of the *opinion* of the jury and not of the *verdict*¹⁷ The principle of the sanctity of the verdict need not be applied with strictness to the *opinion* of the jury

It is however necessary before the High Court can interfere under this section that it should come to the conclusion on the evidence that the decision of the jury is *wrong* Where the decision is correct or cannot be said to be wrong there is no room for any interference¹⁸ Where, on the other hand, the decision is perverse or unreasonable or against the evidence or is not supported by evidence the High Court will interfere¹⁹

(22) 9 AIR 1922 Pat 348 (332) 23 Cr L Jour 421 *Emperor v Punit Chain* (Per Courts I — Verdict not interfered with)

(37) 19 AIR 1932 Lah 345 (348) 13 Lah 573 33 Cr L Jour 220 *Emperor v Barwal*

(78) 1 Cal L Rep 275 (281 282) *Empress v Mulhun Kuriar*

(97) 2 Weir 390 (391) *In re Nagan*

(39) 19 AIR 1932 Cal 659 (659) 33 Cr L Jour 476 (5D) *Mabajan Bibi v Emperor*

(74) 11 Bom H C P Cr 137 (148) *Reg v Bhattant*

(05) 2 Cal L Jour 77n (78n) *Emperor v Purna Hasra* (The fact that the verdict of jury has the assent of one of the Judges of the High Court is sufficient to show that verdict should not be reversed)

15 (38) 25 AIR 1938 All 227 (229) 39 Cr L Jour 559 1 L R (1938) All 483 *Emperor v Bansu*

16 (40) 27 AIR 1940 Nag 17 (29) 41 Cr L J 289 ILR (1940) Nag 394 (1B) *Dattatraya v Emperor*

17 (06) 3 Cr L Jour 371 (373 374) 29 Mad 91 *Emperor v Chellan*

(24) 11 AIR 1924 Mad 232 (233) 25 Cr L Jour 145, Nannu Kudumban v Emperor

18 (16) 3 AIR 1916 Mad 783 (784) 16 Cr L Jour 440 (441) *In re Irula Sadayan*

(27) 14 AIR 1927 Cal 800 (821) 23 Cr L Jour 874 *Emperor v Irgan* (Verdict in accordance with facts of the case—No retrial ordered though the jury was not properly constituted)

(79) 1929 Pun Re No 30 Cr p 105 (114) *Empress v Josef Casorali*

(39) 17 AIR 1930 Oudh 334 (334) 31 Cr L Jour 719 5 Luck 720 *Emperor v Chiranj Lal* (Verdict cannot be said to be wrong—No reversal)

(31) 32 Cr L Jour 1028 (1029) 133 Ind Cas 475 (All) *Emperor v Madan Gopal*

(34) 21 AIR 1934 Pat 533 (536) 36 Cr L Jour 262 *Emperor v Suar Gola* (Verdict cannot be said to be wrong—Verdict not set aside)

(28) 30 Cr L Jour 820 (824) 117 Ind Cas 680 (Cal) *Emperor v Yunus Ali* (The fact that one of the Judges of the High Court agrees with the verdict is sufficient for its not being set aside)

(34) 29 AIR 1933 Pat 433 (434 435), *Emperor v Bhagwat Sahu* (Verdict depending mainly on the question on whether the testimony of witnesses is to be believed — Verdict not perverse—Such verdict is to be upheld)

[See also (40) 27 AIR 1940 Nag 17 (30) 41 Cr L Jour 289 1 L R (1940) Nag 394 (FB), *Dattatraya Sadasani v Emperor* (Per Stone, C J and Grille J — If the Court is not absolutely certain that the jury's opinion is wrong but is of opinion that it is wrong the proper course is to accept that opinion or possibly in certain circumstances to order a new trial If the Court inclines to an opinion that the jury is wrong but has not decided on one way or other the right course is to accept the jury's opinion)]

19 (45) 2 AIR 1915 Oudh 49 (57) 47 Cr L Jour 66 220 Ind Cas 447 (DB) *Emperor v Sheo Nandan Mallah* (Unanimous jury verdict of not guilty — High Court on reference satisfied on evidence — Verdict not set aside.)

(96) 20 Bom 215 (221 227), *Queen-Empress v Deraj Gorundji* (Per Jardine, J — Verdict manifestly wrong and unreasonable—Per Rande, J, verdict perverse)

though as it has been said before, its powers are not limited to the perversity or unreasonableness of the verdict

It has been held that when a confession comes before the High Court in appeal or upon a reference under this section or in any other manner it is open to the High Court to consider whether the making of the confession was caused by any such threat inducement or promise as is contemplated by s 24 of the Evidence Act²⁰

It has been held by the High Court of Bombay in the undermentioned case²¹ that the powers of the High Court under this section are controlled by s 537 and that consequently where there is no failure of justice, the High Court cannot interfere

12 Reference in case falling under S 449 — See Section 449 Note 7

13 "After giving due weight to the opinions of the Sessions Judge and the jury." — In arriving at a conclusion the High Court is required to give due weight to the opinions of the Sessions Judge and the jury. There is a difference of opinion as to the relative weight to be given to such opinions, one view being that the opinion of the jury must stand unless the evidence and opinion of the Judge show clearly that it is wrong and that in the interests of justice it ought to be reversed¹ a second view being that more

- (73) 19 Suth W R Cr 45 (46) *Queen v Doorjodhun* (Verd ct reasonable—No interference)
 (05) 2 Cri L Jour 259 (264) 32 Cal 759 9 Cal W N 520 *Emperor v Abdul Hamid* (Jury refusing to believe expert witness—Verdict cannot be said to be unreasonable—Verd ct not set as de)
 (22) 9 AIR 1922 Cal 382 (386) 49 Cal 358 24 Cri L Jour 291 *Emperor v Balaram Das* (Verdict incomprehensible)
 (23) 10 AIR 1923 Cal 97 (99) 25 Cri L Jour 748 *Emperor v Sristidhar Masumdar* (Verdict not so reasonable — No interference)
 (24) 11 AIR 1924 Cal 960 (963) 95 Cri L Jour 1217 *Emperor v Sagarmal* (Jury overlooking direct evidence)
 (28) 15 AIR 1928 Cal 233 (233) *Emperor v Komoruddin* (Verdict against the evidence)
udhar Mandal v Emperor (Verd ct not

- v Ali Hyder* (Verdict against evidence)
v or v Zahir Hyder
 (33) 20 AIR 1933 Pat 273 (273) 34 Cri L Jour 731, *Emperor v Sitalu Ahir* (Verd ct not perverse — No interference)
 (33) 20 AIR 1933 Pat 481 (484) 34 Cri L Jour 828 *Emperor v Kameshwar Lal* (Verdict correct — No interference)
 (34) 35 Cri L Jour 285 (286) 147 Ind Cas 53 (Oudh) *Emperor v Chupai* (Verdict perverse and against the weight of evidence)
 (25) 12 AIR 1905 Oudh 311 (311 312) 26 Cri L Jour 310 28 Oudh Cas 69 *Emperor v Ali Buzi* (Verd ct not perverse)
 (28) 15 AIR 1908 Oudh 277 (280) 3 Luck 491 29 Cri L Jour 983 *Mohammad Hadi Husain v Emperor* (Verdict unreasonable and also perverse)
 (24) 20 Cri L Jour 160 (166) 76 Ind Cas 389 (Cal) *Emperor v Sukhn Bewa* (Verdict reasonable — Reference rejected)

2) 16 Snd L R 143 *Emperor v Pr*
v Ramdas (Verdict palpably perverse)

Rahim (Unanimous verdict)
rashken (Evidence concluded)
 Verdict is perverse)
peror v Maharaj Behari

1 Cal 487 45 Cri L Jour 150 909 Ind Cas 570

lom 31 25 Cri L Jour 815 *Emperor v Shankar*

Also see S 537, Note 3

Note 13

1 (24) 11 AIR 1904 Cal 701 (703) 51 Cal 160 25 Cri L Jour 1000 *Emperor v Jamalul Fakir*

weight should be given to the opinion of the Sessions Judge inasmuch as in addition to the fact that he has, equally with the jury, heard the witnesses he has been trained to appreciate evidence and gives reasons for his opinion,² a third view is that the opinion of the one is not entitled to more weight than that of the other and that they are both entitled to equal weight³ In the undermentioned case⁴ it was held that the measure of the relative weight to be attached to the opinions cannot be crystallized into an inflexible formula but depends upon the facts of each case though the trend of opinion is to prefer the opinion of the jurors

There is also a difference of opinions on the question whether the opinion of the jury includes the reasons for the verdict or whether it means the verdict only On the one hand, it has been held that the Judge has no power to ask the jury under S 303 the reasons for their verdict and that consequently the opinion of the jury does not include the reasons but only the verdict⁵ On the other hand it has been held that for the purpose of satisfying himself as to the advisability of making a reference under this section, the Judge is entitled to question the jury as to their reasons for their verdict and that the reasons so given are included in the word 'opinion' and can be considered by the High Court⁶ It has also been held that the word 'opinions' in this section is wider than the word 'verdict' in S 423, sub-s (2) and includes not only the final decision of the majority, but also the opinion of the minority⁷ The opinion of the Sessions Judge means the opinion expressed in the reference or at the hearing⁸ It does not include his speculations as to what external considerations, such as the conduct of the jury, might have affected the verdict of the jury⁹ The weight to be given to the opinion of the jury must depend to a considerable extent on the nature satisfactory or otherwise of the charge to the jury¹⁰

See also Note 11

14 Power of High Court to order re-trial or order additional evidence to be taken—The High Court can in a reference under this section not only determine the facts itself but may also order a re-trial¹ It may also call for additional evidence

- 2 (29) 15 AIR 1929 Cal 732 (733) 50 Cal 879 29 Cri L Jour 823 *Emperor v Ramchandra*
 3 (24) 11 AIR 1924 Oudh 314 (314) 27 Oudh Cas 29 20 Cri L Jour 78 *Emperor v Ramcharan*
 (13) 14 Cri L Jour 556 (559) 21 Ind Cas 156 (Cal) *Emperor v Neamatulla*
 4 (24) 11 AIR 1924 Cal 321 (322) 51 Cal 347 25 Cri L Jour 753 *Emperor v Dhananjay*
 S (06) 3 Cri L Jour 371 (375) 29 Mad 91 *Emperor v Chellan*
 (28) 15 AIR 1928 Pat 203 (205) 7 Pat 55 29 Cri L Jour 466 *Ram Jag Ahir v Emperor*
 (91) 15 Bom 452 (457) *Queen Empress v Dada Ana*
 (24) 11 AIR 1924 Mad 232 (233) 25 Cri L Jour 145 *Nannu Kudumban v Emperor* (It becomes an opinion on disagreement)
 (14) 1 AIR 1914 Cal 324 (330) 15 Cri L Jour 31 *Emperor v Tara Pada*
 6 (40) 27 AIR 1940 Nag 17 (36) 41 Cri L Jour 789 1 LR (1940) Nag 394 (FB) *Dattatraya Sadashiv v Emperor* (Per Bose J)
 (20) 7 AIR 1920 Mad 170 (171) 43 Mad 744 21 Cri L Jour 466 *In re Subbiah Thevar* (Per Sadasiva Aiyar J — Spencer J dissenting)

¹ It Zohra

² v Annada Charan

³ Punil Charn (Per Jwala Prasad J —

- (26) 13 AIR 1926 Nag 304 (309) 22 Nag LR 42 27 Cri L Jour 773, *Emperor v Kanlaya*
 (29) 16 AIR 1929 Nag 84 (95) 30 Cri L Jour 310 *Emperor v Tukaram*

⁴ v *Emperor* (Per Bose J)

8 (21) 11 AIR 1924 Mad 232 (233) 25 Cri L Jour 145 *Nannu Kudumban v Emperor*

9 (24) 11 AIR 1924 Cal 321 (322) 51 Cal 317 25 Cri L Jour 753 *Emperor v Dhananjay Roy*

10 (45) 32 AIR 1915 Pat 109 (113) 23 Pat 656 46 Cri L Jour 613 218 Ind Cas 465 (DB) *Emperor v American Mission*

Note 14

1 (35) 22 AIR 1935 Cal 144 (149) 67 Cal 572 36 Cri L Jour 80 (FB) *Rafiqueuddin Ahmad v Emperor*

The jurisdiction exercised in such cases is not, however, original criminal jurisdiction³ although it is not also that of a Court of appeal.⁴

15 Verdict of jury in cases not triable by jury—Applicability of this section.—Where by mistake an offence which is triable with the aid of assessors is tried by jury, the Judge when he discovers the mistake may treat the trial as legal and refer the case to the High Court under this section if he disagrees with the verdict of the jury.¹ Where a charge is triable with the aid of the jury as assessors (s 260 sub s (3)) but is tried by the jury and a verdict is given the procedure though irregular is legal and a reference is competent under this section.²

Sub section (2) of this section which forbids recording of judgment of acquittal or of conviction applies only to charges which are tried by jury and not to charges which are tried with the aid of assessors. Thus where a case is triable with regard to some of the charges by a jury and with regard to others with the jury as assessors under s 300 sub s (a) the mere fact that a reference is made with regard to the charges triable by jury does not absolve the Court from proceeding under s 309 to judgment in respect of the other charges. The whole case should not be submitted.³ It has been held that in such a

(40) 27 AIR 1940 Nag 17 (29) 41 Cr. L. Jour 289 IIR (1940) Nag 394 (TB) *Dattatraya Sadashiv v Emperor*

(37) 24 AIR 1937 All 190 (196) 38 Cri L Jor 465 ILR (1937) All 419 *Manjia v Emperor* (Obiter)
n *Chohan*
(Obiter)

625 200 Ind Cas 3rd (DE)

Emperor v Ram Aular Lal (Where the accused has been greatly harassed by the undue prolongation of proceedings it is not desirable that he should be retried to meet the charge of criminal misappropriation in respect of items which have been included in the charge of falsification of accounts for which he has been held to be not guilty)

Narayan r Empress

3 (00) 29 Cal 286 (297 303) 6 Cal W N 254 (FB) *In the matter of Horace Lyall*

4 (28) 15 AIR 1928 All 207 (P10) 50 All 625 29 Cri L Jour 353 (FD) *Emperor v Shera*

Note 15

1 (85) 22 AIR 1935 Pat 433 (435) 36 Cri L Jour 1502 *Emperor v. Bhaguate Sahu* (Offence under S 396 Penal Code)

2 (99) 23 Dom 696 (697) 1 Dom L R 114 *Queen Empress v Jayram Haribhai* (Offence of criminal appropriation)

(98) 20 Cal 555 (557) *Surja Kurma v Queen Empress*

(79) 4 Cal L R 405 (409) *In re Bhootnath Day* (Offence under S 82 of Registration Act triable by
jurors as assessors)

Judge with the aid of assessors)

re Baji Reddi (Judge is not competent to
sors to High Court nor c n his reference given

ngappa
Emperor

whole case to High Court when charges triable with the aid of assessors are not disposed of prematurely)

(08) 7 Cri L Jour 236 (238) 9 Bom L R 1057, *Emperor v Vyankatsingh Sambhu Singh*

(108) 7 Cri L Jour 236 (238) 9 Bom L R 1057, *Emperor v Vyankatsingh Sambhu Singh*
[See however (37) 24 AIR 1937 Pat 662 (665) 39 Cri L Jour 166 *Emperor v Haria Dhol*,
(Inconvenience of above procedure pointed out)]

Also see § 269 Note 7.

case the High Court can on the reference set aside the sentence passed by the Judge with regard to the offence triable with the aid of assessors (though not appealed against) ⁴

See also S 269 Note 3 S 306 Note 3 and Note 13 on S 309

16. Acquit or convict of any offence, etc — It has been seen in Note 11 that the whole case is open to the High Court and it can come to its own conclusion therein. In hearing a reference under this section the High Court can acquit the accused or convict him of any offence of which the jury could have convicted the accused on the charges framed and placed before them ¹. In cases falling within Ss 237 and 238 the accused can be convicted of an offence different from the one for which he was charged. So the High Court can, on hearing a reference under this section convict the accused of an offence different from the one he was charged with within the limits imposed by those two sections ². Thus in a case under S 302 of the Penal Code the High Court can convict the accused of an offence under S 301A of that Code even though the accused was not specifically charged under that section since such a case comes under Ss 237 and 238 of this Code ³. On a case submitted under this section the High Court can acquit the accused if it so thinks fit on facts notwithstanding that the jury have found the prisoner guilty ⁴ and it can convict the accused notwithstanding that the jury have found the prisoner not guilty ⁵.

See also the undermentioned case ⁶

17 Procedure at the hearing of reference — The High Court under this section on a reference against the verdict of acquittal must deal with the case as an appeal

- 4 (22) 9 AIR 1922 Bom 281 (237) 24 Cri L Jour 923 *Emperor v. Hasrat Mohani*
[See however (39) 25 AIR 1934 Mad 686 (686) 30 Cri L Jour 864 *In re Bajji Reddi* (Reference of case including offences triable by jury and those triable with the aid of assessors — Reference cannot give jurisdiction to High Court to dispose of latter offences)]

Note 16

- 1 (19) 6 AIR 1919 Cal 195 (197) 20 Cri L Jour 223 *Emperor v. Ghanoo Lal Bania*
2 (77) 3 Cal 189 (191 192) *Empress v. Harai Mirdha* (Charge under S 302/149 and S 326/149 — Can be convicted under S 143 Penal Code)
(14) 1 AIR 1914 Mad 425 (428) 37 Mad 236 13 Cri L Jour 739 *In re Adabala* (Can convict under S 326 Penal Code where the charge was only under S 397 Penal Code)
(24) 11 AIR 1924 Bom 450 (451) 26 Cri L Jour 211 *Emperor v. Charles John Waller* (Charge under S 304 conviction under S 304A)
(95) 22 Cal 1006 (1009, 1010) *Queen v. Sistanli* (Can convict under S 363 Penal Code even though the charge was only under Ss 366 and 376 Penal Code)

Also see S 239 Note 5

- 3 (15) 2 AIR 1915 Bom 297 (298) 16 Cri L Jour 305 *Emperor v. Rattana Channappa*
[See also (45) 32 AIR 1945 Cal 159 (171 175) 46 Cri L Jour 692 220 Ind Cas 237 *Emperor v. Ajit Kumar Ghosh* (High Court could convict accused of any offence of which they might legally be convicted)]

- 4 (73) 20 Buth W R Cr 1 (4) 11 Beng L R 14 *Empress v. Koonjo Leth*
(26) 13 AIR 1926 Cal 1034 (1037) 27 Cri L Jour 1311 *Emperor v. Faliub* (Unanimous verdict of guilty set aside and accused acquitted)

5
S

Shri

Mr Dur

no accused charged

under S 120B Penal Code — Charge not showing complicity of any other person in conspiracy — One of the accused convicted of conspiracy and the case of the other accused referred under S 307 — Latter acquitted on reference — Conviction against the other accused cannot remain and must be set aside)

by the prosecution¹ In such a case the Crown is the party who asks for a conviction and the prosecutor *must begin the case* and satisfy the High Court that there is a case calling upon the prisoner for an answer²

18 Notice of reference — This section is silent as to whether any notice of reference to the accused is necessary It is, however, fair to him that such notice should be given and that he should have time to bring forward any objection he may have to recommendations of the Sessions Judge¹

19. Difference between Judges hearing reference—Procedure — Where a reference is heard by two Judges and they differ in their opinions, the decision is not to be governed by the opinion of the senior Judge, the matter must be referred to a third Judge in the manner required by Section 499¹

20. Appeal. — Inasmuch as no judgment of acquittal or of conviction is to be recorded where a reference is made under this section there can be no appeal as from a Sessions Judge to the High Court¹ But where no reference is made it is clear that the judgment that must follow the verdict will be appealable under ss. 417² and 418

A judgment passed by the High Court on a reference under this section is itself not open to appeal to the High Court³

G.—Re-trial of Accused after Discharge of Jury.

308.* Whenever the jury is discharged, the accused shall be re-trial of accused detained in custody or on bail (as the case may be) and after discharge of jury shall be tried by another jury unless the Judge considers that he should not be re-tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

1. Legislative changes — There was no section corresponding to this in the Codes of 1861 and 1872 This section was first introduced in the Code of 1892

2 "Whenever the jury is discharged" — See Section 282 Note 2

3 Re-summoning of a jury. — In the undermentioned case¹ Rankin J observed as follows

"With reference to the question whether, had we thought that the discharge of the jury was illegal, we would have ordered a re-summoning of the old jury I only desire to say for myself that it would require very strong circumstances indeed to make me give an order for the re-summoning of a jury that have been at large since the 16th of August Taking one thing with another, it would require some little further

* 1892 S 308 1872 and 1861—Nil

Note 17

1 (73) 20 Suth W R Cr 70 (71) 13 Beng L R App 20 *Queen v Nabin Ghunder*
2 (73) 20 Suth W R Cr 33 (33) *Queen v Rani Churn Ghose*

Note 18

1. (73) 19 Suth W R Cr 38 (39) *Queen v Ootlam Dhoba*
(73) 20 Suth W R Cr 33 (33) *Queen v Ram Ghurn Ghose*

Note 19

1. (29) 16 AIR 1929 Mad 135 (137) 30 Cri L Jour 843, *Mottayya Pillai v Emperor*
2 (78) 2 Bom 526n (5'6n), *In re Hari Ghanu*
3 (91) 1891 Rat 691 (691) *Queen Empress v Adveppa*

Section 308 — Note 3

1. (27) 14 AIR 1927 Cal 199 (200) 23 Cri L Jour 141, *Emperor v Monmotha Nath-*

time before the case possibly could be re-tried and it would be improper and inconvenient for persons to be re-summoned who have been released from their oath as jurors by an order of discharge and who therefore have been perfectly entitled in the interim to discuss the matter either with their friends or with the accused or with anybody they like. Such an order as that I hope will never be made by this Court except in very exceptional circumstances.

4. "The Judge shall make an entry" — In an order under this section that the accused should not be re-tried the Judge cannot pass remarks implying the guilt of the accused.¹ But the Judge can record his opinion that the accused is innocent.²

Where the Judge is of opinion that the accused should not be re-tried the passing of an order of acquittal is not technically correct the proper course is to make an entry as provided by this section though in either case in substance the effect is the same.³

Where the accused was tried three times but the Judge could not agree with the verdict of the jury in any trial it was held that as there must be a limit to the number of trials which an accused must be called upon to face the Judge should make an entry under this section that the accused should not be re-tried and it would operate as an acquittal by operation of law and that the holding of successive re-trials was not a ground for transfer of the case to a non-jury district.⁴

5 Re-trial of accused — As to whether and in what cases a re-trial will be barred under S 403, see S 403 Note 7.

H — Conclusion of Trial in Cases tried with Assessors

309. (1) When, in a case tried with the aid of assessors, the case

Delivery of opinion for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally "on all the charges on which the accused has been tried", and shall record such opinion, "[and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded].

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

* Code of 1898 original S 309

309 (1) When in a case tried with the aid of assessors the case for the defence and the prosecutor's reply (if any) are concluded the Court may sum up the evidence for the prosecution and defence and shall then require each of the assessors to state his opinion orally and shall record such opinion.

(2) The Judge shall then give judgment but in doing so shall not be bound to conform to the opinions of the assessors.

(3) If the accused is convicted the Judge shall pass sentence on him according to law.

1882 S 309 1872 Ss 255 261, 262 1861 S 324

Note 4

1 (29) 16 AIR 1909 S n1 145 (146) 23 Sind L R 397 30 Cri L Jour 877 *Mir Ahmad v Emperor* {See also (47) 32 AIR 1915 Bom 110 (119) *Emperor v Abdul Wahab Kamruddin* (In cases falling under Ss 305 and 309 the accused is neither convicted nor acquitted of the offence when the jury is discharged.)

2 (35) 22 AIR 1935 S n1 189 (191) 36 Cri L Jour 1359 *Premchand v Emperor*

3 (46) 33 AIR 1946 Bom 39 (17) (FN) *Bombay Government v Abdul Wahab*

4 (41) 31 A I R 1944 S n1 65 (67, 68) 1 L R (1944) Kar 239 212 Ind Cas 79 45 Cri L Jour 505 (DB) *Emperor v Hundraj Lachiram*

(3) If the accused is convicted, the Judge shall, * [unless he proceeds in accordance with the provisions of section 562], pass sentence on him according to law

* These words were inserted by the Code of Criminal Procedure (Amendment) Act 18 (VIII) of 1993

Synopsis

- | | |
|--|---|
| 1 Scope of the section | 9 Recording of opinions |
| 2 Summing up of evidence by Judge to assessors | 10 Questioning assessors |
| 3 Delivery of opinions of assessors | 11 Reasons for opinions, if may be asked |
| 4 Retirement of assessors to consider their opinions | 12 "The Judge shall then give judgment" |
| 5 Each assessor to be asked his opinion | 13 Judge not bound to conform to the opinions of the assessors |
| 6 Assessors' opinions to be stated orally | 14 Opinions of assessors recorded by one Judge — Judgment delivered by his successor — Legality |
| 7 Opinion to be given on all the charges | 15 Sentence |
| 8 Conviction for offence different from that on which opinions of assessors were taken | |
- NOTE to the Synopsis See the Notes indicated for the following topics
- | | |
|--|---|
| Assessors case tried as jury case—Procedure See Note 13 | Legislative changes See Note 2 |
| Assessors not to be cross examined See Note 11 | Medical evidence after opinion See Note 13 |
| Assessors' opinion based on evidence and not on personal knowledge See Note 13 | No amendment of charge after taking opinion of assessors See Note 8 |
| Consultation by assessors See Note 4 | No cancellation of trial after opinion See Note 13 |
| Double capacity of jurors and assessors to be explained See Note 2 | No local inspection after opinion See Note 13 |
| Duty of Judge to assist assessors See Note 10 | No trial after taking opinion See Note 13 |
| Further opinion See Note 10 | Object of summing up See Note 2 |
| Individual opinion and not concurrence See Note 5 | Omission to ask for or record opinion—Effect. See Notes 3 and 5 |
| Judge unable to record—Procedure See Note 2 | Opinion and not bare result See Note 9 |
| Judge's opinion not to be forced on assessors See Notes 2, 3 and 11 | Opinion of committing Magistrate See Note 13 |
| | Record of summing up See Note 2 |
| | Weight to assessors' opinion See Note 13 |

1 Scope of the section — The Code provides for two modes of trial before the Sessions Court —

(1) trial by jury, and

(2) trial with the aid of assessors

Sections 297 to 307 provide for the procedure to be followed at the conclusion of a trial by jury after the arguments on either side have been completed. This section provides for the procedure to be followed at the conclusion of a trial with the aid of assessors. The following are some of the important points of distinction between the verdict of a jury and the opinions of assessors¹

- (1) The verdict of a jury is *conclusive* though the Judge disagrees with it unless he considers it fit to submit the case to the High Court under S 307. But in a trial with the aid of assessors the Judge is not bound to pronounce judgment in accordance with the opinions of the assessors although in delivering his judgment he is bound to take into consideration the opinions of the assessors. See Note 13

Section 309 — Note 1

Arumal Reddi

¹ In 243 Emperor v. ... as a larger share ... that in the absence of a specific prohibition an objection that could not be upheld regarding a juror would be ruled out in the case of an assessor — Per Ram Lal J. in Order of Reference]]

- (2) The jury form a *body* and their verdict is the verdict of the body. If it is in the case of a trial with the aid of assessors the assessors do not form a body each acts and expresses his opinion individually. See Note 5
- (3) In the case of a trial by jury the Judge's charge to the jury is an *essential* part of the procedure while in a trial with the aid of assessors it is left to the *discretion* of the Judge whether or not to sum up the evidence to them. See Note 2
- (4) The jury are entitled to retire for mutual consultation before delivering their verdict the assessors are not so *entitled* although the Judge *may permit* such consultation. See Note 4

2 Summing up of evidence by Judge to assessors — While it is obligatory on the Judge to charge the jury summing up the evidence and laying down the law by which they are to be guided (s 297) this section confers a *discretion* on the Court to sum up the evidence for the prosecution and the defence¹ This provision was first introduced into the section in the Code of 1892² but even prior to it it was held that the Court had a discretion to sum up the evidence for the benefit of the assessors³ The object of the provision is to enable the Sessions Judge in long or intricate cases to place the evidence in an intelligible form before the assessors so as to assist them in arriving at a reasonable conclusion, the provision should be resorted to only in such cases⁴ In summing up the evidence the Judge should not obtrude on the assessors his own opinion on the value of the evidence⁵ When at the same trial, an accused is tried by jury for some offences and by the Court with the aid of the jurors as assessors for other offences (s 269 sub s (8)) the Judge in summing up the evidence should explain to the jurors the double capacity in which they are acting⁶ As to the *recording* of the summing up, see the undermentioned case⁷

3 Delivery of opinions of assessors — In a trial by a Sessions Court with the aid of assessors, the Judge is not bound to deliver judgment in conformity with the opinions of assessors (see Note 13), but he is bound to take the opinions of the assessors before convicting or acquitting the accused¹ Even where the accused admits his guilt (after the prosecution evidence, in a case where originally he pleaded not guilty) he cannot be convicted without taking such opinions² The power (under s 289) to record a finding of not guilty and acquit the accused at the conclusion of the case for the prosecution without calling on the accused to enter on his defence and without recording the opinions of the assessors is confined to cases where there is no evidence in support of the prosecution Where such is not the case the Judge is bound to record the opinions of the assessors under this section though he considers the evidence for the prosecution to be unreliable³ The

Note 2

1 (12) 13 Cr L Jour 497 (497) 40 Cal 163 15 Ind Cas 641 *Nazimuddin v Emperor*

2 (83) 9 Cal 875 (876) 12 Cal L Rep 505 *Shadulla Howladar v Empress*

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omission to ask for and record opinions is not a mere irregularity curable under s 57⁴. But where a prosecution is withdrawn under S 491, the accused is entitled to be acquitted irrespective of the opinions of the assessors and such opinions need not be recorded before he is acquitted⁵.

The opinions of the assessors must be given in open Court. The failure to do so must amount to such disregard of the forms of justice as to lead to substantial and grave injustice⁶ and cannot be cured under S 537.

4 Retirement of assessors to consider their opinions.—This section makes no provision as to the right of the assessors to retire to consider their opinions (compare s 300 in the case of jurors). The matter is left to the discretion of the Judge. Though he may in his discretion allow the assessors to consult each other before giving their opinions¹ he is not bound to do so as he is entitled to have before him the independent and individual opinion of each of the assessors².

5 Each assessor to be asked his opinion.—In a trial by jury, the jury form a body and the verdict is that of the body. But in a trial by the Court with the aid of assessors the assessors do not form a body, but each assessor acts and expresses his opinion individually¹. Hence it is the duty of the Judge to ask each assessor individually his opinion and record it separately². Where the opinions of some of the assessors are not

- (83) 9 Cal 875 (877) 12 Cal L Rep 506 *Shadulla Howladar v Empress*
 (92) 16 Bom 414 (422) *Queen-Empress v Vajiram* (10 All 414 followed)
 (93) 0 C P L R Cr 24 (26) *Empress v Tularam* (10 All 414 and 16 Bom 414 followed)
 (80) 2 Weir 891 (391, 892)

Also see S 289, Note 7

- 4 (88) 10 All 414 (417 418) 1888 All W N 129, *Queen-Empress v Minna Lal*
 (12) 13 Cr L Jour 197 (497) 40 Cal 183 15 Ind Cas 611, *Narimuddi v Emperor*
 (06) 2 Cr L Jour 609 (610) 7 Bom L R 731 *Emperor v Bai Nani*

[See (71) 15 Buth W R Cr 3 (3) *Queen v Bhugwan Lal* (No legal conviction can take place unless the opinion of the assessors is taken on the whole of the evidence in a case)]

Also see S 289 Note 11

[But see (75) 1 All 610 (611) *In the matter of Narain Das*]

- 5 (88) 1888 Rat 307 (307) *Queen Empress v Chendasapa*

- 6 (48) 30 AIR 1913 P C 4 (7) 44 Cr L Jour 1 203 Ind Cas 453, *Mahli ulmi Djalami v The King*

Note 4

- 1 (87) 1887 Pan Re No 41 Cr 95 (97) *Hassan Khan v Empress* (The more correct way is such as would be to put them in a room where no one could have access to them)
 (15) 2 AIR 1915 Vol 1 1036 (1037) 16 Cr L Jour 717 (718), *In re Sennimalai Goundan* (There is no provision to prevent consultation between assessors)
 2 (15) 2 AIR 1915 Mad 1036 (1037) 16 Cr L Jour 717 (718) *In re Sennimalai Goundan* (It is no irregularity to refuse consultation)
 (01) 24 Mad 573 (537) 2 Weir 340 11 Mad L Jour 241, *King Emperor v Thirumal Reddy* (Assessors are not to retire for consultation and form their opinions)

Note 5

- 1 (01) 24 Mad 573 (536 537) 2 Weir 340 11 Mad L Jour 241, *King Emperor v Thirumal Reddy*
 [See (39) 26 AIR 1939 Lah 475 (477) 41 Cr L Jour 55 I L R (1939) Lah 243 *Emperor v Pahlu* (An assessor does not form an essential part of the Sessions Court — Per Ram Lal J in Order of Reference)]
 2 (97) 14 All 502 (506) 1892 All W N 95 *Queen Empress v Mulua* (Record of opinion of one assessor only when there were two — Irregularity)
 (79) 4 Cal L Rep 405 (409) *In re Bhootnath Dey*
 (01) 24 Mad 573 (537) 2 Weir 340 11 Mad L Jour 241 *King Emperor v Thirumal*
 (83) 9 Cal 875 (877) 12 Cal L Rep 506, *Shadulla Howladar v Empress*
 (87) 1887 Pan Re No 41 Cr p 95 (97, 98) *Hassan Khan v Empress* (Where however the assessors are all of same opinion, it is only a matter of form whether their opinions are taken down once or repeated five times where there are five assessors)
 (1863) 4 Buth W R Cr L 9 (10) (Each assessor should be asked to state his individual opinion and not merely signify concurrence with his co-assessor)
 [See (38) 25 AIR 1938 Cal 551 (552) 39 Cr L Jour 835 *Nirmal Kumar v Emperor*]

asked for and recorded the trial is vitiated by an *illegality*³ But where the opinions of all the assessors are asked for the fact that on its being found that all of them are of the same opinion such opinion is recorded in a *joint statement*, instead of separately, is only an irregularity curable by section 53⁴

6 Assessors' opinions to be stated orally.—The section requires the opinions of the assessors to be stated *orally*. The submission of written opinions by the assessors is not contemplated by the section¹ But the giving of opinions in writing is only an irregularity which will not vitiate the proceedings unless it has occasioned a failure of justice²

7 Opinion to be given on all the charges — A distinct opinion on each charge on which the accused has been tried must be taken and recorded¹ It has been held by the Outh Chief Court that a failure to comply with the section in this respect renders the trial illegal²

8 Conviction for offence different from that on which opinions of assessors were taken — After the opinions of the assessors have been taken it is not open to the Court to add to or *alter the charge* (s 237) But if a case falls within the purview of s 237 or s 238 the accused can be *convicted* of an offence different from that on which the opinions of the assessors were taken¹ Thus, where the accused is charged under s 302 Penal Code (murder) and the opinions of the assessors are taken on such charge it is open to the Session Judge (in a proper case) under s 237 to convict the accused under s 301 of the Penal Code (criminal, disappearance of evidence of the offence by removing the dead body) though the opinions of the assessors are not taken on such offence² Similarly (in a proper case) an accused can be convicted under s 403 Penal Code (criminal misappropriation) though the charge against him was under s 302 Penal Code (murder) and the opinions of the assessors were taken only on such charge³ The

3 (33) 26 Mad 596 (199) 2 Weir 333 *Lamabrishna P Idi v Emperor* (Section 269 (3) — Opinions of all jurors as assessors not taken — Illegal)

4 (87) 1867 Pun Re No 41 Cr p 99 (97, 98) *Hassan Khan v Emperor*

(102) 14 All 502 (506) 1892 All W N 95 *Queen Empress v Mulwa*

Note 6

1 (12) 13 Cri L Jour 433 (433, 434) 39 Cal 119 15 Ind Cas 65 *Lalit Chandra v Emperor*

2 (92) 12 AIR 1925 P C 130 (131) 6 Lah 226 52 Ind App 191 26 Cri L Jour 1059 (FC) *Begu v Emperor* (Such point ought to be raised at the trial)

Note 7

1 (28) 15 AIR 1908 Na, 257 (261) 29 Cri L Jour 561 *Mt Shevants v Emperor*

(30) 22 AIR 1935 Sind 23 (23, 24) 28 Sind L R 295 36 Cri L Jour 501 *Ditto v Emperor*

[See (74) 22 Sath W R Cr 34 (34, 35) *Queen v Matam Mal* (Case decided under 1872 Code — Charge of murder and culpable homicide — *Hell* intent on of Legislature was that assessors should give definite opinions whether prisoner was guilty of either offence)]

2 (34) 21 AIR 1934 Oudh 354 (359) 35 Cri L Jour 1066 10 Luck 119 *Lal Pehari v Emperor*

Note 8

1 (22) 12 AIR 1925 P C 130 (131) 6 Lah 226 52 Ind App 191 (FC) *Begu v Emperor*

— Legal)

(29) 16 AIR 1929 Sind 147 (148) 30 Cri L Jour 875 *Haroon v Emperor* (Sections 403 and 395, Penal Code)

[But see (24) 11 AIR 1904 Bom 246 (247) 26 Cri L Jour 394, *Appaya Da Lingappa v Emperor* (Submitted not good law in view of AIR 1925 P C 130 6 Lah 226 52 Ind App 191 26 Cri L Jour 1059 (FC))

High Court of Allahabad has expressed the view that in such a case it would be better if the Judge elicits the opinion of the assessors on such a charge also but his not doing so is a mere irregularity and cannot vitiate the trial⁴

9. Recording of opinions. — The opinions of assessors should be recorded correctly¹ and fully² They should be recorded in the very words used by each assessor immediately after he delivers his opinion³ It was held in the undermentioned case⁴ that the failure to record the opinions of the assessors vitiated the proceedings and that the conviction must be set aside.

10. Questioning assessors — This section empowers the Judge to ask the assessors such questions as are necessary to ascertain what their opinions are Thus if there is anything obscure in the opinions expressed by the assessors, the Judge can clear up the obscurity by questioning the assessors¹ Sometimes it may become the duty of the Judge to assist the assessors by putting them specific questions concerning the facts of the case Thus, when there is a mixed question of fact and law to be decided, as for instance a question of private defence, it may be necessary to ask the assessors specific questions on the facts on which the law will turn² But the Judge should allow the assessors in the first instance, to give their opinions in their own way and when they have completed their statements, it would be open to him to question them to elucidate their opinions³ In questioning the assessors they should first be asked to give their opinions as to what happened and then if necessary, to give a further opinion on such matters as intention, knowledge, etc⁴

11. Reasons for opinions, if may be asked — There is a conflict of decisions as to whether the assessors may be asked to give reasons for their opinions In a decision of the Madras High Court it has been held that, as in the case of jurors, so also in the case of assessors, the Judge ought not to ask the assessors to give reasons for their opinions beyond what is necessary to decide whether they have understood the case¹ On the other hand, it has been held by the Bombay High Court that the assessors can and should be asked to give reasons for their opinions² A similar view was held by the Calcutta High Court in certain old decisions³ The Chief Courts of the Punjab and Lower Burma were

4 (45) 82 AIR 1945 All 87 (90) 46 Cri L Jour 495 218 Ind Cas 372, *Fattan v Emperor*

Note 9

1 (81) 1891 All W N 145 (146) *Empress v Darmajit* (Opinion of assessors recorded as guilty when the opinion was 'not guilty')

2 (1900) 2 Bom L R 323 (324) *Queen-Empress v Fakira* (Opinions of assessors should be recorded otherwise than by simple statement that assessor No 1 found all the accused not guilty and that

expressed, without any influence from the Judge)

4 (34) 21 AIR 1934 Pat 561 (564) 19 Pat 729 36 Cri L Jour 17, *Bhikari v Emperor*

Note 10

1 (12) 18 Cri L Jour 497 (497) 15 Ind Cas 641 40 Cal 163, *Nasimuddin v Emperor* (It is not open to the Judge to cross examine the assessors)

2 (18) 5 AIR 1918 Pat 308 (310 311) 3 Pat L Jour 653 19 Cri L Jour 983, *Sundar Buhsh Singh v Emperor*

accused struck the deceased and if so, when, with what intention or knowledge, etc)

Note 11

1 (31) 1931 Mad W N 1139 (1140) *In re Kunnammal Krishnan* (Such procedure is not warranted

(No power to
ask such opinions)
example whether

also inclined to the same view⁴ This view proceeds on the ground that in the case of a jury their verdict is a simple verdict of guilty or not guilty while in the case of assessors, they merely give an *opinion* and its weight depends solely on the reason and cause on which it is supported⁵

In any view it is not open to the Judge to *cross examine* the assessors, they must be allowed to give their *independent* opinions on the case⁶ See also Note 13

12 "The Judge shall then give judgment" — The section requires that on taking the opinions of the assessors the Judge should proceed to deliver his judgment¹ He has no power after the opinions of the assessors have been recorded to cancel the trial and hold a fresh trial² Nor can he at such stage take fresh evidence³ or make a local inspection⁴ and base his judgment on such evidence or inspection The judgment must conform to the provisions of S 367 of the Code and must accordingly contain the reasons for the decision of the Judge It is no compliance with that section if the Judge merely states that he agrees with the opinions of the assessors⁵ In delivering his judgment though the Judge is not bound to conform to the opinions of the assessors he is entitled to take into consideration such opinions in arriving at his conclusions see Note 13 But the Judge is not entitled to refer in his judgment to the opinion of the *committing Magistrate*⁶

13 Judge not bound to conform to the opinions of the assessors — Sub section (2) expressly provides that in delivering his judgment the Judge is not bound to conform to the opinions of the assessors¹ But the Judge can and should take into

(1865) 8 Suth W R Cr 6 (6) *Queen v Mt Vina Nuggerbhatin*

(1865) 3 Suth W R Cr 21 (21) *Queen v Bushmo Anent* (Particularly when the opinion differs from that of Judge)

(79) 4 Cal L Rep 403 (410) *In re Bhootnath Dey*

4 (03) 1905 Pun Re No 49 Cr p 117 (117) 1903 Pun L R No 192 3 Cr L Jo r 132 *Guranditta v Emperor* (On difference of opinion between Judge and assessors, grounds of opinions of assessors should be recorded carefully)

Muddin v Emperor

Note 12

1 (38) 25 AIR 1939 Cal 551 (552) 39 Cr L Jour 635 *Nirmal Kumar v Emperor*

2 (15) 2 AIR 1915 Bom 149 (150) 16 Cr L J 624 *Nathu Rewa v Emperor* (Section 387 not applicable)

3 (93) 15 All 136 (136) 1893 All W N 50 *Queen Empress v Ramlal* (Evidence taken after assessors were discharged)

(88) 1888 Pun Re No 29 Cr, p 59 (62) *Hasan v Empress* (Though opinions of assessors are again taken after such fresh evidence assessors adhering to first opinion — No prejudice)

(70) 1870 Pun Re No 14 Cr p 26 (26) *Soojawul v Crown*

(34) 3 Cr L Jour 1002 (1003) 149 Ind Cas 412 (Lah) *Santa Singh v Emperor* (Examination of chemical examiner called as court witness under S 510 after assessors' opinions were recorded — Procedure irregular — But conviction not set aside as in circumstances of case, accused had suffered no prejudice)

opinion

6 (75) 22 Cal 805 (810) *Dewan Singh v Queen Empress*

Note 13

1 (39) 26 AIR 1939 Lah 475 (477) 41 Cr L Jour 55 I L R (1939) Lah 213 *Emperor v Pahlua* (Opinion of an assessor based on personal knowledge may be ignored)

(38) 25 AIR 1938 Nag 52 (53) 39 Cr L Jour 105 *Shahigram Rafanlal v Emperor* (Though assessors' opinions are entitled to consideration they lack legal training which will enable them to dis-

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High Court of Allahabad has expressed the view that in such a case it would be better if the Judge elicits the opinion of the assessors on such a charge also but his not doing so is a mere irregularity and cannot vitiate the trial⁴

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4 (45) 32 AIR 1945 All 87 (90) 46 Cri L Jour 495 218 Ind Cas 372 *Fattan v Emperor*

Note 9

- 1 (91) 1891 All W N 145 (146) *Empress v Darmajit* (Opinion of assessors recorded as guilty when the opinion was not guilty)
 2 (1900) 2 Bom L R 323 (324) *Queen Empress v Fakira* (Opinions of assessors should be recorded otherwise so than by simple statement that assessor No 1 found all the accused not guilty and the assessor No 2 concurred in such opinion But reasons for the opinions should be briefly stated)
 3 *Emperor v they*

Note 10

- 1 (12) 13 Cri L Jour 497 (497) 15 Ind Cas 641 40 Cal 163 *Nazimuddin v Emperor* (It is open to the Judge to cross examine the assessors)
 2 (18) 5 AIR 1918 Pat 303 (310 311) 3 Pat L Jour 653 19 Cri L Jour 983 *Sundar Bish Singh Emperor*
 3 (14) 1 AIR 1914 Cal 456 (459) 41 Cal 350 15 Cri L Jour 385 *Ramesh v Emperor*
 (12) 13 Cri L Jour 497 (497) 15 Ind Cas 641 40 Cal 163 *Nazimuddin v Emperor* (No power question assessors until they have delivered their opinions orally and Judge has recorded such opinion)
 4 (29) 16 AIR 1929 Lah 37 (37) 30 Cri L Jour 378 *Khewna v Emperor* (For example when accused struck the deceased and if so when with what intention or knowledge etc)

Note 11

Such procedure is not warranted

also inclined to the same view.⁶ This view proceeds on the ground that in the case of a jury their verdict is a simple verdict of guilty or not guilty while in the case of assessors, they merely give an opinion and its weight depends solely on the reason and sense on which it is supported.⁵

In any view it is not open to the Judge to *cross examine* the assessors they must be allowed to give their *independent* opinions on the case.⁶ See also Note 13

12 "The Judge shall then give judgment" — The section requires that on taking the opinions of the assessors the Judge should proceed to deliver his judgment.¹ He has no power after the opinions of the assessors have been recorded to cancel the trial and hold a fresh trial.² Nor can he at such stage take fresh evidence³ or make a local inspection⁴ and base his judgment on such evidence or inspection. The judgment must conform to the provisions of S 367 of the Code and must accordingly contain the reasons for the decision of the Judge. It is no compliance with that section if the Judge merely states that he agrees with the opinions of the assessors.⁵ In delivering his judgment though the Judge is not bound to conform to the opinions of the assessors he is entitled to take into consideration such opinions in arriving at his conclusions see Note 13. But the Judge is not entitled to refer in his judgment to the opinion of the committing Magistrate.⁶

13 Judge not bound to conform to the opinions of the assessors — Sub section (2) expressly provides that in delivering his judgment the Judge is not bound to conform to the opinions of the assessors.¹ But the Judge can and should take into

(1865) 3 Suth W R Cr 6 (6) *Queen v Mt Mina Nuggerbhatin*

(1865) 3 Suth W R Cr 21 (21) *Queen v Bushmo Anent* (particularly when their opinion differs from that of Judge)

(79) 4 Cal L Rep 405 (410) *In re Bhootnath Dey*

4 (1905) 1900 Pun Re No 48 Cr p 117 (117) 1900 Pun L R No 192 3 Cri L Jour 132 *Guranditta v Emperor* (On difference of opinion between Judge and assessors, grounds of opinions of assessors should be recorded carefully)

(93) 1900 1893 1900 Low Bur Rul 126 (127) *Nga Shan v Empress*

5 (1865) 3 Suth W R Cr 6 (6) *Queen v Mt Mina Nuggerbhatin*

6 (12) 13 Cri L Jour 497 (497) 15 Ind Cas 611 40 Cal 163 *Nazimuddin v Emperor*

Note 12

1 (38) 25 AIR 1939 Cal 551 (552) 39 Cri L Jour 835 *Nirmal Kumar v Emperor*

2 (15) 2 AIR 1915 Dom 149 (150) 16 Cr L J 824 *Nathu Rewa v Emperor* (Sect on 537 not applicable)

3 (93) 15 All 136 (136) 1893 All W N 50 *Queen Empress v Ramlal* (Evidence taken after assessors were discharged)

(88) 1888 Pun Re No 29 Cr, p 59 (62), *Hasan v Empress* (Though opinions of assessors are again taken after such fresh evidence assessors adhering to first opinion — No prejudice)

(70) 1870 Pun Re No 14 Cr, p 26 (26) *Soojansul v Crown*

(34) 30 Cri L Jour 1002 (1005) 149 Ind Cas 442 (Lab) *Santa Singh v Emperor* (Examination of chemical examiner called as court witness under S 510 after assessors' opinions were recorded — Proceedure irregular — But conviction not set aside as in circumstances of case accused had suffered no prejudice)

(89) 1889 All W N 181 (184) *Empress v Jia Lal* (After recording assessors' opinions taking opinion on of Civil Surgeon concerning mental condition of accused is illegal)

4 (18) 5 AIR 1918 Low Bur 22 (23) 9 Low Bur Rul 88 19 Cri L Jour 51 *Deya v Emperor*

5 (38) 25 AIR 1939 Cal 551 (552) 39 Cri L Jour 835 *Nirmal Kumar v Emperor*

6 (75) 22 Cal 805 (810) *Dewan Singh v Queen Empress*

Note 13

1 (39) 26 AIR 1939 Lah 475 (477) 41 Cri L Jour 55 1 I L R (1939) Lah 243 *Emperor v Pahlu* (Opinion of an assessor based on personal knowledge may be ignored)

(38) 25 AIR 1939 Nag 52 (53) 37 Cri L Jour 100 *Shaligram Ratanlal v Emperor* (Though assessors' opinions are entitled to consideration they lack legal training which will enable them to dis-

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v Emperor

LR 100 44 Cal 676 18 Cri L Jour 471

consideration such opinions² and although there is no express provision in the Code making it obligatory on the Judge to discuss in his judgment the opinions of the assessors still, as a matter of practice, it is desirable that he should do so³

The sub-section applies only to cases which are actually tried with the aid of assessors. Where a case which is so triable is, as a matter of fact, tried by jury, the Judge cannot treat the verdict of the jury as the opinions of assessors and pronounce judgment contrary to the verdict, but he must, if he disagrees with it, proceed under S 307⁴

The opinions of the assessors which a Judge can take into account in pronouncing his judgment are opinions based on *the evidence* in the case. The Judge cannot refer in his judgment to the opinion of an assessor based on the latter's *personal knowledge*⁵

See the undermentioned cases⁶ which lean on the weight to be attached to the opinions of the assessors

14 Opinions of assessors recorded by one Judge—Judgment delivered by his successor — Legality. — Where after hearing part of a case a Judge is transferred or goes on leave, his successor must hear the case *de novo* from the beginning and not only from the point at which the previous Judge left the case¹. Even where the previous Judge is transferred or goes on leave *after* the opinions of the assessors have been recorded the successor cannot pronounce judgment without hearing the case *de novo* from the beginning and taking the opinions of the assessors over again² (Compare S 330 in the case of Magistrates)

2 (38) 25 AIR 1938 Nag 52 (53) 39 Cri L Jour 105, *Shahgram v Emperor*. (Especially of intelligent assessors and especially when they consider a man guilty for it is so seldom that that happens in capital cases)

3 (36) 23 AIR 1936 Cal 527 (528) 38 Cri L Jour 212 1 L R (1937) 1 Cal 806 *Jagnenkar Ghosh v Emperor* (Accused tried at same trial for offence X by jury and for offence Y with the aid of the jurors acting as assessors — Jury returning unanimous verdict of not guilty with regard to offence X and as assessors expressing unanimous opinion in favour of acquittal in regard to offence Y — Judge accepting jury's verdict with regard to offence X but rejecting their opinions as assessors with regard to offence Y — Conviction set aside by

v Emperor

35 Pun L R No 192 *Gura idia v*

King Emperor

(93) 1900 1893 1900 Low Bar Rul 126 (127) *Nga Shan v Queen Empress*

(See (69) 6 Bom H C R Cr 55 (56) *R v Kala Karson*

(74) 22 Suth W R Cr 34 (35) *Queen v Malam Mal*)

4 (30) 25 AIR 1938 Nag 52 (53) 39 Cri L Jour 105

of which trial
on all charges

— Judge convicted the accused upon the latter charges also — Conviction is illegal)

Also see S 269 Note 3 S 306, Note 3 and S 307, Note 15

5 (39) 26 AIR 1939 Lah 475 (478 479) 41 Cri L Jour 55 1 L R (1939) Lah 243 *Emperor v Fakir* (Assessor when expressing his opinion that accused is guilty adding that he has personal knowledge of this matter acquired during investigation—*De novo* trial is not necessary—Proper course for the Judge is to ignore such opinion)

(75) 24 Suth W R Or 28 (28) *Queen v Ram Churn Karmolar* (Personal knowledge of character of defence witnesses)

(In a case of identical
value)

or (Approver examined
is unable to appreciate

corroborative evidence — Opinions of assessors lose their value)

Note 14

1 (30) 8 Cri L Jour 121 (123) 8 Cal L Jour 59, *Durga Charan v Emperor*.

2 (74) 21 Suth W R Cr 47 (47) *Queen v Gopin Nandya*

15 Sentence — If the accused is convicted the Court has no discretion unless it decides to proceed under s 502, to refuse to pass sentence according to law ¹ and, if the accused is found guilty on several charges, the Court is bound to pass sentence on each of the charges ²

The responsibility for the sentence rests with the Judge alone and where he differs from the assessors as regards conviction he should not let their opinion weigh with him regarding the sentence. Hence, the fact that the assessors gave their opinions that the accused was not guilty is no reason for passing a lesser sentence ³

1 — Procedure in case of Previous Conviction.

310. In the case of a trial by a jury or with the aid of assessors

when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely —

(a) Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until,

(i) he has been convicted of the subsequent offence, or

(ii) the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence

(b) In the case of a trial held with the aid of assessors, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.

** Code of 1898, original S 310*

310 In the case of a trial by jury or with the aid of assessors when the accused is charged with an offence committed after a previous conviction for any offence the procedure laid down in S 271 286 305 306 and 307 shall be modified as follows

(a) The part of the charge stating the previous conviction shall not be read out in Court nor shall the accused be asked whether he has been previously convicted as alleged in the charge unless and until he has either pleaded guilty to or been convicted of the subsequent offence

(b) if he pleads guilty to or is convicted of the subsequent offence he shall then be asked whether he has been previously convicted as alleged in the charge

(c) if he answers that he has been so previously convicted the Judge may proceed to pass sentence

does not
here
not be necessary to swear the jurors again

Code of 1882 S 310

Some except the following. In clause (c) the words 'hear evidence' were substituted for the word 'inquire'

Codes of 1872 and 1861 — Nil

Note 15

I (9) 22 Cal 605 (809) *Dewan Singh v Queen Empress* (Case before amendment of 1973)

v *Emperor* (Accused
crimes punishment under

S 309 and 310 is in effect
3 (33) 20 AIR 1933 Nag 307 (303) 34 Cri L J 1168 - 30 Nag L R 9, *Local Government v Sitrya Arjuna*

Synopsis

- | | |
|--|---|
| 1 Legislative changes
2 Scope and object of the section
3 When previous conviction should be referred to | 4 Non-compliance with the section
5 Evidence as to previous conviction Section 311
6 Proof of previous conviction See Sect on 311 |
|--|---|

NOTE to the Synopsis See the Notes indicated for the following topics

Non-applicability to trials before Magistrate See Note 2

Record to show when reference to prior conviction made See Note 3

Reference under Section 307 See Note 1

1. **Legislative changes.** — This section has been substituted for the original section by the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923

Under the section as it stood before the amendment the accused could be asked about his previous conviction only if he pleaded guilty to or was convicted of the subsequent offence. The Court could not ask him about it where the jury had given a verdict and the Court *without convicting him*, made a reference to the High Court under s 30¹. This disability has now been removed.

2. **Scope and object of the section.** — This provision of law has been taken from the English Statute law, 6 & 7 William IV, Chap 3¹. It is based on the principle that a prisoner on his trial ought not to be prejudiced by a statement of a previous conviction suffered by him². The section is imperative³. It is most essential that the procedure prescribed by it should be conducted with precision, regularity and close adherence to the rules laid down in this section⁴. This section indicates the importance of the complete exclusion of the knowledge of previous conviction when weighing the evidence as to the truth or otherwise of the main charge⁵.

It has been held in the undermentioned case⁶ that the fact that an accused is a registered member of a criminal tribe under the Criminal Tribes Act, 6 [VI] of 1921,—a fact from which bad character can be inferred—should not, on the analogy of this section be disclosed to the jury until after their verdict, lest their minds should be prejudiced.

The section is applicable to trials before the Court of Session only and does not apply to trials before Magistrate⁷. As to trials before Magistrates, see section 255A.

3. **When previous conviction should be referred to.**—The accused should not be asked about his previous conviction nor his plea should be taken thereto until after—

(1) his conviction for the subsequent offence,¹ or

Section 310 — Note 1

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2
(2) r v Emperor
(30) 14 AIR 1930 All 17 (19) 31 Cr L Jour 8, Golt v Emperor (An accused person though he has several convictions behind him, is entitled to have his case treated as if it was not a foregone conclusion)

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Emperor

(2) the jury have delivered their verdict² or the opinions of the assessors have been recorded on the charge for the subsequent offence³

The record should invariably show that no reference to the previous conviction was made until one or the other of the conditions mentioned in the section has happened⁴

Where a charge of previous conviction is tried the accused cannot be examined about his previous conviction in such trial unless there is on the record some legally admissible evidence to show the fact of the previous conviction⁵ See Section 312

4. Non compliance with the section — A non compliance with the provisions of this section is only an irregularity which will not vitiate the trial unless the accused is shown to have been prejudiced thereby¹

5 Evidence as to previous conviction — See Section 311

6 Proof of previous conviction — See Section 511

(90) 1890 All W N 12 (13) *Empress v Jhinghura*

(86) 1886 All W N 47 (47) *Empress v Sukha*

(07) 5 Cri L Jour 422 (423) 30 Mad 134 *Emperor v Kandawami Goundan* (When reference is made to High Court under S 307 accused cannot be asked to plead to previous conviction until after conviction by High Court)

(01) 29 Cal 689 (693) 5 Cal W N 670 *Yasin v King Emperor*

(68) 5 Suth W R Cr L 10 (10)

(66) 5 Suth W R Cr 67 (68) *Queen v Jehan Mullick*

(186a) 3 Suth W R Cr 38 (39) *Empress v Nittar Mundle* (Previous conviction can only be used after conviction in determining the measure of punishment)

2 (90) 1890 All W N 12 (13) *Empress v Jhinghura*

[See also (40) 27 AIR 1940 Pat 14 (15) 40 Cri L Jour 833 *Mosahab Dome v Emperor* (Fact that accused is registered member of criminal tribe should not be disclosed to jury until after their verdict)]

3 (20) 7 AIR 1920 Pat 351 (351) 22 Cri L Jour 219 5 Pat L Jour 706 *Tela Ahir v Emperor*

[See also (66) 5 Suth W R Cr 72 (73) *Empress v Gopal Thakoor* (Improper admission of previous conviction—It is however, not clear whether this was done after the opinions were recorded)]

(67) 8 Suth W R Cr 11 (12) *Empress v Phoolchand (Do)*

4 (39) 26 AIR 1939 Sind 203 (204) 40 Cri L Jour 770 1LR (1939) Kar 677 *Ghous Balhsh v Emperor* (Whole charge including the portion relating to previous conviction read out before the assessors gave their opinions — Accused's statement in the lower Court relating to the previous convictions and the subsequent offences treated as a whole and read out before assessors gave their opinions—Held that the accused had been prejudiced and convictions were set aside)

(63) 13 Cal L Rep 555 (555), *Kristo Behari Dass v Empress*

(35) 22 AIR 1935 Sind 115 (127, 128) 29 Sind L R 121 36 Cri L Jour 1310 *Bhurasing v Emperor* (Evidence as to previous conviction can neither be let in before the verdict nor referred to by the Judge in his charge to the jury — Provisions in S 51 Evidence Act, and Ss 221 (7) and 310, Cr P C, compared by Ferrers J O)

[See also (40) 27 AIR 1940 Pat 14 (15) 40 Cri L Jour 833 *Mosahab Dome v Emperor* (Fact of accused being a registered member of a criminal tribe under the Criminal Tribes Act should not be brought before jury till they have returned their verdict)]

5 (39) 26 AIR 1939 Sind 203 (205) 40 Cri L Jour 770 1LR (1939) Kar 677, *Ghous Balhsh v Emperor* (29 Cal 689 followed)

Note 4

1 (90) 1890 All W N 12 (13), *Empress v Jhinghura* (Accused prejudiced — Conviction set aside)

(20) 7 AIR 1920 Pat 351 (353) 22 Cri L Jour 219 5 Pat L Jour 706 *Tela Ahir v Emperor* (Do)

(27) 14 AIR 1927 Lah 774 (774 775) 23 Cri L Jour 667, *Raju v Emperor* (Do)

(01) 2 Wcr 393 (393) *In re Chundi Perugadu* (Do)

(83) 13 Cal L Rep 110 (111), *Devin Behari Shaha v Empress* (No prejudice—Conviction not set aside)

(86) 1886 All W N 47 (47) *Empress v Sukha* (Do)

[See (39) 26 AIR 1939 Sind 203 (205) 40 Cri L Jour 770 1LR (1939) Kar 677, *Ghous Balhsh v Emperor* (Accused held prejudiced and retrial ordered)]

311. Notwithstanding anything in the last foregoing section, evi-

When evidence of previous conviction may be given for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872.

a This section was added as the 1st paragraph of S 310 of the Code of 1882 by Act 3 [III] of 1891 and took the place of S 311* of the Code of 1882, which was repealed by Act 12 [III] of 1891

1. Scope. — The guilt of a person accused of an offence is to be established by proof of the facts and not by proof of his character. A previous conviction may be proved to show the offender's character. But such evidence might create a prejudice but not lead a step towards substantiation of guilt. Hence, s 310 delays the proof of such previous conviction to a stage after the conviction, or the delivery of a verdict by the jury, or the recording of opinions of assessors, as the case may be. However, if the fact of the previous conviction is relevant under the provisions of the Evidence Act, the present section provides that the evidence of the same need not be delayed but may be given at the trial of the subsequent offence, notwithstanding s 310.

The relevancy of a previous conviction is to be determined by a reference to the sections of the Evidence Act. Such evidence is inadmissible save in a few, well defined and exceptional circumstances.¹ Under s 51, Evidence Act, a previous conviction is relevant as evidence of bad character. But a previous conviction is not admissible in evidence against the accused unless evidence of good character be given by him, in which case the fact that the accused has been previously convicted of an offence is admissible as evidence of bad character. A previous conviction may also be relevant under s 49 (see illustrations (e) and (f)) and s 8 Evidence Act as showing motive. It is also relevant under s 14 Evidence Act, when the existence of any state of mind such as intention, knowledge, etc., or evidence of any state of body or bodily feeling is in issue or relevant (see illustration (b)).² For instance where a person was charged with the offence of belonging to a gang of persons associated for purpose of habitually committing dacoity, it was held that the proof of a previous conviction was admissible under s 14 of the Evidence Act, having regard to the character of the offence attributed to the accused.³

* Code of 1882 S 311

J — List of jurors for High Court, and summoning jurors for that Court

311 In each Presidency town the jurors' book for the year current when this Code comes into force shall be taken as containing a correct list of persons liable to serve as jurors under this Chapter.

Those persons whose names are entered in the jurors' book as being liable to serve on special juries only shall be deemed to be persons privileged and liable to serve only as special jurors under this Chapter during the year for which the said list has been prepared.

Codes of 1872 and 1851—Nil

Section 311 — Note 1

1. (34) 21 AIR 1934 Cal 198 (202) 35 Cr L Jour 722, *Parbati Das v Emperor* (1904) 2 Bom H C R Cr 125 (126), *Reg v Timmi*. (It is improper to allow evidence of bad character

- 2 press
3 Patna.
(¹ *Emperor v Tukaram Walhari* (Section 401 Penal Code)
(23) 10 AIR 1923 Bom 71 (71, 72) 46 Bom 958 24 Cr L Jour 867, *Emperor v. Haji Sher Mahomed*
(11) 12 Cr L Jour 97 (98) 38 Cal 408 9 Ind Cas 555, *Dona v Emperor* (Offence under S 401, Penal Code)
(14) 1 AIR 1914 Cal 589 (591) 15 Cr L Jour 43, *Baharuddin Mandal v Emperor* (Sections 148 365, 306, Penal Code)
(10) 11 Cr L Jour 364 (365) • 6 Ind Cas 492 (Lab), *Waha v Emperor*.

J. — List of Jurors for High Court, and summoning Jurors for that Court

312. The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors' list

Number of special jurors
 Provided that no definite number of Europeans or of Americans or of Indians shall be so prescribed

a This section was substituted for the original section by the Criminal Law Amendment Act 12 [VII] of 1923

1 High Court — As to the meaning of the expression High Court see s 206

2 "May prescribe the number" — Under the section as it stood before the amendment it was provided that not more than *four hundred* persons should at any one time be entered in the special jurors list Under the present section as amended by Act 12 [VII] of 1923, the High Court is empowered to prescribe the number of special jurors The proviso is intended to secure a list which should include all persons qualified to whatever nationality they may belong

313.† (i) The Clerk of the Crown shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare —

(a) a list of all persons liable to serve as common jurors, and

(b) a list of persons liable to serve as special jurors only

(2) Regard shall be had, in the preparation of the latter list, to the property, character and education of the persons whose names are entered therein

(3) No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year.

*[(4) The Provincial Government may exempt any salaried servant of the Crown from serving as a juror.]

(5) The Clerk of the Crown shall, subject to such rules as aforesaid, have full discretion to prepare the said list as seems to him to be proper, and there shall be no appeal from, or review of, his decision

a The present sub s (4) was substituted by A O for original sub-s (4)

1 Clerk of the Crown — For the definition, see s 4 (1) (e)

The preparation of the list of special jurors is entirely in the discretion of the Clerk of the Crown, the Court will not interfere¹

* Code of 1898, original S 312

Number of special jurors
 312 The names of not more than four hundred persons shall at any one time be entered in the special jurors' list

1882 S 312 1872 and 1861 — Nil

† 1882 S 313, 1872 and 1861 — Nil

(14) 1 AIR 1914 Lah 545 (548) 16 Cr L Jour 300 (302) 1915 Pua Be No 3 Cr, *Hidayata v Emperor* (Evidence of previous orders under S 110 Cr P C, is also admissible)

(30) 17 AIR 1930 Oudh 455 (459) 32 Cr L Jour 162, *Bachchu v Emperor* (Where evidence of previous conviction can be considered only as evidence of character it must be excluded but where such evidence is admissible *ab initio* it should not be excluded)

(33) 20 AIR 1933 Oudh 355 (358) 9 Luck 22 35 Cr L Jour 273, *Dens Madho v Emperor* (Do)

Section 313 — Note 1

1. (77) 1 Ind Jur (N S) 106, *In re Shamchand Matter*

314. (1) Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively, signed by the Clerk of the Crown, shall be published once in the "[Official Gazette]" before the fifteenth day of April next after their preparation.

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the "[Official Gazette]" before the first day of May next after their preparation.

(3) Copies of the said lists shall be affixed to some conspicuous part of the court-house

a. Substituted by A O for Local Official Gazette

315.[†] (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each sessions in the town which is the usual place of sitting of each High Court as many of those who are liable to serve on special or common juries respectively as the Clerk of the Crown considers necessary.

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him

(3) If, during the continuance of any sessions, it appears that the Supplementary number of persons so summoned is not sufficient, such summons number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

1 Legislative changes — The words 'in the town' considers necessary in sub s (1) were substituted by Act 18 [XVIII] of 1923 for the words, 'in each presidency town at least twenty seven of those who are liable to serve on special juries and fifty four of those who are liable to serve on common juries'

2 "Shall be summoned" — The procedure for the service of summons to be followed is the one laid down in S 68 and the following sections and no other mode adopted for such service is justifiable. Thus the issue of summons by a registered letter is illegal and no fine can be imposed for non attendance in pursuance of such summons. Where the summons was served by affixing a duplicate on the door of the dwelling house of the juror but the latter had no knowledge thereof, as he was living away from his residence, it was held that he was not liable to fine for non attendance as the law did not contemplate the imposition of any obligation on persons on the jury list, either to notify their change of address or to make any arrangement for the acceptance of the summons.

3. Sub-section (3) — Sub section (3) allows further persons to be summoned during the course of the High Court Sessions when the number summoned is insufficient.

* 1882 S 314, 1872 and 1861 — Nil

† Code of 1898 — Original S 315, sub-ss (2) and (3) were the same as above

Sub-section (1) was as follows

315 (1) Out of the persons named in the revised lists aforesaid there shall be summoned for each session in each presidency town at least twenty seven of those who are liable to serve on special juries and fifty four of those who are liable to serve on common juries

1882 S 315, 1872 and 1861 — Nil

Section 315 — Note 2

1 (97) 1 Cal W N cxvi (cxvi), *In re Sharat Chandra Ray*

2 (02) 6 Cal W N 897 (898) *Mons Lal Poy v Emperor*

Note 3

1 (39) 26 AIR 1939 Sind 209 (219) 41 Cr L Jour 28 I L R (1910) Kar 219, *Sheuaram Jethanand*

v *Emperor*

The sub-section does not apply to the choosing of a jury in a particular case where a deficiency of one or more members has appeared within the meaning of ss 276 and 279 (2) and the trial has already begun.²

316.* Whenever a High Court has given notice of its intention to hold sittings at any place outside the [town which is the usual place of sitting of such High Court] for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Court of Session.

a The words were substituted for the words 'presidency towns' by the Code of Criminal Procedure (Amendment) Act 18 (XIII) of 1923

317.† (i) In addition to the persons so summoned as jurors, the said Court of Session shall if it thinks needful, after communication with the Commanding Officer, cause to be summoned such number of commissioned and non-commissioned officers in Her Majesty's Army or Air Force resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code, but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent official duty, or for any other special official reason

1. Legislative changes — The words 'or Air Force' were inserted in sub s (1) and the word, 'official' at both the places in sub s (2) was substituted for the word 'military' by the Repealing and Amending Act 10 (X) of 1927

318.‡ Any person summoned under section 315, section 316 or section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt and be liable, by order of the Judge, to such fine as he thinks fit, and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid.

Provided that the Court may in its discretion remit any fine or imprisonment so imposed

1. Legislative changes

Code of 1898 — The words 'for a term not exceeding six months' and the proviso were newly added

2 Failure to attend — Effect of — See Note 2 on Section 315

* 1882 S 316, 1872 and 1861 — Nil

† 1882 S 317, 1872 and 1861 — Nil

‡ 1882 S 318, 1872 and 1861 — Nil

K.—List of Jurors and Assessors for Court of Session, and summoning Jurors and Assessors for that Court.

319. All male persons between the ages of twenty-one and sixty

shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside, or, if the "[Provincial Government]" on consideration of local circumstances, has fixed any smaller area in this behalf, within the area so fixed.

a Substituted by A O for "Local Government."

1. **Legislative changes.** — The last twenty-three words beginning from "or, if the Local Government" were not found in the Code of 1882 but were newly added in the present Code.

2. **"All male persons."** — It is contrary to the usage of the country and eminently undesirable that a gentleman of high position, such as a hereditary Raja, should be placed on the list, or if placed on such list, should be summoned to serve as an assessor unless it were known that he would be willing to act as such¹

3. **"Liable to serve."** — The mere fact that a person's name is on the list does not render him liable to serve as an assessor unless he is liable under this section. Thus, a man may reside during the year in more than one district and his name might be entered in the jurors' or assessors' list in each of such districts. But he would be subject to serve as a juror or assessor only if he is residing in the district in which the trial is held. A juror or assessor, who is absent for a long time from his ordinary place of residence, will be regarded as non resident in that place and will be exempt from liability to serve as a juror or assessor under this section¹

4. **Within the district.** — Where the Sessions Judge of Kanara asked the High Court for special permission to hold his Court at Sirsi instead of at Karnar, the High Court declined to permit it as no assessors were available for the sessions at Sirsi which was outside the area fixed¹

320.[†] The following persons are exempt from liability to serve as jurors or assessors, namely :

- (a) officers in civil employ superior in rank to a District Magistrate;
- (aa) members of any Legislature in British India;
- (b) salaried Judges;
- (c) Commissioners and Collectors of Revenue or Customs;
- (d) police-officers and persons engaged in the Preventive Service in the Customs Department;
- (e) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty;
- (f) persons actually officiating as priests or ministers of their respective religions;

^{*} 1882 : S. 319; 1872 : S. 404, 1861 : S. 333.

[†] 1882 : S. 320, 1872 : S. 406, 1861 : S. 335.

Section 319 — Note 2

1. ('97) 1897 All W N 167 (167), *In the matter of Dhup Indar Bahadur Singh*.

Note 3

1. ('31) 18 AIR 1931 Pat 160 (160) : 32 Cal L Jour 740, *Md. Ejaz Hussain Khan v. Emperor*.

Note 4

1. ('86) 1886 Rat 304 (304).

- (g) persons in Her Majesty's Army, Navy, or Air Force, except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors,
- (h) surgeons and others who openly and constantly practise the medical profession,
- (i) legal practitioners (as defined by the Legal Practitioners Act 1879), in actual practice
- (j) persons employed in the Post Office and Telegraph Departments,
- (k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, sections 640 and 641¹⁶
- (l) other persons exempted by the Provincial Government from liability to serve as jurors or assessors

a See now the Code of Civil Procedure 1908 (5 [V] of 1908) Ss 132 and 133

1 Legislative changes

In the Code of 1898—

The words *salaries* in clause (b) *police officers* and in clause (d) and the whole clause (i) were not found in the Code of 1897 but have been added in this Code

Changes after 1898—

(1) A new clause (aa) was inserted after clause (a) by the Legislative Members Exemption Act 1925 (23 [XIII] of 1925) It ran as follows

'(aa) Members of either chamber of the Indian Legislature and members of a Legislative Council constituted under the Government of India Act

The present clause (aa) was substituted for the above clause by the Government of India (Adaptation of Indian Laws) Order 1937

(2) In clause (g) the word *Navy* and the words *or Air Force* were inserted by the Amending Act 1931 (3, [XXV] of 1931) and the Repealing and Amending Act 1937 (10 [X] of 1937) respectively

(3) In clause (l) the words *Provincial Government* were substituted for the words *Local Government* by the Government of India (Adaptation of Indian Laws) Order 1937

2 Scope of the section—Under this section cases of *exemption* are dealt with while s 278 deals with cases of *disqualification*. Thus the Code makes a clear distinction between exemption and disqualification. The persons enumerated in this section though they are *capable* are not *liable* to serve as jurors or assessors (see s 371). This right to exemption has however to be claimed and established (s 324). Where the proper number of Europeans and Americans cannot otherwise be obtained, even the exempted persons may, under the proviso to s 326 sub s (3), be summoned to try Europeans and Americans.

3 Persons exempted under Civil Procedure Code—Clause (k) — Sections 640 and 641 of the Civil Procedure Code of 1887 are now Ss. 132 and 133 of the present Civil Procedure Code of 1908. Under the former section women who according to the customs and manners of the country, ought not to be compelled to appear in public are exempt from personal appearance in Court. Under the latter section the Provincial Government may, by notification in the Official Gazette, exempt from personal appearance in Court any person whose rank entitles him to the privilege of exemption the names and residences of such persons being forwarded to the High Court.

*K—List of Jurors and Assessors for Court of Session, and
summoning Jurors and Assessors for that Court*

319. All male persons between the ages of twenty-one and sixty

shall, except as next hereinafter mentioned, be liable to
jurors or assessors serve as jurors or assessors at any trial held within the
district in which they reside, or, if the "[Provincial Government] on
consideration of local circumstances, has fixed any smaller area in this
behalf, within the area so fixed

a Substituted by A O for Local Government

1 Legislative changes. — The last twenty three words beginning from or of
the Local Government were not found in the Code of 1882 but were newly added in the
present Code

2 'All male persons' — It is contrary to the usage of the country and eminently
undesirable that a gentleman of high position such as a hereditary Raja should be placed
on the list or if placed on such list should be summoned to serve as an assessor unless it
were known that he would be willing to act as such¹

3 "Liable to serve" — The mere fact that a person's name is on the list does
not render him liable to serve as an assessor unless he is liable under this section. Thus a
man may reside during the year in more than one district and his name might be entered
in the jurors or assessors list in each of such districts. But he would be subject to serve
as a juror or assessor only if he is residing in the district in which the trial is held. A juror
or assessor who is absent for a long time from his ordinary place of residence will be
regarded as non resident in that place and will be exempt from liability to serve as a juror
or assessor under this section¹

4 Within the district — Where the Sessions Judge of Kanara asked the High
Court for special permission to hold his Court at Sirsi instead of at Karwar the High
Court declined to permit it as no assessors were available for the sessions at Sirsi which
was outside the area fixed¹

320. The following persons are exempt from liability to serve as
jurors or assessors, namely

- (a) officers in civil employ superior in rank to a District Magistrate,
- (aa) members of any Legislature in British India,
- (b) salaried Judges,
- (c) Commissioners and Collectors of Revenue or Customs,
- (d) police officers and persons engaged in the Preventive Service
in the Customs Department,
- (e) persons engaged in the collection of the revenue whom the
Collector thinks fit to exempt on the ground of official duty,
- (f) persons actually officiating as priests or ministers of their
respective religions,

* 1882	S 319,	1872	S 404	1861	S 333
† 1882	S 320	1872	S 406	1861	S 335

Section 319 — Note 2

1 (97) 1897 All W N 167 (167) *In the matter of Bhai p Indar Bahadur Singh*

Note 3

1 (31) 18 AIR 1931 Pat 160 (160) 32 Cri L Jour 740 *Ud Ljass Hussan Khan v Emperor*

Note 4

1 (86) 1886 Rat 804 (304)

- (g) persons in Her Majesty's Army, Navy, or Air Force, except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors,
- (h) surgeons and others who openly and constantly practise the medical profession,
- (i) legal practitioners (as defined by the Legal Practitioners Act 1879), in actual practice
- (j) persons employed in the Post Office and Telegraph Departments,
- (k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, sections 640 and 641^a
- (l) other persons exempted by the Provincial Government from liability to serve as jurors or assessors

^a See now the Code of Civil Procedure 1908 (S [F] of 1908) Ss 132 and 133

1 Legislative changes

In the Code of 1898—

The words *salaried* in clause (b) *police officers* and in clause (d) and the whole clause (i) were not found in the Code of 1882 but have been added in this Code

Changes after 1898—

- (1) A new clause (aa) was inserted after clause (a) by the Legislative Members Exemption Act 1925 (23 [XIII] of 1925) It ran as follows

(aa) Members of either chamber of the Indian Legislature and members of a Legislative Council constituted under the Government of India Act

The present clause (aa) was substituted for the above clause by the Government of India (Adaptation of Indian Laws) Order 1937

- (2) In clause (g) the word *Navy* and the words *or Air Force* were inserted by the Amending Act 1931 (35 [XXV] of 1931) and the Repealing and Amending Act 1927 (10 [V] of 1927) respectively

- (3) In clause (l) the words *Provincial Government* were substituted for the words *Local Government* by the Government of India (Adaptation of Indian Laws) Order, 1937

2 Scope of the section—Under this section cases of *exemption* are dealt with while s 278 deals with cases of *disqualification*. Thus the Code makes a clear distinction between *exemption* and *disqualification*. The persons enumerated in this section though they are *capable* are not *liable* to serve as jurors or assessors (see S 321). Thus right to exemption has however to be claimed and established (S 321). Where the proper number of Europeans and Americans cannot otherwise be obtained even the exempted persons may, under the proviso to s 326 sub s (3), be summoned to try Europeans and Americans.

3 Persons exempted under Civil Procedure Code—Clause (k) —

Sections 640 and 641 of the Civil Procedure Code of 1882 are now Ss 132 and 133 of the present Civil Procedure Code of 1908. Under the former section women who according to the customs and manners of the country, ought not to be compelled to appear in public are exempt from personal appearance in Court. Under the latter section the Provincial Government may, by notification in the Official Gazette exempt from personal appearance in Court any person whose rank entitles him to the privilege of exemption: the names and residences of such persons being forwarded to the High Court.

321. (1) The Sessions Judge, and the Collector of the district or

such other officer as the [Provincial Government] appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under section 278, clauses (b) to (h), both inclusive.

(2) The list shall contain the name, place of abode and quality or business of every such person, and, if the person is an European or an American, the list shall mention the race to which he belongs

n Substituted by A O for Local Government

1. Preparation of list of persons liable to serve as jurors or assessors

—It is undesirable that a gentleman of a high position, such as a hereditary Raja should be placed on the list of jurors or assessors¹

322.† Copies of such list shall be stuck up in the office of the

Collector or other officer as aforesaid, and in the court houses of the District Magistrate and of the District Court, and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside

323.† To every such copy or extract shall be subjoined a notice

stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid at the sessions court-house, and at a time to be mentioned in the notice

324.‡ (1) For the hearing of such objections the Sessions Judge

shall sit with the Collector or other officer as aforesaid and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof and shall strike out the name of any person not suitable in their judgment to serve as a juror, or as an assessor, or who may establish his right to any exemption from service given by section 320 and insert the name of any person omitted from the list whom they deem qualified for such service

(2) In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session

(4) Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final

* 1882 S 321 1872 S 400 1861 S 329

† 1882 S 322 1872 S 401, 1861 S 330

‡ 1882 S 323 1872 S 401, para 2, 1861 S 330

§ 1882 Ss 324 325, 1872 Ss 402, 403, 1861 Ss 331, 332

Section 321 — Note 1

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised

Annual revision of list (6) The list so prepared and revised shall be again revised once in every year

(7) The list so revised shall be deemed a new list and shall be subject to all the rules hereinbefore contained as to the list originally prepared

1 Annual revision of the list — Sub section (6) — The list of jurors or assessors can be revised only once a year¹

325. In the case of any district for which the "[Provincial Government] has declared that the trial of certain offences of special jurors shall, if the Judge so direct, be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare, in addition to the revised list hereinbefore prescribed a special list containing the names of such jurors as are borne on the revised list and are, in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors. Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list nor relieve him of liability to serve as an ordinary juror in cases not tried by special jury.

a Substituted by A O for Local Government

326.† (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial and including, where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial

(2) The names of the persons to be summoned shall be drawn by lot in open Court, excluding those who have served within six months unless the number cannot be made up without them, and the names so drawn shall be specified in the said letter

(3) Where the accused requires and is entitled to be tried under the provisions of section 275, there shall be chosen by lot, in the manner prescribed by or under section 276, from the whole number of persons returned the jurors who are to constitute the jury until a jury containing

* 1882 S 325A, 1872 and 1861 — Nd

† 1882 S 326 1872 S 407, 1861 S 336

the proper number of Europeans or Europeans and Americans or of Indians, as the case may be, has been obtained :

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under section 320.

(4) Where, under the proviso to sub-section (3), the Court proposes to summon as a juror any person in his Majesty's Army, the provisions of section 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under section 316.

Synopsis

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|--|---|
| 1. Legislative changes | 4. Assessor not summoned if can be chosen by the Sessions Judge to make up deficiency |
| 2. Scope and object of the section | 5. Names of persons to be drawn by lot |
| 3. Letter to be sent only by the Sessions Judge. | |

NOTE to the Synopsis See the Notes indicated for the following topics :

- | | |
|--|---|
| All jurors available for all trials though double the number needed is to be summoned See Note 2 | Non-compliance—Effect See Note 2 |
| Form of precept See Schedule V, Form No. 32 | Normal procedure to summon for first day of sessions See Note 2 |
| Murder case—Summoning less than 18—Illegality. See Note 2 | Object of lots. See Note 5 |
| | Section not mandatory. See Note 2. |

1. Legislative changes.

There was no material difference between the corresponding sections of the Codes of 1861 and 1872

Difference between the Codes of 1872 and 1882 —

The words "the Sessions Judge" and "for any such trial" were substituted respectively for the words 'the Court' and "for any case about to be tried at such sessions," which occurred in the corresponding section of the Code of 1872

Changes introduced in the Code of 1898 —

The words "seven days" were substituted for "three days" and the words "or the said special list" were added after the words "revised list"

Changes made in 1923 —

The words "and including. for the trial" at the end of sub-s (1) were inserted and sub ss (3) and (4) were added by the Criminal Law Amendment Act, 19 [xii] of 1923

2. Scope and object of the section. — This section fixes the minimum number of jurors and assessors to be summoned by the Sessions Judge for trials in a session. The normal procedure contemplated is that all jurors or assessors should be summoned for the first day on which a criminal session commences, whatever may be the number of trials it may be proposed to hold in the course of that session¹

The total number of jurors or assessors so summoned are intended to be available for all the trials, though, in order to fix a minimum, it has been provided that the Judge is to summon at least double the number of jurors or assessors required for any particular trial to be held in the course of the session²

The object of the section in summoning a number of jurors or assessors is two fold. firstly, to ensure that there is no reason for suspicion that any of the jurors or assessors

Section 326 — Note 2

1. (31) 18 AIR 1931 Pat 152 (153, 154) • 10 Pat 107 • 32 Cri L Jour 797, *Behari Mahlon v Emperor*.
 (33) 20 AIR 1933 All 941 (944, 945) : 66 All 210 : 35 Cri L Jour 668, *Lala v. Emperor*.
 (16) 3 AIR 1916 All 54 (55, 56) • 17 Cri L Jour 17 (18), *Chutla v Emperor*.
 2 (31) 18 AIR 1931 Pat 152 (153) : 10 Pat 107 : 32 Cri L Jour 797, *Behari Mahlon v Emperor*.

sitting on a particular trial has been planted on the Court by any person interested in the success or failure of the prosecution³ and *secondly* to leave a margin for those cases where any particular juror or jurors may claim exemption from being empanelled on the ground of ill health or some other reason⁴

The section is not however *mandatory*⁵. Although the section deals with the summoning of jurors for a particular session and has really no concern with individual cases at all⁶ the use of the word *ordinarily* shows that it is neither illegal nor irregular to summon jurors or assessors only for a *particular trial* and not for the whole of the session or to summon less than eighteen persons for a murder trial so long as the Judge takes care to have summoned a sufficient number of persons to enable him to choose the requisite number of jurors or assessors from among them in the manner provided by law⁷. In *Emperor v. Ermanali*⁸ fourteen persons were summoned to act as jurors in a murder case. Nine of them appeared and were chosen by lot. It was held that the trial was not bad. It is no part of the intention of the Legislature said Rankin C.J. to have a large area of selection in the persons attending upon summons on the theory that the larger the number of effective names in the ballot the greater the chance that the persons chosen will make good jurors.

Where however in a murder trial less than eighteen persons are summoned and *less than nine* are chosen out of them it cannot be said that it was *impracticable* to get the requisite number, namely nine, and consequently the jury is not a validly constituted one. See Note 4 on S 274.

The section does not require that a fresh summons should be issued in the case of the failure to effect service on any of the jurors originally summoned. Thus where eighteen jurors were summoned out of whom eleven appeared and a jury of seven persons only was empanelled it was held that the failure to effect service on some of the jurors against whom summonses had been issued did not amount to a defect in procedure sufficient to vitiate the trial⁹.

3. Letter to be sent only by the Sessions Judge — The duty of issuing a letter or precept imposed on the *Sessions Judge* by this section cannot legally be performed by a subordinate Judge in temporary charge of the current duties of the Court of Session¹. In the undermentioned case Rowland J. of the Patna High Court was however inclined to the view that the power of sending a precept could be exercised by an Assistant Sessions Judge.

4. Assessor not summoned if can be chosen by the Sessions Judge to make up deficiency — In the case of deficiency of jurors summoned or where

3 (16) 3 AIR 1916 All 54 (55-56) 17 Cri L Jour 17 (17) *Chutta v. Emperor*

4 (31) 18 AIR 1931 Pat 152 (153) 10 Pat 107 32 Cri L Jour 797 *Behari Mahlon v. Emperor*

5 (38) 25 AIR 1938 Pat 60 (62) 39 Cri L Jour 302 *Ravi Babu Jadau v. Emperor* (One assessor absent on day of trial — Person present in Court and whose name appeared in list summoned and chosen as assessor — Trial not contrary to law)

practise it is not usual for the Sessions Judge acting under S 326 to summon a single set of jurors to hear all the cases that are set down for hearing in a particular session but rather to summon one set of jurors for each trial that has to be held and this procedure is in accordance with S 397 }

8 (30) 17 AIR 1938 Cal 217 (213-214 215-216) 57 Cal 1298 31 Cri L Jour 536 (FB) (Overruling 31 Cri L Jour 426)

9 (46) 33 AIR 1916 Cal 36 (38) 1 L R (1914) 2 Cal 287 (DB) *Mahabir Singh v. Emperor* (Defect if any is cured by S 637)

Note 3

1 (80) 1860 Pat 149 (148)

2 (41) 28 AIR 1911 Pat 361 (361) 195 Ind Cas 107 *Balkrishna Gope v. Hafiz Abdul Halim*

a juror is objected to and the objection is allowed, the deficiency can be made up by choosing from persons present in Court (see S 276, second proviso and S 279). There is no such provision applicable to the case of assessors. The Sessions Judge has, therefore, no power to select any one to act as an assessor who has not been summoned under this section¹. Thus, where the Sessions Judge had requested the District Magistrate to summon five persons to attend as assessors but only one of these persons was present, whereupon the Nazir of the Court was directed by the Judge to act as an assessor, it was held that as the Nazir was neither a person on the list of assessors nor summoned to act as an assessor, the trial was illegal². But, where out of the assessors summoned only three were present at the date of the trial and the Sessions Judge caused a summons to be served on a gentleman who was present in the Court and whose name was in the list of persons qualified to serve as assessors and chose him as an assessor, it was held that the trial was not illegal³.

5. Names of persons to be drawn by lot. — An accused person has a right to claim to be tried, whether by a jury or with the aid of assessors, chosen with strict regard to all the safeguards provided in the Code to secure perfect impartiality,¹ the object in view being to secure an impartial trial by rendering impossible any intentional selection of jurors or assessors to try a particular case². Thus, in the interests alike of the jury or the assessors and the prisoner, it is desirable that the persons, who are in fact to serve as jurors or assessors, should not be selected by the conscious choice of any one whether it be the District Magistrate, the Judge or any other person³.

327.⁴ The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in section 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive or whenever for other reasons such direction is found to be necessary.

1 Scope of the section — Section 326 provides for the summoning of jurors or assessors for the first day on which the criminal session commences, while this section

* 1882 : S 327, 1872 S 410, 1861 S 338

Note 4

1 (94) 1894 All W N 207 (207), *Empress v Badri*

Also see S 284, Note 5

[See however (38) 25 AIR 1938 Pat 352 (357) 39 Cr L Jour 725 *Emperor v Pamsidh Dal* (Omission to follow the provisions strictly is only an irregularity — Held, in the particular case no prejudice to accused was caused as the assessor who was not summoned, gave his opinion in favour of

h v Emperor.

or

(Requisite number of assessors but not of

assessors summoned but only three present summoned for any case on that date, asked gentleman whose name is in the assessors' Jour 302, followed)

Note 5

v Emperor

o v Emperor

3 (30) 17 AIR 1930 Cal 212 (215) 57 Cal 1228 31 Cr L Jour 536 (FB), *Emperor v Frmanali*.
(94) 1894 All W N 207 (207), *Empress v Badri*.

provides for summoning them at subsequent periods. Thus, if a set of jurors have been summoned by the Sessions Judge for the whole session, it is still open to him or to the presiding officer of any of the Courts holding sessions to summon another set of jurors for a particular trial if it is not convenient or practicable for the trial to be held by the jurors of the set summoned by the Sessions Judge under section 326¹

The powers under this section can be exercised by an Assistant Sessions Judge. Thus, where a case is adjourned to the next month after the jurors have been summoned, he can summon under this section a fresh set of jurors if he thinks fit to do so, but such a course is not imperative though desirable so that it might not be open to any person to suggest that there was a possibility of imputing any such thing as packing of the jury or of outside influences being brought to bear on them. The trial cannot be challenged as illegal on the ground that he did not summon fresh jurors for the adjourned date²

328. Every summons to a juror or assessor shall be in writing,

Form and contents of summons and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified,

1 Summons to juror or assessor.—Forms of summons given in Schedule V, Nos 32 and 33, are to be used under this section. Service of summons is to be effected in the manner provided by s 68 and the sections following it

329.† When any person summoned to serve as a juror or assessor

When Crown or Railway is in the service of the ^a[Crown] or of a Railway servant may be excused. Company, the Court to serve in which he is so summoned may excuse his attendance if it appears on the representation of the head of the office in which he is employed that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public.

a Substituted by A O for Government

Court may excuse attendance of juror or assessor

330.† (1) The Court of Session may for reasonable cause excuse any juror or assessor from attendance at any particular session

Court may relieve special jurors from liability to serve again as jurors for twelve months

^a(2) The Court of Session may, if it shall think fit, at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months

a Sub-section (2) corresponds with section 330A of the Code of 1882 which was added to it by Act 13 [XIII] of 1896

331.† (1) At each session the said Court shall cause to be made a

List of jurors and assessors attending and list of the names of those who have attended as jurors and assessors at such session

(2) Such list shall be kept with the list of the jurors and assessors as revised under section 324

^{*} 1882 S. 328, 1872 S 409, para. 1, 1861 S 337

[†] 1882 S 329, 1872 S 411, 1861 S 339,

[‡] 1882 S 330, 1872 S 412, 1861 S 340

[§] 1882 S 331, 1872 S 413, 1861 S 341

Section 327 — Note 1

1 (41) 28 AIR 1941 Pat 362 (364) 195 Ind Cas 107, *Bakhori Gope v Hafiz Abdul Halim*
2. (41) 28 AIR 1941 Pat 362 (364) 195 Ind Cas 107, *Bakhori Gope v Hafiz Abdul Halim*

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section

332. (1) Any person summoned to attend as a juror or as an assessor who without lawful excuse, fails to attend as required by summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order

(3) For good cause shown, the Court may remit or reduce any fine so imposed

(4) In default of recovery of the fine by attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term

1 Legislative changes (to added)

2 Failure to attend—Effect of — See Note 2 on S 310

If an assessor has been absent for a long time from district A and has gone to reside in district B so that he may be said to have almost ceased to be a resident of district A he is not liable to serve as an assessor in that district under S 319. Consequently he cannot be fined under this section for non attendance as an assessor in obedience to a summons served in district A of which he had no notice¹

3 "Shall be liable to a fine" — The order of a Sessions Judge fining an assessor is not open to appeal¹

4 "For good cause shown" — The fact that an assessor was ill on the day on which he was summoned to act as such and that he had produced a medical certificate to that effect would be a good cause under this section¹

L — Special Provisions for High Courts

333.† At any stage of any trial before a High Court under this Code before the return of the verdict, the Advocate General may if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge, and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs

* 1882 S 332 1872 S 414 1861 S 354

† 1882 S 333 1872 and 1861 — N 1

Section 332 — Note 2

1 (31) 18 AIR 1931 Pat 160 (160) 3rd Cr L Jour 740 *Id. Ejaaz Hussain Khan v Emperor*

Note 3

1 (67) 8 Suth W R Cr 83 (83) *In re Gaur Surind Dass*

Note 4

1 S C (67) 8 Suth W R Cr 83 (83) *In re Gaur Surind Dass*

1 Scope of the section—The power given to the Advocate General under this section is the power of entering a *nolle prosequi*, which is an entry on the record of a statement that the prosecutor will proceed no further in his action. The power does not depend on the consent of the Court which a Public Prosecutor has to obtain when acting under s 494. Entering a *nolle prosequi* is one of the rights and privileges which an Advocate General has by virtue of his appointment.¹

2 The Advocate-General may not further prosecute—A *nolle prosequi* is entered where any improper and vexatious attempts are made to oppress the defendant, as by repeatedly preferring defective indictments for the same supposed offence, or where it is clear that an indictment is not sustainable against the defendant¹ or questions of difficulty arise as to the jurisdiction of the Court.² Thus where, after a trial had commenced before it and a jury retired under s 556 of the Code and was succeeded by 8, and it was objected that 8 and the jury had no jurisdiction the Advocate General was allowed to enter a *nolle prosequi*.³ Similarly, where the jury gave a verdict in a case, before the case for the defence was heard the Advocate General entered a *nolle prosequi* and the accused was discharged.⁴

3. An order of discharge is no bar to fresh proceedings—An order of discharge under this section is no bar to fresh proceedings being taken before a competent Magistrate upon complaint, or upon a police report, or under s 150 (1) (c).¹ The same proceeding, however, in which *nolle prosequi* was entered cannot be renewed. Thus, where A and B were indicted before the Court B being at that time an absconder, and A was discharged under this section on the Advocate General entering *nolle prosequi* against him, and subsequently when B was apprehended, the same proceeding was sought to be continued against both A and B it was held that this could not be done.²

334. For the exercise of its original criminal jurisdiction, every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints

335. (1) The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the [Provincial Government], may direct

(2) But it may, from time to time, [with the consent of the [Provincial Government], hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints

(3) Such officer as the Chief Justice directs shall give notice before-hand in the [Official Gazette] of all sittings intended to

* 1882 S 334, 1872 and 1861 — Nil

† 1882 S 335, 1872 and 1861 — Nil

Section 333.—Note 1

1 (30) 19 AIR 1932 Cal 699 (703) 60 Cal 233 34 Cri L Jour 433 *Giribala Das v Mader Gazi* (Per Mukerji J)

Note 2

1 (31) 18 AIR 1931 Cal 607 (612) 59 Cal 275 33 Cri L Jour 3 *Sher Singh v Jitendranath*

Note 3

v *Sitoh A Idoo*
Emperor v Jitendranath Dose.

be held for the exercise of the original criminal jurisdiction of the High Court.

- a Substituted by A O for 'Governor General in Council in the case of the High Court at Fort William or the Local Government in the case of the other High Courts'
- b The words 'in the case of the High Court at Fort William with the consent of the Governor-General in Council, and in all other cases' were repealed by the A O
- c Substituted by A O for 'Local Government'
- d Substituted by A O for 'Local Official Gazette'

336.* [Place of trial of European British subjects] (*Repealed by the Criminal Law Amendment Act 1923 (XII of 1923), section 20*)

The repealed section ran as follows

336. The High Court may direct that all European British subjects and persons liable to be tried by it under S 214, who have been committed for trial by it within certain specified districts or during certain specified periods of the year, shall be tried at the ordinary place of sitting of the Court, or direct that they shall be tried at a particular place named

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

337.† ^a(1) In the case of any offence triable exclusively by the Tender of pardon High Court or Court of Session, or any offence punishable to accomplice with imprisonment which may extend to ten years, or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code, namely, sections 216A, 369, 401, 435 and 477A, the District Magistrate, a Presidency Magistrate, a Sub divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise

* 1882 S 336, 1872 and 1861 — Nil

† Code of 1898, original S 337

337. (1) In the case of any offence triable exclusively by the Court of Session or High Court the District Magistrate, a Presidency Magistrate any Magistrate of the first class inquiring into the offence or, with the sanction of the District Magistrate any other Magistrate may with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence

the Court of Session or High Court as the case may be

(4) Every Magistrate other than a Presidency Magistrate who tenders a pardon under this section, shall record his reasons for so doing, and when any Magistrate has made such tender and examined the person to whom it has been made he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate

1882 S 337, 1872 S 347, 1861 S 209

the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(1A) Every Magistrate who tenders a pardon under sub section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost]

(2) Every person accepting a tender under this section shall be examined as a witness in ^b[the Court of the Magistrate taking cognizance of the offence and in the subsequent trial if any]

^c[(2A) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be]

(3) Such person, ^d[unless he is already on bail], shall be detained in custody until the termination of the trial ^e* * *

(4) [*Repealed by the Code of Criminal Procedure (Amendment) Act, XVIII of 1923.*]

nal subs (1) by the Code of Criminal

^c Sub-section (2A) was inserted *ibid*

^d Substituted for the words 'if not on bail' *ibid*

^e The words "by the Court of Session or High Court as the case may be" appearing at the end of sub a (3) were omitted *ibid*

Synopsis

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| 4 Power of Provincial Government to tender conditional pardon | 13 Disclosure, whether should be recorded at the time of the tender of pardon |
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 Suspicion—No corroboration See Note 17
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1 Legislative changes.

Changes introduced by Act 18 (XVIII) of 1923 —

(1) In sub section (1) —

- (a) The words "or any offence . . . and 477A" are new See Note 5
- (b) The words "at any stage of the investigation or inquiry into, or trial of the offence" are new See Note 7.
- (c) For the words "with the sanction of the District Magistrate, any other Magistrate," the proviso to sub s (1) has been substituted See Note 2.

- (2) The words 'and shall, on application made by the accused, furnish him with a copy of such record,' in sub s (1A) and the proviso to sub s (1A), are new
- (3) In sub s (2), the words 'in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any' have been substituted for the words "in the case" See Note 16
- (4) Sub section (4) has been omitted and sub s (21) is new See Note 18

2. Scope and object of the section. —

This section empowers a Magistrate to tender pardon to a person who is supposed to have been directly or indirectly concerned in, or privy to, an offence under investigation or inquiry, on condition that he makes a full and true disclosure of all the circumstances within his knowledge in relation to the accused and to the offence. The object of tendering such conditional pardon to an accomplice in the crime is to secure the evidence of such a person, and also to encourage him to give the fullest details in respect of the matter, so that points may be found in his evidence which may be capable of corroboration, especially in cases where it is otherwise impossible to establish the guilt of the accused from other evidence¹ In the exercise therefore, of the power to tender a pardon, the Magistrate should exercise a sound judicial

Section 337 — Note 2

- 1 *ress v Ganga Charan*
 515 : 45 Cr L Jour 731 220 Ind Cas 319
 requiring case to be committed to sessions
- 274 : 45 Cr L Jour 673 212 Ind Cas 419
Order of Reference — The object of tendering the
 pardon is to enable the Crown to obtain evidence which is otherwise shut out and thus to enable it to

discretion,² and proceed with great caution and on ample grounds, and with a clear recognition of the risk which it necessarily involves of allowing an offender to escape just punishment at the expense of possibly innocent men.³ Where a Magistrate tendered a pardon to a person who was the principal offender in order to obtain evidence against the other accused it was held that the Magistrate had wrongly exercised the discretion given by this section.⁴

The provisions of this section do not imply that the only method of obtaining the evidence of an accused person against his co-accused is by tendering a pardon to such person with all the conditions and safeguards mentioned in the section.⁵ It is the right of the Crown at any stage to enter *nolle prosequi* (ss 333 and 401) and thereafter call such person as a witness for the Crown.⁶ (See Note 16 and s 342) Similarly, there is nothing in the section to compel the police to produce an accused person who is intended to be examined as a witness in the case for the tender of a pardon. The police can refrain from prosecuting such person although there is adequate evidence to justify his prosecution and if they do so, he will be a competent witness in the trial of the other accused. But such a course is to be highly deprecated and the evidence of such a witness will be entitled to little weight.⁷

As special powers are conferred upon the Magistrate by the section, he should exercise such powers in strict accordance with the provisions of the section.⁸

Where action has been taken under this section and a conditional pardon has been tendered and accepted, it is not thereafter open to the prosecution to ignore the provisions of this section and proceed under s 491. Thus, in such a case, the prosecution against the person who has accepted the pardon cannot be withdrawn under s 491 and the provisions of subs (2A) of this section which require the case to be tried by a High Court or Sessions Court avoided. In determining whether action has been taken under this section, if the manner in which the tender of pardon is made follows in substance the method prescribed in this section, the section must be held to apply and minor and immaterial irregularities or variations cannot be taken to affect the operation of the section.⁹ (See also Note 18)

When the prosecution wants to examine an accused person as a witness in cases of offences specified in the section the proper procedure is to proceed under this section and not under s 491. See Notes on s 491.

3. Who can tender a pardon. — A District Magistrate has power to tender a pardon at any stage of the investigation, inquiry or trial even though he himself may

2. See (72 92) 1872-1892 Low Bur Rul 246 (248, 250), *In the matter of Nga Po Aung*

3. (03) 1903 Pun Re No 4 Cr, p 11 (14) - 1903 P L R No. 52, *Ghulam Md. v. Crown*

(66) 5 Suth W R Cr 80 (85) : Beng L R Sup Vol 459 (FB), *In re Eshies Bishak*.

4. (21) 8 AIR 1921 Pat 499 (501), *Sheobhajan Ahir v. Emperor*.

5. (37) 24 AIR 1937 Nag 17 (21) : 38 Cri L Jour 237 & 251 : 1 L R (1937) Nag 315 (FD), *Amdumayan v. Emperor*. (Provision is enabling and obligatory)

6. (29) 16 AIR 1929 Cal 319 (320, 321) : 56 Cal 1023 : 31 Cri L Jour 315, *Raman v. Emperor*.

(23) 10 AIR 1923 All 91 (107) : 45 All 226 : 25 Cri L Jour 497, *Emperor v. Har Prasad Bhargata*,

(1900) 25 Bom 422 (428, 429) : 2 Bom L R 1095, *Queen Empress v. Hussein Haji*

(35) 22 AIR 1935 Bom 186 (188) : 59 Bom 355 : 36 Cri L Jour 937, *Keshav Vasudev v. Emperor*.

[But see (35) 22 AIR 1935 Cal 473 (474) 36 Cri L Jour 1248, *Abdul Majid v. Emperor*. (Section 491 is not intended to be used by prosecution to get evidence of accomplice)]

7. (37) 24 AIR 1937 Nag 17 (20, 21) 38 Cri L Jour 237 & 251 : 1 L R (1937) Nag 315 (FD), *Amdumayan v. Emperor*

(35) 22 AIR 1935 Bom 186 (188) : 59 Bom 355 : 36 Cri L Jour 937, *Keshav Vasudev v. Emperor*.

8. (22 92) 1872-1892 Low Bur Rul 246 (248, 250), *In the matter of Nga Po Aung*

(08) 8 Cri L Jour 15 (450) : 5 All L Jour 691, *Sultan Khan v. Emperor*. (Provisions of this section are very salutary, the neglect of which may easily lead to great difficulties.)

9. (38) 25 AIR 1938 P O 266 (269) : 1 L R (1938) Lah 628 : 65 Ind App 389 : 32 Sind L R 937 : 40 Cri L Jour 360 (F C), *Pagir Singh v. Emperor*.

not be holding such inquiry or trial¹ A Magistrate of the first class not being a District Magistrate can tender a pardon only —

(a) in case the offence is under investigation if he has jurisdiction in the place where the offence might be inquired into and tried, and the sanction of the District Magistrate has been obtained therefor, or

(b) in case the offence is under inquiry or trial if the case is pending inquiry or trial before him

The words 'District Magistrate' in this section will include an Additional District Magistrate on whom all the powers of a District Magistrate have been conferred under section 10 (2)²

The mere absence of a *written* sanction of the District Magistrate where it appears that in fact an oral sanction was given, is only an irregularity which, under S 529 is not sufficient to vitiate the proceedings if it was obtained in good faith³

The tender of pardon being a judicial function⁴ the Magistrate empowered to exercise such function cannot delegate it to a police officer or to a subordinate Magistrate.⁵ Where a Magistrate, not empowered by law to tender a pardon, erroneously in good faith tenders such pardon under this section the proceedings cannot be set aside merely on the ground of his not being so empowered [S 529, clause (g)] But if a Magistrate who has no *jurisdiction* in respect of such offence tenders a pardon such pardon is illegal and the defect cannot be cured under S 529⁶ The person to whom such illegal pardon is tendered continues to be an accused person and can be tried and convicted along with the other accused⁷ He cannot be examined as a witness (section 342), and if he has been examined his evidence is inadmissible⁸

A special Magistrate appointed under S 24 of the Bengal Suppression of Terrorism Outrages Act (12 [XII] of 1932) has power to tender a pardon under this section⁹

4 Power of Provincial Government to tender conditional pardon —

There is no provision in the Code conferring upon the Provincial Government a power to tender, to an accused person, a conditional pardon. Such pardon can be tendered only by the Magistrate and the Courts specified in ss 337 and 338¹ But the fact that the Magistrate in tendering the pardon did so after consulting the Provincial Government and with its authority is an internal matter of administration which cannot affect the position of the

Note 3

- 1 See (12) 13 Cri L Jour 33 (34) 5 Sind L R 174 13 Ind Cas 273 *Emperor v Andai*
- 2 (38) 25 AIR 1938 Lah 796 (798) 1 L R (1939) Lah 38 40 Cri L Jour 543 *Emperor v Amer* (Pardon tendered by such Additional District Magistrate without sanction of District Magistrate is not invalid — Dissenting from AIR 1936 Lah 353 16 Lah 594 37 Cri L Jour 515)
- 3 (08) 8 Cri L Jour 445 (450 451) 5 All L Jour 691 *Sultan Khan v Emperor*
- 4 (38) 25 AIR 1938 P O 266 (270) 1 L R (1938) Lah 698 65 Ind App 393 32 Sind L R 9
- 5 40 Cr L J 360 (P C) *Taqir Singh v Emperor* (Pardon under this section is tendered as a judicial act)

matter of Nga Po Aung

- 6 (97) 20 All 40 (41 42) 1897 All W N 173 *Queen Empress v Chidda*

Also see S 529 Note 1

- 7 (97) 20 All 40 (41 42) 1897 All W N 173

- 8 (72 92) 1872 92 Low

- 9 (36) 23 AIR 1936 Ca

Sinha v Emperor (P of committing him to the sessions — *Mukerji J contra*)

- (35) 22 AIR 1935 Cal 281 (282) 36 Cri L Jour 884 *Md Salauddin v Emperor*

Note 4

- 1 (06) 4 Cri L Jour 145 (148) 33 Cal 1353 10 Cal W N 962 *Danu Singh v Emperor*
- (06) 4 Cri L Jour 44 (45) 10 Cal W N 817 *Paban Singh v Emperor* (Evidence of accused taken under conditional pardon so offered is wholly inadmissible)

accused or the approver.³ The Provincial Government has however power under S 401 to remit or suspend sentences passed against the accused.

As to the exercise of the Royal Prerogative of mercy see Section 401.

5 Offences in respect of which pardon may be tendered — The jurisdiction to tender a pardon to an accomplice is strictly limited to such offences as are specifically mentioned in the section itself.¹ It is determined with reference to the offence in respect of which the investigation is being made or the inquiry or trial is held and is not affected in any manner by a subsequent alteration of the charge or offence or by the ultimate result of the investigation inquiry or trial² or by the fact that there are also other offences alleged or charged against the accused.³ All that is necessary is that there should be an investigation or inquiry in progress relating to an offence referred to in the section.⁴ The words triable exclusively by the High Court or a Court of Session mean 'shown in the second schedule as so triable'.⁵ Before the amendment of 1933 conditional pardon could be granted only in cases of offences triable by a Court of Session or High Court.⁶ The amended section provides specifically for tender of pardon in respect of several other offences enumerated in the section.⁷

6 Effect of tendering pardon in other cases. — Where a pardon is granted in respect of an offence not specified in the section and the person to whom pardon is granted is examined as a witness such evidence is inadmissible. The reason is that as the

2 (38) 25 AIR 1933 P C 266 (269) 1 LR (1933) Lah 623 65 I A 388 32 Sind L R 937 40 Cr L Jour 360 (P C) *Faqir Singh v Emperor* (Overruling AIR 1936 Lah 833 16 Lah 594 37 Cr L Jour 515)

Note 5

1 (39) 25 AIR 1933 P C 266 (268) 1 LR (1933) Lah 623 65 Ind App 398 31 Sind L R 937 40 Cr L Jour 360 (P C) *Faqir Singh v Emperor*

(36) 23 AIR 1936 Cal 306 (360) 37 Cr L Jour 703 1 LR (1937) 1 Cal 711 (TB) *Harshar Sinha v Emperor*

(1900-02) 1 Low Bur Rul 62 (62), *Empress v Nga Po Sin* (Magistrate has no power under S 337 to examine an accused person charged under the Gambling Act)

2 (39) 26 AIR 1933 All 607 (571 572) 1 LR (1933) All 736 10 Cr L Jour 800 *Bhoja Nath v Emperor*

(21) 20 Cr L Jour 676 (677) 63 Ind Cas 612 (613) (Lah) *Sardara v Emperor*

(20) 12 AIR 1915 Sind 100 (108) 19 Sind L R 183 20 Cr L Jour 1007 *Kasulla v Emperor*

(33) 20 AIR 1933 Pesh 3 (4) 31 Cr L Jour 212 *Public Prosecutor, Peshawar v Muqarrab*

[See also (26) 13 AIR 1906 All 590 (591) 27 Cr L Jour 1103 *Bhawan Prasad v Emperor* (It is

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(15) 2 AIR 1915 Sind 43 (45) 9 Sind L R 43 16 Cr L Jour 63 *Harumal v Emperor*

4 (25) 12 AIR 1920 Nag 337 (338) 26 Cr L Jour 1115, *Ismail Panju v Emperor*

5 (27) 1897 Pun Re No 3 Cr p 4 (6) *Bhallu Singh v Empress*

6 (84) 10 Cal 936 (937) *Queen Empress v Sadhee Kasal*

(82) 1882 All W N 240 (240) *Empress v Gopal*

(20) 7 AIR 1900 Lah 215 (216) 1 Lah 102 21 Cr L Jour 599, *Mahandru v Emperor*

peror

case triable by Magistrate concurrently with Court of Session)

(66) 3 Mad H C R App 14 (iv) (The power given to a Magistrate by S 209 of the Code of 1861 could not be properly exercised except with a view to commit the case to a Court of Session.)]

Also see S 338 Note 2

[But see (72 93) 1972 1892 Low Bur Rul 596 (597, 598) *Tia Dung v Empress*.]

7 (37) 24 AIR 1937 Nag 17 (20) 33 Cr L Jour 237 & 251 1 LR (1937) Nag 315 (TB) *Amdumayan v Emperor* (Amendment also amplifies the power to tender a pardon even during the course of the future litigation)

An accomplice is different from a spy. An accomplice is a person who concurs fully in the criminal designs of his co-conspirators for a time and joins in the execution of those designs while a spy or informer does not concur in those designs but enters into the conspiracy as agent for the prosecution for the sole purpose of detecting and disclosing it and of bringing the offenders to justice.⁸

The word supposed does not exclude a person who confesses the guilt and pleads guilty to the charge but is yet unconvicted. It merely excludes the person who has been already convicted of the offence.⁹

9 Condition of pardon — It has been already seen in Note 2 that the object of tendering a pardon is to encourage the approver to give the fullest details so that points may be found in his evidence which may be capable of corroboration. The law therefore requires not a cramped and constrained statement by the approver but a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence or offences as to which he gives evidence.¹

It should however be borne in mind that the temptation to the accomplice to strain the truth should be as slight as possible and it is illegal to tender a pardon on condition that the prisoner should profess to have been present at the murder and to have personal knowledge of the circumstances under which the offence took place as alleged by the prosecution.² As to the effect of a breach of the conditions of pardon see Section 339.

10 Procedure in tendering pardon — The tender of pardon should be made by the Magistrate directly and should not be made through any police officer.¹ The Magistrate should at the time explain to the person to whom it is made all the conditions accompanying such tender of pardon and should also record his reasons for tendering the pardon (sub-s (1A)). If the person does not accept the conditions the inquiry or trial will proceed as if no tender of pardon was made. If such person should accept the conditions it is the duty of the Magistrate to examine him as a witness under the rules applicable for the examination of witnesses.² As to whether the Magistrate should record informal statements from the person at the time of tendering the pardon see Note 13.

11, Recording reasons for tendering pardon — It has been seen already in Note 2 that the Magistrate should tender a pardon to an accomplice only on ample

(24) 11 AIR 1924 Oudh 188 (188) 24 Cr L Jour 799 *Sant Ram v Emperor* (The statement of an alleged approver who is not proved to have participated in the offence is not admissible against the accused.)

(09) 10 Cr L Jour 530 (532) 4 Ind Cas 268 (969) (Bom) *Emperor v Percy Henry Burn*]

5 (28) 15 AIR 1928 Lah 193 (194 195) 9 Lah 550 29 Cr L Jour 577 *Karim Bakhsh v Emperor*

(95) 19 Bom 363 (370) *Queen Empress v Jatecharam*

(10) 11 Cr L Jour 560 (564) 38 Cal 96 8 Ind Cas 119 *Emperor v Chaturbhuj*

(12) 13 Cr L Jour 609 (663) 16 Ind Cas 257 (Cal) *Pulin Behari Das v Emperor*

(28) 15 AIR 1928 Lah 647 (649) 29 Cr L Jour 740 *Mangal Ray v Emperor*

6 (84) 7 All 160 (163) 1884 All W N 814 *Queen Empress v Kallu*

(95) 1895 Rat 750 (752) *Queen Empress v Bhagya*

Note 9

1 (84) 11 All 79 (87) 1888 All W N 289, *Queen Empress v Ganga Charan*

(26) 13 AIR 1926 Pat 279 (281 286) 5 Pat 171 27 Cr L Jour 937 *Nitmadhab v Emperor*

2 (92) 1892 Rat 612 (613 614) *Queen Empress v Yakub*

Note 10

1 (66) 6 Suth W R Cr Letters 5

Also see Note 3

[See however (44) 31 AIR 1914 Snd 184 (186) 11 L R (1914) Kar 97 45 Cr L Jour 218 217 Ind Cas 177 (DB) *Emperor v Pir Imamshah* (Ordinarily a District Magistrate would himself tender a pardon to the accused person brought before him. But where the person to whom pardon is to be

may make an order in

grounds and in exceptional cases and that he should exercise a sound judicial discretion before taking such a step. Sub section (1A) provides that it is his duty to record his reasons for so doing and that the accused is entitled to a copy thereof.¹ Where however the circumstances which preceded the grant of pardon provide by themselves sufficient grounds for the Magistrate's action and such circumstances appear on record it is not necessary for the Magistrate to formally set out such circumstances in writing.² Similarly where the Magistrate states in his order that in order to connect the accused with the offence of certain murder, it is essential to make an approver in the case, there is sufficient compliance with the provisions of subs (1A) of this section.³ The recording of reasons is merely a matter relating to procedure and is not a condition precedent to the tender of pardon.⁴ Thus an omission to record the reasons amounts only to an irregularity⁵ and will not vitiate the trial unless it is shown that it has in fact, occasioned a failure of justice.⁶ See Section 537.

12 Accepting pardon. — A person can be said to accept a pardon tendered to him only when he *actively assents* to the conditions of the pardon and volunteers to make a statement with reference to the offence. Where he expresses complete ignorance and states that he is indifferent as to whether a pardon is granted or not he cannot be said to accept a tender of pardon.¹ But it is not necessary that the acceptance of the pardon should be in writing or that it should be expressed in any other manner. It can be gathered from the circumstances. Thus the fact that he appears before the Magistrate in the capacity of a witness and not in the capacity of an accused person is a clear indication of the fact that he has accepted the pardon tendered to him.²

13 Disclosure, whether should be recorded at the time of the tender of pardon. — The section does not contemplate the recording of any statement by the proposed approver before the pardon is granted to him.¹

Note 11

1 (97 01) 1 Upp Bur Rul 81 (81) *Queen Empress v Nga Tun Baw*

2 (09) 10 Cri L Jour 32 (34) 36 Cal 629 2 Ind Cas 497, *Emperor v Annada Charan Thakur* (Omission to state reasons in such a case is neither illegality nor irregularity which vitiates the proceedings)

(07) " " " "

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v Danu Singh (Do)
Emperor v Amar Singh
Tharan

Emperor v Pir Imamshah (A lawful tender of pardon is not invalidated by mere failure to record reasons.—A I R 1938 P C 266 65 Ind App 388 I L R (1938) Lah 628 32 Sind L R 937 40 Cri L Jour 360 followed)

(38) 25 AIR 1938 P C 266 (269) I L R (1938) Lah 628 65 Ind App 388 32 Sind L R 937 40 Cri L Jour 360 (P C) *Faqir Singh v Emperor* (Right of accused or approver is not affected because of accused)

171 v *Emperor*

Emperor v Dana Singh

Note 12

(the pardon has been accepted)

(38) 25 AIR 1938 Lah 796 (798 799) I L R (1938) Lah 33 40 Cri L J 543, *Emperor v Amar Singh*

Note 13

1 (44) 31 AIR 1914 Sind 184 (185) I L R (1914) Kar 97 217 Ind Cas 177 46 Cri L Jour 219 (DB) *Emperor v Pir Imamshah* (But a statement may be recorded under S 164 for the purpose of tender of pardon)

(40) 27 AIR 1910 Nag 218 (219) 187 Ind Cas 203 (205) 41 Cri L Jour 433 (437) *Horlal Mohanlal v Emperor*

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There is a conflict of decisions as to whether after the pardon has been granted the approver can be examined on oath before the preliminary inquiry in the committing Magistrate's Court. One view is that such an examination is permissible under § 161² and the other view is that it is not.³ As there does not seem to be any reason why § 161 should not apply to such cases, it is submitted that the former view is correct.

14 Effect of pardon. — Where a pardon is tendered and accepted under this section, the accused person ceases to be such from the moment the pardon is accepted and is to be treated as a witness thereafter. It is not necessary that the prosecution should be *withdrawn* in such cases.¹

A pardon tendered under this section refers not only to the offence in respect of which it is tendered, but extends to all such offences also in connection with the same matter, as the approver has *necessarily* to disclose, in making a full and true disclosure of all the circumstances relating to such offence.² In *Queen Empress v Ganga Charan*³ Straight J. observed as follows:

"While, on the one hand, the condition is 'a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, on the other a non-compliance with it leaves him open to trial for the offence in respect of which the pardon was tendered, or any other offence in connection with the same matter. It must be borne in mind that, in countenancing these pardons to accomplices, the law does not invite a cramped and constrained statement by the approver, on the contrary it requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence, or offences, as to which he gives evidence and when he has given his evidence, I do not think that the question of how far it is to protect him and what portion of it should not protect him, ought to be treated in a narrow spirit."

Where, however, the statement of the person to whom a pardon was tendered disclosed a *distinct* offence of dacoity which was committed one month prior to the offence in respect of which the pardon was tendered it was held that the tender of pardon did not extend to such an offence.⁴

A pardon once tendered and accepted cannot be withdrawn subsequently. It is not for the Magistrate who has tendered a pardon to decide whether the approver has or has not made a true statement. It is for the Public Prosecutor, after the trial is over, to give the necessary certificate under § 339 for the prosecution of the approver for breaking the conditions of pardon. The Magistrate has no power to withdraw the pardon.⁵

See also § 339, Note C

15 Forfeiture of pardon — See Section 339

2 (44) 31 AIR 1914 Nag 105 (116)	1 L R (1914) Nag 274	45 Cri L Jour 673	212 Ind Cas 449 (IE)
			d A I R 1910 Nag
			erruled)
			ianand
			v Amar Singh
			Do Cyt

Note 14

- 1 (36) 23 AIR 1936 Lah 353 (354) 16 Lah 591 37 Cri L Jour 515, *Pagur Singh v Emperor*
- 2 (88) 11 All 79 (87) *Queen-Empress v Ganga Charan*
- (21) 8 AIR 1921 All 234 (234) 27 Cri L Jour 699 *Sham Sunder v Emperor*
- 3 (84) 11 All 79 (87)
- 4 (24) 11 AIR 1914 All 220 (220) 46 All 236 25 Cri L Jour 936 (FD), *Sardara v Emperor*
- [See also (37) 34 Cri L Jour 84 (86) 165 Ind Cas 795 *Jagat Singh v Emperor* (Trial for such distinct offence — Accused's statement as approver and witness in prior trial is admissible)]
- 5 (44) 31 AIR 1914 Snd 184 (185 186) 1 L R (1914) Kar 97 46 Cri L Jour 219 217 Ind Cas 177 (DL) *Emperor v Pir Imamshah*.

16 Examination of approver as witness. — Sub-section (2) — S. b. section (2) as it stood before the amendment of 1923, provided that the person accepting a tender of pardon should be examined as a witness "in the case," and it was held in the undermentioned cases¹ that the words "in the case" referred both to the magisterial inquiry and to the sessions trial and that, therefore, the approver ought to be examined in the sessions trial notwithstanding he did not fulfil the conditions of pardon in the magisterial inquiry. It was, however, held in other cases that if the approver should show an inclination to resile from his evidence before the committing Magistrate the prosecution was not bound to examine him as a witness in the sessions trial as his examination before the committing Magistrate is a sufficient compliance with the provisions of subs (2).¹ The amended section now specifically provides that such person should be examined as a witness in the Magistrate's Court and in the subsequent trial, if any.³ There is still a conflict of decisions whether the section makes it obligatory on the prosecution to examine the approver in the Sessions Court where in the committing Magistrate's Court he has resiled from his former position and broken the condition of his pardon. The Lahore High Court⁴ and the Sind Judicial Commissioner's Court⁵ have held that the approver must be examined in the Sessions Court even in such cases, while the opposite view has been expressed by the Calcutta High Court⁶.

17, Evidence of an accomplice — Credibility of. — In dealing with this question as to the weight to be attached to the evidence of an accomplice, it is necessary to consider the provisions of s 133 of the Evidence Act, as also illustration (b) to s 114 of that Act. Section 133 of that Act provides as follows:

"An accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Illustration (b) to section 114 runs as follows: "The Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars."¹ The reasons underlying the presumption are —

- (i) that an accomplice is likely to swear falsely in order to shift the blame on to others,

Note 16

- 1 (94) 1894 Pun Re No 14 Cr, p 44 *Mamun v Queen Empress*
(90) 2 Weir 394 (394) *In re Kumaramany*
(1900) 27 Cal 137 (139) *Queen Empress v Natu*

v Bala (Quare)
J 65, *Sashi Rajbanshi v Emperor*

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(Even where the

- (30) 17 AIR 1930 Lah 90 (96) 11 Lah 230 31 Cri L Jour 111 *Mahla v Emperor* (Approver examined in the trial of some of the accused — Sessions Judge coming to the conclusion that he was untrustworthy and he not being examined in the inquiry or trial relating to the other accused — Held this was illegal)

(Pardon cannot

v Emperor
— Approver

Note 17

- 1 The following cases deal with the testimony of an accomplice
(30) 23 AIR 1936 Pat 531 (532) 33 Cri L Jour 72 *Hanuman Sahay v Emperor* (The Court though it may presume the evidence of accomplices to be unworthy of credit is not compelled to do so)

- (36) 37 Cr L Jour 840 (844) 163 Ind Cas 566 (Cal) *Bimal Krishna v Emperor*
 (86) 8 All 120 (139) 1886 All W N 7 *Queen Empress v Indad Khan*
 (13) 14 Cr L Jour 577 (586) 36 Mad 501 40 Ind App 193 21 Ind Cas 369 (P C) *Vaithinatha Pillai v Emperor*
 (26) 27 Cr L Jour 918 (920) 96 Ind Cas 262 (Lah) *Jang Singh v Emperor*
 (26) 13 AIR 1926 All 705 (706) 27 Cr L Jour 979 *Parlab Singh v Emperor*
 (30)
 (96)
 (85)
 (12) 13 Cr L Jour 542 (543) 15 Ind Cas 814 (Bom) *Emperor v Chotalal* (Degree of corroboration)

(Persons bribing for obtaining release of wrongfully confined persons are not accomplices and therefore their evidence may be accepted without corroboration)

- (18) 5 AIR 1918 Cal 72 (73) 19 Cr L Jour 959 *Emperor v Kabuli Kaloni*
 (20) 7 AIR 1920 Cal 663 (666) 32 Cal L Jour 204 (209) 22 Cr L Jour 225 *Emperor v Anant Kumar*
 (32) 19 AIR 1932 Cal 377 (380) 33 Cr L Jour 357 *Surendranath Goswami v Emperor*
 (66) 5 Suth W R Cr 59 (59 60) *Queen v Chutler Dharcesingh*
The following cases are also relevant

v Emperor (Conviction upon

Mah v Emperor (Confession

made to private person repeated before Magistrate but retracted four months later — Another accused turning approver—Held confession was sufficient to corroborate approver)

- (67) 8 Suth W R Cr 57 (58) *Queen v Ram Sagor*
 (19) 6 AIR 1919 All 327 (328) 20 Cr L Jour 561 *Allauddin v Emperor* (Statement by approver not corroborated—His statement though not reliable casts doubt and accused is entitled to benefit)
 (68) 9 Suth W R Cr 28 (28, 29), *Queen v Nunhoo*
 (69) 12 Suth W R Cr 5 (5 7) *Queen v Chirag Ali*
 (11) 12 Cr L Jour 5 (5) 9 Ind Cas 39 (Lah), *Hira v Emperor*
 (11) 12 Cr L Jour 35 (37) 9 Ind Cas 232 (Lah) *Manna v Emperor*
 (12) 13 Cr L Jour 182 (182) 13 Ind Cas 998 (Lah) *Ladkhan v Emperor*
 (16) 8 AIR 1916 Lah 390 (393) 17 Cr L Jour 107, *Waryam Singh v Emperor* (There should be direct and material corroboration of statement of approver who is of very bad character)
 (18) 8 AIR 1916 Lah 339 (340) 17 Cr L Jour 220 *Ghulam Rasul v Emperor*
 (24) 11 AIR 1924 Lah 235 (235) 24 Cr L Jour 696 *Chaprolia v Emperor*
 (24) 11 AIR 1924 Lah 481 (482) 25 Cr L Jour 979 *Khush Muhammad v Emperor*
 (25) 12 AIR 1925 Lah 253 (254) *Nur Muhammad v Emperor*
 (25) 12 AIR 1925 Lah 397 (399) 26 Cr L Jour 1335 *Nawab v Crown*
 (26) 13 AIR 1926 Lah 439 (439) 27 Cr L Jour 600 *Munshi v Emperor*
 (27) 14 AIR 1927 Lah 581 (589) 28 Cr L Jour 675, *Bharlat v Emperor*
 (32) 19 AIR 1932 Lah 557 (558) 33 Cr L Jour 935, *Sangara Pass v Emperor*

or (Unconvincing and

uncorroborated statement of approver is not sufficient for conviction)

- (34) 21 AIR 1934 Lah 316 (347) 35 Cr L Jour 1016 *Mangal Singh v Emperor*
 (34) 21 AIR 1934 Lah 583 (585) 35 Cr L Jour 752, *Bimal Pershad v Emperor*
 (89) 12 Mad 196 (197) 2 Wair 519, *Queen Empress v Arninga* (Judge should caution jury not to accept evidence of approver unless it is corroborated, omission to do so amounts to misdirection)
 (09) 10 Cr L Jour 567 (568) 4 Ind Cas 391 (Mad) *In re Muthan Papayya* (Corroboration must be by material facts tending to point accused as guilty person)
 (11)
 (14)
 (12)
 (25) *peror*
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emperor (Evidence given by a spy who encourages a person to commit a crime is of no better value than that of an accomplice and cannot be accepted without corroboration)

circumstances that the Court could notwithstanding the above rule of prudence and caution, give credit to the accomplices testimony against the accused even without corroboration, and in such cases s 133 of the Evidence Act provides that a conviction is not illegal merely because it proceeds upon such uncorroborated testimony of an accomplice⁵

- (36) 37 Cri L Jour 810 (843) 62 Cal 819 163 Ind Cas 566 (Cal) *Bimal v Emperor*
 (34) 21 AIR 1934 Cal 114 (116) 35 Cri L Jour 531 *Shibadas Das v Emperor*
 (32) 19 AIR 1932 Oudh 11 (15) 33 Cri L Jour 287 *Jai Singh v Emperor*
 (25) 12 AIR 1925 Oudh 715 (716) 26 Cri L Jour 1317 *Sheo Narain Singh v Emperor*
 (27) 14 AIR 1927 Lah 581 (589) 28 Cri L Jour 625 *Barkati v Emperor*
 (23) 24 Cri L Jour 723 (730) 73 Ind Cas 963 (970) (Pat) *Madan v Emperor* (Failure to raise presumption is error of law)
 (14) 1 AIR 1914 Mad 323 (326) 15 Cri L Jour 417 *Narayana Ayya v Emperor*
 (84) 7 All 160 (162) 1894 All W N 314 *Queen Empress v Kallu*
 (12) 13 Cri L Jour 767 (768) 17 Ind Cas 79 6 Sind L R 106 *Emperor v Isardas*
 (24) 11 AIR 1924 Lah 357 (358) *Tota Singh v Emperor*
 (15) 2 AIR 1915 Cal 73 (74) 15 Cri L Jour 438 (439) *Munassar Ahir v Emperor*
 (25) 12 AIR 1925 Oudh 1 (8) 27 Oudh Cas 40 25 Cri L Jour 49, *Manna Lal v Emperor* (Impossibility of corroborative evidence does not dispense with necessity thereof)
 (34) 21 AIR 1934 Oudh 90 (92) 9 Luck 355 35 Cri L Jour 397 *Mahadco v Emperor*
 (31) 18 AIR 1931 Pat 105 (109 110) 32 Cri L Jour 383 *Kailas Misssir v Emperor*
 (14) 1 AIR 1914 Oudh 176 (181) 15 Cri L Jour 410, *Rustam Singh v Emperor*.
 (28) 15 AIR 1928 Pat 630 (631) 8 Pat 235 30 Cri L Jour 137, *Pattan v Emperor*
 (90) 14 Bom 331 (336) *Queen Empress v Chagan Dayaram* (Omission to follow this rule of practice is not error of law)
 (35) 22 AIR 1935 All 132 (133 134) 36 Cri L Jour 617 *Abdul Salam v Emperor*
 (35) 22 AIR 1935 Cal 513 (517) 62 Cal 238 36 Cri L Jour 1115 (S D) *Emperor v Nimal Jiban Ghose* (Rule requiring corroboration though one of prudence has become equivalent to rule of law)
 (35) 36 Cri L Jour 1202 (1203) 157 Ind Cas 626 (628) (Lah) *Ata Md v Emperor* (The rule which is one of prudence has acquired the sanctity of a rule of law)
 (25) 12 AIR 1925 Lah 268 (269) 26 Cri L Jour 769 *Feroze Khan v Emperor*
 [See (1863) 2 Weir 796 (797) *In re Palavasam* (Though this is the general rule, conviction on basis of uncorroborated testimony of accomplice need not necessarily be set aside)]
 5 (39) 26 AIR 1939 All 567 (571) 40 Cri L Jour 856 ILR (1939) All 736, *Bhola Nath v Emperor* (The question as to whether or not the statement of the approver should be taken into consideration or should be totally rejected is one which will depend upon the circumstances of each case — No hard and fast rule can be enunciated which will govern all cases)
 (38) 25 AIR 1938 Rang 177 (178) 39 Cri L Jour 591 1938 Rang L R 190 (F B), *King v Nga Myo* (The presumption is not a hard and fast presumption but can be displaced in the circumstances of a particular case)
 (37) 24 AIR 1937 Rang 209 (210) 38 Cri L Jour 785 1937 Rang L R 110, *Nga Aung Po v Emperor*
 (36) 23 AIR 1936 Pat 531 (532) 35 Cri L Jour 72 *Manuman Sahay v Emperor* (Though the Court may presume the evidence of accomplices to be unworthy of credit, it is not compelled to do so)
 (25) 12 AIR 1925 Oudh 715 (716) 26 Cri L Jour 1317 *Sheo Narain Singh v Emperor*
 (87) 9 All 528 (554) 1897 All W N 156, *Queen Empress v Gobardhan*
 (66) 5 Suth W R Cr 80 (83, 91 92) Beng L R Sup Vol 459, *In re Ptlakes Dul sh*
 (89) 14 Bom 115 (120 121) *Queen Empress v Maganlal* (Per Scott, J)
 (04) 1 Cri L Jour 211 (214 215) 1 All L Jour 110, *Abdul Karim v Emperor*
 (27) 14 AIR 1927 All 90 (91) 49 All 181 27 Cri L Jour 1369 *Dalechand v Emperor*
 (25) 12 AIR 1925 All 223 (226) 47 All 39 27 Cri L Jour 536 *Abdul Wahab v Emperor*
 (95) 1895 All W N 24 (28) *Queen Empress v Tipru*
 (10) 11 Cri L Jour 441 (441) 7 Ind Cas 185 (All), *Ballaran v Emperor* (Evidence must be so far

has

- (29) 16 AIR 1929 Cal 222 (224) 31 Cri L Jour 609, *Emperor v Mathews*
 (73) 19 Suth W R Cr 48 (48) *Queen v Koa*
 (71) 15 Suth W R Cr 37 (38) 6 Beng L R App 108 *Queen v Mahima Chandra Das*
 (70) 13 Suth W R Cr 91 (91) *Queen v ...* (Evidence not open to ...)

It is not necessary, however, that an accomplice should be corroborated as regards every portion of his statement and in all its details^a. In determining the weight to be

- (31) 18 AIR 1931 Lah 178 (179) 32 Cri L Jour 684 *Sher Jang v Emperor*
(17) 4 AIR 1917 Lah 323 (327) 1917 Pun Re No 9 Cr 18 Cri L Jour 536 *Ghulam v Emperor*
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ur 226 *Ramaswamy v Emperor*
(78) 1 Mad 394 (395) 2 Weir 799 *Reg v Ramaswamy Padayachi*
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corroborated testimony of an accomplice must be acted upon if believed in)
(32) 19 AIR 1932 Oudh 11 (15) 33 Cri L Jour 287, *Jaisingh v Emperor*
(31) 18 AIR 1931 Pat 105 (109 110) 32 Cri L Jour 383 *Kailash Misir v Emperor*
(33) 20 AIR 1933 Pat 500 (502 503) *Emperor v Wajid Shrikh*
(15) 2 AIR 1915 Lah 16 (21 50) 16 Cri L Jour 354 1915 Pun Re No 17 Cr, *Balmokand v Emperor*
[See also (07) 29 All 434 (440) 5 Cri L Jour 360 4 All L Jour 310 1907 All W N 140 *Emperor v Keheri*
(16) 3 AIR 1916 Lah 32 (35) 18 Cri L Jour 29 1917 Pun Re No 2 Cr, *Barkat Ali v Emperor*
(Section 183 Evidence Act contains the rule of law and S 114 Illust (b) of the same Act is merely a rule of guidance to assist Courts)
(30) 1930 Mad W N 169 (171 172) *Kuppuswamy Iyer v Emperor*]
6 (35) 22 AIR 1935 Oudh 1 (3) 10 Luck 291 36 Cri L Jour 166 *Turab v Emperor* (The evidence of an accessory after murder is virtually that of an accomplice)
(32) 19 AIR 1932 Cal 295 (296) 33 Cri L Jour 477 *Golam Aspha v Emperor* (An accomplice includes one who poses himself as an accomplice and his evidence requires corroboration)
(32) 19 AIR 1932 Oudh 317 (319) 7 Luck 511 33 Cri L Jour 920 *Emperor v Magbool Ahmad Khan*
(19) 6 AIR 1919 Bom 164 (166) 43 Bom 739 20 Cri L Jour 497 *Emperor v Sahib Khan* (Case of a confession of co accused)
(98) 2 Cal W N 749 (750) *Manki Tewari v Amir Hossein* (Confession of co accused if proved is evidence of the very weakest kind and if uncorroborated is not sufficient to warrant a conviction)
(12) 13 Cri L Jour 305 (315) 14 Ind Cas 849 35 Mad 247 *Emperor v Nilakanta*
(29) 16 AIR 1929 Oudh 321 (326) 30 Cri L Jour 922 *Lale v Emperor* — (Court's duty noted)
(29) 16 AIR 1929 Nag 233 (234) 30 Cri L Jour 333 *Misa v Emperor*
(27) 14 AIR 1927 Oudh 369 (378) 2 Luck 631 29 Cri L Jour 129 *Ram Parsad v Emperor*
(24) 11 AIR 1924 Rang 173 (174) 1 Rang 609 25 Cri L Jour 381 *Maung Lay v Emperor*
(25) 12 AIR 1925 Sind 105 (108) 19 Sind L R 183 25 Cri L Jour 1057 *Faizulla v Emperor*
7 (36) 37 Cri L Jour 999 (1002 1008) 164 Ind Cas 779 (FB) (Cal) *Moti Lal v Emperor*
(34) 21 AIR 1934 Cal 114 (116) 35 Cri L Jour 351 *Shibadas Das v Emperor* (Evidence of accomplice — Judge sitting without jury must treat himself as jury and apply same rules as in trials with jury)
(32) 19 AIR 1932 Cal 295 (296) 33 Cri L Jour 477 *Golam Aspha v Emperor*
(1925) 133 L T 736 (738) 89 J P 175 41 T L R 635 28 Cox CC 47 *Itz v Beebe*
(12) 13 Cri L Jour 305 (314) 14 Ind Cas 819 35 Mad 247 *Emperor v Nilakanta*
(89) 1889 Rat 466 (466) *Queen Empress v Rama*
(96) 1896 Rat 818 (818 849) *Queen Empress v Dhond*
(68) 10 Sath W R Cr 17 (17) *Queen v Dylunt Nath*
(21) 11 AIR 1924 Cal 701 (702) 51 Cal 160 25 Cri L Jour 1000 *Emperor v Jamal*
(80) 2 Weir 742 (744) *In re Alagappa Bah*
(68) 4 Mad H C R App vii (vii viii)
(28) 15 AIR 1928 Oudh 207 (208) 29 Cri L Jour 511 *Mami Ravi v Emperor*
(28) 15 AIR 1928 Pat 630 (631) 8 Pat 235 30 Cri L Jour 137 *Rattan v Emperor*
8 (41) 28 AIR 1911 Oudh 130 (138) 42 Cri L Jour 165 191 Ind Cas 466 (DB) *Siyam Kumar Singh v Emperor*. (It is not necessary that the story of an accomplice should be corroborated in every particular of the crime When it is established that there are good grounds for believing the accomplice

attached to such evidence and the amount of corroboration required in each particular case the Court must exercise careful discrimination and consider all the surrounding circumstances including the character and antecedents of the accomplice, the extent of his complicity in the crime and the circumstances under which his evidence is tendered.

place a story by reason of the existence of corroboration on on material points implicating the accused the Court can come safely to conclusion as to the truth of the whole story on uncorroborated points so far as they implicate the same accused—AIR 1936 Rang 373 37 Cri L Jour 922 (relied on)

(29) 26 AIR 1932 All 567 (571) 40 Cri L Jour 876 11 R (1932) All 736 *Phola Nath v Emperor* (More fact that an approver makes a wrong statement on a particular point will not justify the total rejection of his evidence when in other respects his evidence is trustworthy and fully corroborated)

(1884) 15 Cox C C 231 (316) *Peg v Thomas Shalaghar*

(73) 14 Cri L Jour 223 (227) 19 Ind Cas 321 (Dom) *Emperor v Kuberappa*

(25) 12 AIR 1913 Cal 672 (674) 52 Cal 535 26 Cri L Jour 1037, *Ledu Molla v Emperor*

(60) 11 South W R Cr 21 (21) *Queen v Kalla Chand*

(12) 13 Cri L Jour 303 (313) 14 Ind Cas 819 35 Mad 217, *Emperor v Aslakanta*

(92 96) 1 Upp Bur Bul 148 (152) *Sapa Kye v Queen-Empress*

(86) 1660 All W N 63 (66) *Empress v Kire*

9 (43) 30 AIR 1943 Lah 5 (6) 44 Cri L Jour 62 203 Ind Cas 6 *Shera v Emperor* (It is not correct to state that the evidence of an accomplice in a case of dacoity is not entitled to any credence if he made his statement as an approver under s 164, Cr P C, after all the accused had been arrested and recoveries of stolen property made from them. This is a criticism to which the evidence of almost every approver is subject because the question whether pardon should be tendered to an accomplice is generally considered at a late stage when the investigation of the case is completed)

(29) 16 AIR 1923 Cal 822 (824) 31 Cri L Jour 803 *Emperor v Mathews*

(23) 16 AIR 1923 Lah 830 (834) 31 Cri L Jour 517, *Halam Singh v Emperor*

(33) 20 AIR 1933 Pat 96 (99) 31 Cri L Jour 421 *Raghunath Panday v Emperor*

(87) 9 All 523 (534) 1857 All W N 156 *Queen-Empress v Gobardar*

(01) 26 Bom 193 (197) 3 Dom L R 691 *Emperor v Malhar Marland*

(33) 20 AIR 1933 Bom 24 (25) 34 Cri L Jour 136 *Allisab Peyesab v Emperor* (A person who has been convicted and sentenced on his own plea continues to be an accomplice and his evidence should be corroborated)

(13) 14 Cri L Jour 273 (227) 19 Ind Cas 321 (Dom) *Emperor v Kuberappa*

(29) 16 AIR 1923 Bom 296 (302) 53 Bom 479 31 Cri L Jour 63 *Emperor v C E Ring* (The testimony of accomplices, who are victimised by police-officer into offering them illegal gratification or have not willingly done so requires a much slighter degree of corroboration)

(79) 4 Cal 493 (490 496) 3 Cal L Rep 270 (FB) *Empress v Ashootosh Chulherbutty*

(1900) 27 Cal 144 (155) *Queen-Empress v Deodhar Singh*

(06) 3 Cri L Jour 452 (453) 33 Cal 619 10 Cal W N 669 *Deonadan v Emperor*

(33) 20 AIR 1933 Cal 148 (149) 34 Cri L Jour 675 *Sudan Chandra Dag v Emperor* (Co accused against whom charge is withdrawn unconditionally is more reliable witness than accomplice under conditional pardon)

(22) 9 AIR 1922 Lah 1 (22) 3 Lah 144 23 Cri L Jour 513 *Mahant Narain v Emperor*

(23) 10 AIR 1923 Lah 345 (346) 24 Cri L Jour 618 *Jehana v Emperor* (One who deposes that he only helped the accused in disposing of the body of the deceased after he was killed by the accused is no accomplice)

(16) 3 AIR 1916 Lah 380 (383) 17 Cri L Jour 97 *Bachanta v Emperor* (Question of value to be attached to accomplice's statement must be decided upon particular circumstances of each case)

(23) 10 AIR 1923 Lah 391 (394) 25 Cri L Jour 264 *Nawab v Crown* (When a person sees a murder committed but gives no information thereof his evidence must be considered as no better than that of an accomplice)

(21) 8 AIR 1921 Lah 267 (269) 21 Cri L Jour 507, *Sunder Singh v Emperor* (Uncorroborated statement of approver taken at the end of trial is valueless)

(25) 12 AIR 1923 Lah 432 (434) 6 Lah 183 26 Cri L Jour 1238 *Balawala v The Crown* (Witness accused a paramour and assisting him to put murdered man on bed and covering him with chadar—Other circumstances—Corroboration of evidence was held essential)

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16 AIR 1929 Lah 540 (542) 31 Cri L Jour 50 *Hayatu v Emperor* (Witnesses who are accessories are in the same position as accomplices and the evidence requires corroboration)

1931 Lah 178 (179) 32 Cri L Jour 634 *Sher Jang v Emperor* (Extent of corroboration circumstances of each case)

While dealing with evidence of corroboration the Court must deal with it as a whole. The evidence in corroboration should be satisfactory and reliable and should be derived from independent and unimpeachable sources or circumstances¹¹. It has generally been

- (32) 19 AIR 1932 Lah 73 (75 80) 32 Cri L Jour 1036, *Nanal Chand v Emperor* (Do)
 (33) 20 AIR 1933 Lah 871 (876) 35 Cri L Jour 137, *Emperor v Pasi Singh Narain Singh*. (Whether approver's evidence is false as against one accused it should not be accepted against other accused)
 (03) 26 Mad 1 (8) 2 Weir 521, *Emperor v Edward William Smither* (Witnesses who took no part in the transaction but merely witnessed it are not 'accomplices')
 (12) 13 Cri L Jour 305 (314, 315) 35 Mad 247 14 Ind Cas 849 *Emperor v Nilakanta* (Oral testimony of independent witnesses is not necessary to corroborate accomplice's evidence)
 (13) 14 Cri L Jour 207 (207) 19 Ind Cas 207 (Mad) *Kulliyatra Bomma v Emperor*
 (29) 16 AIR 1929 Nag 215 (217) 30 Cri L Jour 311, *Muhammad Usuf Khan v Emperor*
 (30) 17 AIR 1930 Nag 97 (104) 31 Cri L Jour 153 *Daulat v Emperor*
 (32) 19 AIR 1932 Oudh 11 (15 16) 33 Cri L Jour 297, *Jai Singh v Emperor* (Evidence of the accomplices after the fact requires corroboration)
 (26) 13 AIR 1926 Pat 232 (235) 5 Pat 63 27 Cri L Jour 484 *Jagwa Dhanuk v Emperor* (Accomplice should be corroborated in material points as to the part played by his accomplices)
 (28) 15 AIR 1928 Pat 630 (631) 8 Pat 235 30 Cri L Jour 137, *Rattan Dhanuk v Emperor* (Corroboration is required with respect to each individual accused)
 (97 1901) 1 Upp Bur Rul 173 (174) *Queen Empress v Nga Tun Bao*
 (24) 11 AIR 1924 Rang 173 (174) 1 Rang 609 25 Cri L Jour 331 *Maung Lay v Emperor*
 (31) 18 AIR 1931 Rang 235 (242) 9 Rang 401 33 Cri L Jour 205 (SD) *Aung Hla v Emperor*

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(In all cases depending on evidence of an informer the degree of support that the evidence requires must depend on the amount of credit in each particular case to be attached to informer)]

- 10 (43) 30 AIR 1943 Pat 146 (151) 22 Pat 27 44 Cri L Jour 494 206 Ind Cas 103 (DB) *Nakul Kishore Pasi v Emperor*
 11 (36) 23 AIR 1936 Lah 400 (401) 17 Lah 518 37 Cri L Jour 597 *Kariar Singh v Emperor* (Motive is not corroborative evidence)
 (04) 1 Cri L Jour 568 (571) 6 Bom L R 481 *Empress v Baji Krishna*
 (73) 19 Suth W R Cr 16 (21) 10 Beng L R App 455n *Queen v Mohesh Bhatias*
 (10) 11 Cri L Jour 554 (555) 13 Oudh Cas 243 7 Ind Cas 1012 *Hira Lal v Emperor*
 (07) 5 Cri L Jour 437 (437) (Lab) *Kallou v Crown*
 (11) 13 Cri L Jour 424 (425 426) 14 Ind Cas 968 1 Upp Bur Rul 3rd Qr 96 *Ah Tal v Emperor* (Hearsay evidence is inadmissible even to corroborate evidence of accomplice)
 (23) 10 AIR 1923 Lah 683 (683) 25 Cri L Jour 435 *Sandagar Singh v Emperor*
 (78) 4 Cal 483 (490 494) 3 Cal L Rep 270 (FB) *Empress v Ashutosh Chuckerbutty* (Such evidence should if believed be sufficient to base a conviction)
 (12) 13 Cri L Jour 283 (284) 14 Ind Cas 667 (Cal) *Tufani Sheikh v Emperor* (Evidence of motive can never by itself be sufficient to corroborate any statement requiring corroboration)
 (25) 12 AIR 1925 Lah 603 (609) 6 Lah 415 27 Cri L Jour 514 *Pratab Singh v Emperor* (But confession of accused himself is corroboration)
 (29) 16 AIR 1929 Lah 587 (589) 31 Cri L Jour 91 *Melur Singh v Emperor* (Evidence of the son of the accomplice who repeated what he had been tutored to say is no corroboration)

(Approver's evidence is not corroborative evidence)

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that the evidence is corroborated on this point by the statement or evidence of the accomplice or confession of co-accused. It would appear that this is only a

- (11) 14 AIR 1931 Ind 107 (119) 32 Cr L J 375 *Fata Mahal v Emperor* (S. p. 22) Lower grave necessity to be of corroboration)
 (21) 8 AIR 1931 Ind 406 (107) *Dhann v Emperor* (Evidence of accomplice is not corroboration)
 (21) 21 AIR 1934 Ind 23 24 35 Cr L J 20 37 *Jat v Emperor* (Motive is no corroboration of evidence)
 [See also (12) 13 Cr L J 20 37 (1) 17 Ind Cas 947 (Cal) *Fata Mahal v Emperor* (In cases depending on evidence of an informer, degree of support that the evidence requires must depend on a report of credit to be attached to informer)]
 12 (44) 51 AIR 1944 Lah 472 (473) 14 R (1944) Lah 463 46 Cr L Jour 152 216 Ind Cas 253 *Sharif v Emperor* (Evidence of one approver cannot be corroborated by evidence of another approver—There must be independent corroboration)
 (43) 30 AIR 1913 Pat 146 (170) 22 Ind 27 44 Cr L Jour 494 206 Ind Cas 109 (DB) *Nahal Kishore v Emperor* (Manner of scrutinizing evidence of several accomplices indicated)
 (37) 24 AIR 1937 Cal 433 (447) 34 Cr L Jour 872 (51) *Narain Chandra v Emperor*
 (36) 37 Cr L Jour 1036 (1037) 163 Ind Cas 144 (Oudh) *Mahabub v Emperor*
 (36) 37 Cr L Jour 810 (843) 163 Ind Cas 568 (Cal), *Bimal Krishna v Emperor*
 (36) 23 AIR 1936 I C 242 (210) 37 Cr L Jour 914 (PC) *Mahadeo v The King*
 (36) 8 AIR 306 (312) 1850 All W N 311 *Queen Empress v Lari Srin*
 (36) 25 South W R Cr 43 (43) *Queen v Pujos Choudhry*
 (33) 20 AIR 1933 Cal 6 (8) 31 Cr L Jour 23 *Kashinath v Emperor*
 (28) 15 AIR 1928 Cal 743 (747) 30 Cr L Jour 536 *Latafat Hussain v Emperor*
 (34) 21 AIR 1934 Cal 678 (680) 33 Cr L Jour 1357 (SB) *Hafizuddin v Emperor*
 (34) 1 Cr L Jour 211 (214 215) 1 All L Jour 110 *Abdul Karim v Emperor*
 (19) 6 AIR 1919 Lah 168 (169) 1919 Ind No 20 Cr 20 Cr L Jour 191, *Shahra v Emperor*
 (29) 16 AIR 1919 Lah 830 (833) 31 Cr L Jour 517 *Hakam Singh v Emperor*
 (32) 20 AIR 1933 Lah 946 (916) 35 Cr L Jour 79 *Parbhu v Emperor* (Approvers having ample opportunity to consult each other before becoming approvers—They should not be considered as corroborating each other)
 (34) 21 AIR 1934 Lah 171 (172 173) 36 Cr L Jour 491 *Ali Muhammad v Emperor*

with suspicion)

[See also (33) 20 AIR 1933 Rang 116 (117) 31 Cr L Jour 929 *Nga Aung Pa v Emperor*]

[But see (35) 22 AIR 1935 Rang 491 (494) 37 Cr L Jour 280 *Maung Tha Ka Do v Emperor*. (Evidence of the accomplice can be used for the purpose of corroborating the evidence of the approvers)]

- 13 (44) 51 AIR 1944 Lah 472 (473) 14 R (1944) Lah 463 46 Cr L Jour 153 216 Ind Cas 253, *Sharif Imardin v Emperor* (Confession of co-accused is in itself insufficient to corroborate approver's evidence)
 (33) 20 AIR 1933 All 31 (36) 55 All 91 34 Cr L Jour 489 *Nazir v Emperor*
 (13) 14 Cr L Jour 112 (113) 18 Ind Cas 672 (All) *Debi Dayal v Emperor* (Retracted confessions do not constitute corroboration of high value though they may be taken into consideration against co-accused)
 (95) 1895 Rat 750 (752) *Queen Empress v Bhagya*
 (76) 1 Bom 475 (476), *Reg v Budhu Nanku*
 (84) 10 Cal 970 (974) *Queen Empress v Bepin Biswas*
 (74) 21 South W R Cr 69 (71) *Queen v Sadhu Mundul*
 (73) 19 South W R Cr 68 (69), *Queen v Uddhan Band*
 (18) 5 AIR 1918 Lah 358 (359) 19 Cr L Jour 439, *Gurdit Singh v Emperor*.
 (21) 8 AIR 1931 Lah 215 (215 216) 23 Cr L Jour 158, *Lala v Emperor*

(24) 11 AIR 1924 Oudh 369 (371) 25 Cr L Jour 1207, *Parmeshwar v Emperor*

(33) 20 AIR 1933 Oudh 355 (360) 9 Luck 22 35 Cr L Jour 273 *Bem Madho v Emperor*.

general rule and it cannot be affirmed that in no circumstances can the evidence of a accomplice be used to corroborate that of another¹⁴ In this connexion, the following observations of a Full Bench of the Rangoon High Court¹⁵ may be quoted

"From a consideration of all the matters to be dealt with it is apparent First Provided it has been established by extraneous evidence or matters appearing on the record that the accomplices are not acting in collusion with one another, the cumulative effect of the evidence of two or more of them may be sufficient to remove the *prima facie* presumption of the individual unworthiness of credit of their statements and if this be the case, a conviction may legitimately be recorded upon their statements alone, if the Court is convinced of their truth The same observation applies to the cumulative effect of the evidence of an accomplice and the confession of a co-accused where the presumption of their unreliability has, in the special circumstances been rebutted Secondly That evidence from a source which is not *prima facie* unworthy of credit may prove a fact which displaces in a particular case the presumption that an accomplice is unworthy of credit Thirdly That corroboration must proceed from a source extraneous to the person whose testimony it is sought to corroborate But it may consist of extraneous proof of a fact relating to that very person's prior conduct"

It is not enough if the corroborative evidence is of a vague or general nature and relates merely to the circumstances of the occurrence or to the details of the crime¹⁶ It should refer and relate distinctly to the complicity of the accused in such offence and also to the identity of each of the accused¹⁷

(14) 1 AIR 1914 Bom 305 (311) 14 Cri L Jour 625 38 Bom 156, *Gangappa v Emperor*
[See however (07) 5 Cri L Jour 360 (375) 1907 All W N 140 29 All 434 4 All L Jour 310 *Kabra v Emperor* (Conviction of accused even on unsupported evidence of confession of co-accused would not be illegal)]
[But see (87) 24 AIR 1937 Rang 116 (116) 38 Cri L Jour 705, *Nga Tun Shue v Emperor* (Approver can be corroborated by the confession of a co-accused jointly tried with the accused for the same offence even where both the approver and the confessor retract their statements — See also AIR 1938 Rang 177 (SB))]

14 (44) 51 AIR 1944 Mad 503 (503) 46 Cri L Jour 377 218 Ind Cas 24, *In re Ramabrahmam* (A conviction on the evidence of one approver corroborated by that of another accused against whom the conviction was obtained is not illegal)
1911 Mad

(33) 20 AIR 1933 Rang 57 (58) 11 Rang 4 34 Cri L Jour 286, *Nga Nyein v Emperor* (Only the care to be exercised in such cases should be great)

(97 01) 1 Upp Bar Rul 173 (174) *Queen Empress v Nga Tun Baw*

(35) 22 AIR 1935 Cal 513 (517) 62 Cal 238 36 Cri L Jour 1115 (SB), *Emperor v Nirmal Jibbar Ghose*

15 (38) 25 AIR 1938 Rang 177 (179) 39 Cri L Jour 581 1938 Rang L R 190 (FB) *Kang v Datt Myo* (Overruling dicta to the contrary in AIR 1931 Rang 235 9 Rang 404: 33 Cri L Jour 205 (SB) and AIR 1937 Rang 209 38 Cri L Jour 785)

16 See (27) 14 AIR 1927 Lah 581 (590) 28 Cri L Jour 625 *Barkati v Emperor*

(17) 4 AIR 1917 Lah 317 (319) 18 Cri L Jour 696, *Nand Singh v Emperor*

17 (45) 32 AIR 1945 Sind 132 (140) 1 L R (1944) Kar 456 221 Ind Cas 358 (DB), *Gopalsingh v Emperor* (with the sting)

- (2) 12 AIR 1925 Oudh 115 (115) 25 Cr L Jour 1317 *Shen Narain Singh v Emperor*
(1916) 5 Suth W R Cr 40 (41) Beng 1 R 5 p Vol 472 *In re F v re P v*
(1916) 2 K B C 4 (1916) 10 Cr L Jour 1151 T 4 3 10 J P 415 2, Cox CC 521 60 S J 620 *Per v Juvareille* (R f reed to n AIR 1931 Mad 100 2 (Mad 931 23 Cr L Jour 31)
(1849) 3 Cox CC 26 (31) *Leg v Mellins* (Ref reed to n AIR 1907)
(33) 20 AIR 1931 All 31 (3 35) 55 All 91 31 Cr L Jour 429 *Nazir v Emperor*
(18) 4 All 306 (310 313 1844) All W N 311 *Queen Empress v Isam Siran* ((1831) 6 C & P 23) *P v Hilds* (reel on)
(37) 22 AIR 1911 All 162 (167) 26 Cr L Jour 646 *Bacha Pishu v Emperor*
(76) 1876 Rat 102 (10 1) *Per v Clatur* (There m i be corrob at ve ex dence at to corp a de ic a 22)
(96) 1876 Rat 440 (440) *Queen Empress v Dhanu Raju*
(76) 1 Bom 473 (476) *Per v B lha Nank*
(85) 10 Bom 319 (327) *Queen Empress v Krishnabhat*
(04) 1 Cr L Jour 564 (572 577) 6 B m l R 491 *Emperor v Raju Krishna*
(06) 3 Cr L Jour 33 (34) 1 Bom 1 R 969 *Emperor v Srinivas*
(32) 19 AIR 1932 Bom 246 (248) 26 R m 172 33 Cr L Jour 396 *Cann v Emperor*
(186) 3 Suth W R Cr 8 (8) *Q re v Isam Hundle*
(66) 5 Suth W R Cr 18 (18) *Queen v Duran*
(67) 6 Suth W R Cr 10 (13) *Queen v Nawab Jan*
(64) 10 Suth W R Cr 17 (17 18) *Queen v Bhlunt Nath Banerjee*
(73) 19 Suth W R Cr 16 (21) 10 Beng L R 453 *Queen v Mohesh Daswas*
(71) 21 Suth W R Cr 69 (71) *Queen v Sadhu Mundul*
(02) 23 Cal 782 (787) 6 Cal W N 553 *Jamirudda Masalli v Emperor*
(11) 12 Cr L Jour 246 (249) 34 Cal 519 10 Ind Cas 552 *Emperor v Noutu Gopal*
(21) 22 Cr L Jour 676 (677) 63 Ind Cas 612 (613) (Cal) *Sardara v Emperor*
(30) 17 AIR 1930 Cal 430 (432) 31 Cr L Jour 1115 *Monohar Mandal v Emperor*
(31) 18 AIR 1931 Cal 697 (707) 33 Cr L Jour 19 (SD) *Ambica Charan Roy v Emperor*
(02) 1902 Pan Ile No 5 Cr p 11 (26) 1902 Pan I R No 57 *Wazir Khan v Emperor*
(16) 3 AIR 1916 Lab 197 (297) 17 Cr L Jour 150 *Nalka v Crown*
(17) 4 AIR 1917 Lab 317 (319) 18 Cr L Jour 696 *Nand Singh v Emperor*
(20) 7 AIR 1920 Lab 437 (488) 23 Cr L Jour 476 *Patta v Emperor*
(23) 10 AIR 1923 Lab 381 (380) 23 Cr L Jour 252 *Suleman v Emperor*
(24) 11 AIR 1924 Lab 727 (728) 25 Cr L Jour 1917 *Hazara Singh v Emperor*
(27) 14 AIR 1927 Lab 10 (10) 27 Cr L Jour 1294 *Kattu v Emperor*
(27) 14 AIR 1927 Lab 581 (585 590) 23 Cr L Jour 695 *Barkati v Emperor*
(29) 16 AIR 1929 Lab 680 (682 681) 30 Cr L Jour 293 *Nathu v Emperor*
(29) 16 AIR 1929 Lab 850 (854) 31 Cr L Jour 517 *Hakam Singh v Emperor*
(31) 18 AIR 1931 Lab 400 (407) 32 Cr L Jour 1049 *Amar Nath v Emperor*
(32) 19 AIR 1932 Lab 73 (75 80) 32 Cr L Jour 1036 *Nanaichand v Emperor*
(32) 19 AIR 1932 Lab 180 (181) 33 Cr L Jour 414 *Gehna v Emperor*
(32) 19 AIR 1932 Lab 204 (207) 33 Cr L Jour 242 *Ranbir Singh v Emperor*
(33) 20 AIR 1933 Lab 294 (296) 33 Cr L Jour 641 *Dalip Singh v Emperor*
(35) 22 AIR 1935 All 130 (133) 36 Cr L Jour 617 *Abdul Salam v Emperor*
(17) 4 AIR 1917 Lab 311 (317) 18 Cr L Jour 802 *Sahas Singh v Emperor* (Accused found in company of approver shortly after commission of crime is strong and cat on of fellowship p in crime)
(12) 13 Cr L Jour 305 (316) 35 Mad 247 14 Ind Cas 819 *Emperor v Nilkanta*

Cr L Jour 51 *Venkalasubba Reddi v*

Emperor

- (29) 16 AIR 1929 Nag 222 (223 224) 30 Cr L Jour 331 *Lodha Mahar v Emperor*
(30) 17 AIR 1930 Nag 97 (99 100) 31 Cr L Jour 153 *Daulat v Emperor*
(10) 11 Cr L Jour 71 (75) 4 Ind Cas 884 12 Oudh Cas 418 *Hubba v Emperor*
(11) 12 Cr L Jour 537 (539) 12 Ind Cas 513 (Oudh) *Makbul Ahmad v Emperor*
(29) 16 AIR 1929 Oudh 321 (326) 30 Cr L Jour 900 *Lals v Emperor*
(30) 17 AIR 1930 Oudh 455 (459) 32 Cr L Jour 162 *Bachalu v Emperor*
(32) 19 AIR 1932 Oudh 11 (16) 33 Cr L Jour 287, *Jas Singh v Emperor*
(32) 19 AIR 1932 Oudh 317 (321) 7 Luck 511 33 Cr L Jour 920 *Emperor v Maqbool Ahmad Khan*
(28) 15 AIR 1928 Pat 630 (631) 8 Pat 235 30 Cr L Jour 137, *Rattan Dhanuk v Emperor*
(30) 17 AIR 1930 Pat 164 (166) 32 Cr L Jour 5 *Shen Barha v Emperor*
(33) 20 AIR 1933 Pat 96 (99) 34 Cr L Jour 421 *Raghunath Pandey v Emperor*
(23) 20 AIR 1933 Pat 112 (113) 34 Cr L Jour 476 *Dhaju Mandal v Emperor*

It is not strictly necessary, however, that the corroboration should be afforded only by *direct* evidence—it may in certain cases be provided by circumstantial evidence.¹⁸ But the circumstantial evidence should be such as would unmistakably lead to the inference of guilt and be reasonably inconsistent with the theory about the innocence of the accused.¹⁹

- (72 99) 1872 1892 Low Bur Rul 322 (322) *Nga Shue v Queen Empress*
 (28) 30 Cr L Jour 57 (61) 113 Ind Cas 73 (Cal) *Kailash Chandra Rishi v Emperor*
 (25) 12 AIR 1925 Lah 600 (601 602) 26 Cr L Jour 1141, *Emperor v Ram Karan* (Mere presence of accused before murder was committed does not connect accused with the crime)
 (08) 7 Cr L Jour 227 (229) (Lah) *Chet Singh v Emperor* (Mere fact that accused was seen with daco does not corroborate participation in crime)
 [See also (16) 3 AIR 1916 Lah 433 (437) 1916 Pun Re No 7 Cr 17 Cr L Jour 273 *Ram Singh v Emperor*
 (34) 21 AIR 1934 Lah 873 (874) 15 Lah 491 36 Cr L Jour 383 *Kanshi Pam v Emperor* (Witness failing to identify accused in Court — There is no sufficient corroboration of approver's testimony)
v Naga Reddi
Emperor (An approver's testimony that he saw accused steal property from a place not in

possession of accused as such evidence is easy to fabricate)]

- 18 (46) 33 AIR 1946 Cal 156 (158) ILR (1944) 2 Cal 312 (DB) *Dhanapati De v Emperor* (Evidence of a witness that the accused were at the time of commission of the offence near the scene of crime and were so placed as to justify the inference that they were accompanying persons whose complicity in the crime has been satisfactorily proved by independent evidence is sufficient corroboration of the testimony of the accomplice)
 (45) 32 AIR 1945 Sind 132 (140) ILR (1944) Kar 458 221 Ind Cas 858 (DB) *Gopaldas Shrivastava v Emperor* (The corroborative evidence which connects or tends to connect the accused with the crime may be circumstantial evidence. The amount of corroborative evidence varies with the facts of each case and where the approver's evidence gives a deep impression of veracity only the minimum corroboration is necessary. Much or little the purpose of corroborative evidence is to satisfy individual he does so truly)
 1 Cas 62 *Shera Jiwan v Emperor* (Accused is good

property by accused is corroborated on)

Emperor

(Identification by three persons and recovery of stolen property with accused constitute very satisfactory corroboration)

Emperor (Production of stolen

Accused
innocent

explanation)

- (35) 22 AIR 1935 All 132 (133 134) 36 Cr L Jour 617 *Abdul Salam v Emperor*
 19 (43) 30 AIR 1943 Lah 5 (8) 44 Cr L Jour 62 203 Ind Cas 62 *Shera Jiwan v Emperor* (Where the production of stolen property recovered in pursuance of an involuntary confession of the accused is sought to be used as corroboration of the approver's evidence that there was a conspiracy to commit dacoity and the accused is found to be a member of the conspiracy his possession of the property cannot but be the possession of a knowing receiver. The accused therefore cannot rightly be convicted both under S 309 and S 412)
 (32) 19 AIR 1932 Oudh 251 (253) 32 Cr L Jour 1184 (1185) 6 Luck 658 *Gaya Prasad v Emperor*
 See below for cases in which the

found in possession of accused is sufficient corroboration)

property being

It has been held that irregularities in matters of procedure in recording the statements of an approver cannot take away the value of his evidence when it is found that it is in the main supported by other reliable evidence.²³

As to the value to be attached to verification proceedings in connection with confessions and statements of approver see the undermentioned cases.²⁴

18 Commitment of accused Prior to s (4) to the section as it stood before 1922 the Magistrate (with the exception of the Presidency Magistrate) who had tendered a pardon to a person and had examined such person as a witness in the case was precluded from trying the case himself even though the offence which the accused appeared to have committed might be triable by such Magistrate.²⁵ It was however held that there was no bar to another Magistrate competent to try the case from doing so.²⁶ Sub-section (4) has now been omitted and a new sub-s (2A) has been added by the amendment of 1921. Under the latter sub-section where a pardon has been granted to a person and he has also been examined as a witness then the Magistrate if he believes that a *prima facie* case against the other accused is established should commit such accused to the Sessions Court or to the High Court as the case may be and has no power to try the case himself even if he is otherwise competent to do so.²⁷ Nor can the case be tried by

(32) 19 AIR 1932 Lah 621 (622-623) 33 Cr L Jour 916 14 Lah 411 *Sher Singh v Emperor* (fact that accused produced certain articles belonging to deceased is sufficient to justify conviction of accused on charge of murder when there is general corroboration of approver's story)

(31) 18 AIR 1931 Mad 699 (691-693-694) 34 Mad 931 33 Cr L Jour 51, *Venkatasubba Reddy v Emperor* (More strong suspicion is not enough — benefit of doubt must be given to accused)

(30) 17 AIR 1930 Oudh 353 (357) 31 Cr L Jour 1210 *Hazira v Emperor* (Person found in possession of stolen articles must be presumed to be either thief or receiver of stolen property)

(29) 2 AIR 1913 Lah 211 (215-216) 11 Cr L Jour 631, *Uda v Emperor* (Production of stolen property from a place not in the possession of accused is no corroboration)

(28) 15 AIR 1925 Lah 681 (684) 10 Lah 265 29 Cr L Jour 631 *Chattru v Emperor* (Accused's conduct may be considered in corroboration of approver's testimony)

(1919) 1 K B 431 (434) 89 L J K B 551 120 L F 572 83 J P 123 11 Cr App R 1 26 Cox C C 387, *Reg v Marks Feigenbaum (Do)*

(03) 2 Weir 609n (609n) *Narayaniswami v Emperor* (Corroboration by conduct of accused)

(21) 6 AIR 1921 Lah 392 (394) *Ghulam Hassan v Emperor* (Discovery of blood in convict's house and on his nails and suspicious conduct corroborate accomplice)

20 (37) 21 AIR 1937 Cal 99 (120) 38 Cr L Jour 618 (SD), *Jitendra Nath v Emperor*

21 (41) 28 AIR 1941 Oudh 130 (144) 42 Cr L Jour 165 191 Ind Cas 466, *Shyam Kumar Singh v Emperor* (Verification proceedings held in connection with the confessions and statements of the approvers do not add to their value. Such proceedings cannot be regarded as corroboration, and are open to criticism in other respects. But such proceedings cannot be deprecated altogether, they show at least that the approver has or has not some knowledge of the places which he has mentioned in his confession. Verification proceedings are not illegal and may afford some test of the truth of the approver's statement. They are in any case a test of the approver's memory. A verification report made by the Magistrate so far as the confessional statement of an accused is concerned, cannot be said to be inadmissible when the Magistrate himself is examined as a witness in the case—AIR 1937 Cal 99 38 Cr L Jour 618 relied on)

Note 13

(33 1900) 1893 1900 Low Bur Rul 373 (323) *Nga Saw Wa v Queen Empress*

06) 4 Cr L Jour 44 (45) 10 Cal W N 847 *Poban Singh v Emperor*

12) 13 Cr L Jour 33 (34) 13 Ind Cas 273 5 Sind L R 174 *Emperor v Andar*

(98) 1898 Pun Re No 3 Cr p 6 (8), *Queen Empress v Batara* (District Magistrate sanctioning a tender of pardon is not precluded from trying the case)

20) 7 A I R 1920 Lah 364 (365) 1919 Pun Re No 30 Cr 21 Cr L Jour 306, *Akbar v Emperor (Do)*

22) 9 AIR 1922 Bom 138 (140) 46 Bom 61 42 Cr L Jour 728 *Emperor v Moti Lal Hira Lal*

(43) 44 Cr L Jour 279 (279) 204 Ind Cas 471 (Oudh) *King Emperor v Jogeshwar*. (Sub-section (2A) does not mean that the approver should be committed to trial along with the accused persons. Where an approver who has been granted pardon under S 337, has been committed for trial to the Court of Sessions along with the other accused, the commitment of the approver must be quashed.)

32) 19 AIR 1932 All 581 (582) 33 Cr L Jour 807 *Emperor v Raja Ram* (Sub-section does not mean that approver must be committed for trial to Court of Sessions)

another Magistrate though he may be vested with power under S 30 to try such an offence⁴ Where, however, a Special Magistrate was empowered by Ordinance 2 [II] of 1912 to try a case, it was held that he was not bound to commit the accused under sub s (2A) for the reason that where the provisions of the Ordinance and those of the Code conflict the provisions of the Ordinance are to prevail⁵ A similar view has been taken in the undermentioned case⁶ arising under Ordinance 2 [II] of 1912 Similarly, a Special Magistrate appointed under the Bengal Suppression of Terrorist Outrages Act, 1932, must after tender of pardon, try the accused himself instead of committing him for trial to the Court of Session or the High Court⁷

The fact that the Magistrate in tendering the pardon did so after consulting the Provincial Government and with its authority will not affect the position of the accused or the approver, and once pardon has been tendered, the trial must not be by another Magistrate, even though he is vested under S 30 to try such an offence, but by the High Court or the Sessions Court⁸

The right to trial by a Sessions Court or High Court conferred by sub s (2A) comes into existence when the conditions mentioned in the sub section are fulfilled It is not dependent upon the nature of evidence given by the person who has accepted the pardon Thus, if a person who has accepted a pardon disclaims any connection with or knowledge of the offence in his evidence, the tender of pardon does not cease to be effectual so far as the accused is concerned and the right of the accused to be tried by Sessions Court or High Court is not affected⁹

The sub section does not authorise the joint commitment of the approver along with the other accused¹⁰ For cases in which approver can be tried and the procedure in such cases, see Ss 339 and 339A

(35) 22 AIR 1935 Bom 70 (71) . 36 Cri L Jour 499, *Emperor v Nana Amrita* (In sub s (2A))

v. Emperor

(Sub section (2A) governs)

S 30, Cr P C)

Muqarrab

Emperor

Peru (Sub-section (2A) does not

4 (38) 25 AIR 1938 P C 266 (270) 1 L R (1938) Lah 623 65 Ind App 388 32 Sind L R 937 49 Cri L Jour 360 (FC), *Faqir Singh v Emperor* (Trial must be by the High Court or Sessions Court)

5 (33) 20 AIR 1933 Cal 537 (538) 60 Cal 652 34 Cri L Jour 1023, *Abdul Majid v Emperor*

6 (44) 31 AIR 1944 Mad 503 (503) 46 Cri L Jour 377 218 Ind Cas 24 In re Ramabrahman (A Special Magistrate functioning under Special Criminal Courts Ordinance 2 [II] of 1912 does not act illegally in continuing to try the case before him after he has tendered a pardon under S 337 Under S 6 (1) of the Ordinance a Special Judge takes cognizance of an offence without the accused being committed for trial in the ordinary way and therefore to this extent S 337, sub s (2A) is inconsistent with the provisions of the Ordinance)

1 (FD), *Haribor*

In so far as

provisions of S 337 are inconsistent with the Act, the Act will prevail)

8 (38) 25 AIR 1938 P C 266 (269, 270) 1 L R (1938) Lah 628 65 Ind App 388 32 Sind L R 937 49 Cri L Jour 360 (FC), *Faqir Singh v Emperor*. (Overruling AIR 1936 Lah 553 16 Lah 594 5th Cri L Jour 515)

9 (42) 29 AIR 1942 Sind 100 (101) 1 L R (1942) Kar 69 43 Cri L Jour 707 200 Ind Cas 723 (Pt) *Dost Muhammad v The Crown* (Under S 337 (1), a pardon is tendered to a person 'supposed to have been directly or indirectly concerned in or privy to the offence, and even if the suggestion turns out to be ill founded, the operation of other clauses of the section will remain unaffected)

10 (43) 44 Cri L Jour 279 (279) 204 Ind Cas 471 (Oudh) *King Emperor v Jageshwar* (AIR 1945 Oudh 472 . 26 Cri L Jour 1216 and AIR 1929 Oudh 190 4 Luck 679 30 Cri L Jour 607, relied on)

19 Detention of approver in custody — Sub section (3) — If the person to whom a pardon is tendered is *not already on bail* he has to be detained in judicial custody until the termination of the trial he cannot be released on bail under the provisions of Ss 497 and 498¹ The custody contemplated is judicial custody and is not the custody of the police² The approver should be detained in such custody until the proceedings are terminated by a magisterial order of discharge or until after the termination of the sessions trial³

There is no jurisdiction to order the detention of the approver till the expiration of the period of limitation for filing an appeal from the decision in the case His detention can only be ordered till the termination of the trial⁴

338.* At any time after commitment, but before judgment is passed,
 Power to direct the Court to which the commitment is made may, with the tender of pardon view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person

1 Scope of the section. — Section 337 provides for tender of pardon to an accomplice during the stage of investigation or of inquiry into the offence by a Magistrate This section enables the Sessions Judge to tender, or direct the Magistrate or District Magistrate to tender a pardon after the commitment of the case¹ He has power to tender a pardon or to direct the tender of pardon at any time before judgment is pronounced² but he should not exercise such power after the evidence for the prosecution and of the defence has been taken and the opinion of the assessors has also been given³ Where the tender of pardon made by the Magistrate is found to be invalid the Sessions Judge may make a valid tender of pardon under this section⁴

An Assistant Sessions Judge when presiding over a Court of Sessions is the Court to which commitment is made and therefore has power under this section to tender pardon⁵

* 1882 S 338 1872 S 348 1861 S 219

Note 19

- 1 (1900) 13 C P L R Cr 7 (8) *Empress v Bodlan*
 (32) 19 AIR 1932 Sind 40 (41) 33 Cr L Jour 906 *Ali Muhammad v Emperor*
 (27) 14 AIR 1927 Sind 173 (173 174) 28 Cr L Jour 439 *Mohammad Abdul Majid v Emperor*
 (Rupchand Bilaram A J C observed however that the restriction in S 337 sub-s (3) does not deprive the power of the Sessions Court or the High Court to grant bail to the approver)
 Also see S 498 Note 2
 [But see (1865) 3 Sath W R Cr L 17 (17) (Decided under Code of 1861)]
 2 (43) 30 AIR 1943 All 93 (95) 1 L R (1943) All 289 44 Cr L Jour 327 205 Ind Cas 89 *Dan Bahadur*

- 3 (12) 13 Cr L Jour 842 (843 844) 17 Ind Cas 714 37 Bom 145 *Emperor v Intiya Salabat Khan*
 4 (35) 22 AIR 1935 Cal 545 (545 546) 62 Cal 430 36 Cr L Jour 1308 *Sullan v Emperor*

Section 338 — Note 1

- 1 (38) 25 AIR 1938 P C 266 (1938) 1 L R 1338 Lah 628 32 Sind L R 937 40 Cr L Jour 360 (FC) *Faqir Singh v Emperor*
 2 (67) 7 Sath W R Cr 78 (76) *In the of Narasimha Debn* (Under the Code of 1861 it was held that Sessions could not tender a before a trial)
 3 (84) 1884 All (148) *Empress v*
 4 (82) 1852 All) *Empress v*
 45 32 AIR 1 (44) 1 L R 1
Akanda v 45 Cr L Jour 557 317 Ind Cas 285 *Ifja*

2 Offences in respect of which pardon may be tendered — A pardon may be tendered, under this section, in respect of any of the offences mentioned in S 37 after the case has been committed by the Magistrate under sub s (2A) of that section. See section 337, Note 5

3 "Any person supposed to have been directly or indirectly concerned in or privy to any such offence — See S 337, Note 8

339. (1) Where a pardon has been tendered under section 337 or section 338, and the Public Prosecutor certifies that Commitment of person to whom pardon has been tendered in his opinion any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connexion with the same matter

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made, in which case it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him at such trial

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court

Synopsis

- | | |
|---|---|
| 1 Legislative changes | 6 Effect of pardon |
| 2 The certificate of the Public Prosecutor | 7 Procedure at the trial — Joint trial |
| 3 "Any person who has accepted such tender" | 8 Plea of pardon in bar See S 339A |
| 4 Non compliance with the conditions | 9 Use of statements made by the approver— Sub section (2) |
| 5 'Wilfully concealing anything essential | 10 Prosecution for perjury — Sanction of the High Court |

- NOTE to the Synopsis** See the Notes indicated for the following topics
- | | |
|---|--|
| Application for sanction and not letter of reference See Note 10 | Certificate and sanction See Note 10 |
| Approver absconding See Note 5 | Certificate of Public Prosecutor not needed in case already pending See Note 2 |
| Approver's statements — Evidence in civil suit See Note 9 | Committal without certificate See Note 2 |
| Approver's statement — Evidence in prosecution for perjury See Note 9 | Discharge of approver after termination of trial See Note 7 |
| Approver's statements—Non applicability of S 24 Evidence Act See Note 9 | Examination of approver not needed See Note 9 and 10 |
| | Facts insufficient for forfeiture of pardon See Note 4 |

* Code of 1898, original S 339

339. (1) Where a pardon has been tendered under S 337 or S 338, and any person who has accepted such tender has either by wilfully concealing anything essential or by giving false evidence not complied with the condition on which the tender was made he may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connexion with the same matter

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him when the pardon has been forfeited under this section

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court

Facts sufficient for forfeiture See Note 4
 Forfeiture of pardon — Which Court to decide See Note 2
 No duty of disclosure as to other offences See Note 5
 No prosecution of approver for other offences disclosed See Note 6
 Onus on prosecution to prove forfeiture See Note 4
 Pardon accepted but rescinded from subsequently See Note 3
 Proof and explanation of approver's statements See Note 9
 Re-arrest of approver See Note 7

Retracted statements — Corroboration needed See Note 9
 Sanction before prosecution See Note 10
 Sanction of High Court — Discretion See Note 10
 Sanction of High Court when granted See Note 10
 Sanction of High Court when refused See Note 10
 Strictest faith with approver See Note 6
 Sub section (3)—Supplementary to Ss. 195 and 1476 See Note 10
 Want of sanction of High Court — Incurable See Note 10
 Withdrawal of pardon See Note 4

1. Legislative changes

Changes introduced by the Code of 1898 —

In sub-s (2) the word 'forfeited' has been substituted for the word 'withdrawn' See Note 4

Changes introduced by Act 18 [XVIII] of 1923 —

- (1) In sub-s (1), the words 'and the Public Prosecutor certifies that in his opinion were inserted' See Note 2
- (2) The proviso to sub-s (1) was added See Note 7.
- (3) The words 'such person may be' after the words 'was made' in sub-s (1) were substituted for the words 'he may be'
- (4) The words 'at such trial at the end of sub-s (2) were substituted for the words 'when the pardon has been forfeited under this section'

2 The certificate of the Public Prosecutor —

Prior to the amendment of 1923 if the approver did not comply with the conditions of pardon the Court before which his evidence was given, could only record its opinion to the effect that he had not complied with the conditions of the pardon and leave it to the District Magistrate to prosecute him if he thought fit to do so it could not itself *direct a prosecution*¹ It was however held in the undermentioned cases² that a Sessions Judge before whom the evidence of the approver was given could himself order the approver to be committed to trial, if he found that he did not comply with the conditions of the pardon See also the undermentioned cases³ decided before the amendment of 1923 These cases are no longer of any importance in view of the amendment of 1923 making the certificate of the Public Prosecutor the sole basis for the prosecution of the approver for the original offence⁴ The Sessions Judge has,

Section 339 — Note 2

Nya Po Ket

7 1915 Cal 667

Emperor
 authority which granted pardon

competent to withdraw pardon granted to the accused by Additional Magistrate during the course of enquiry)

(93) 1895 All W N 163 (164) *Queen Empress v Bhola* (After trial, District Magistrate has no power

4
 (.
 approver was declared by the District Magistrate to have forfeited his pardon before amendment of 1923 certificate of Public Prosecutor was essential if proceedings were instituted after amendment)

thus, no power to order the prosecution of the approver *suo motu*⁵ Where, however proceedings had already been instituted against the approver under this section before the date on which the amendment took effect, it was held that the certificate of the Public Prosecutor was not necessary⁶

The certificate, which is required as a condition precedent to the trial of an approver, has to be filed before his *trial* commences in the *Court of Session* It is not absolutely essential to file it in the *committing Court* and even if it is so, the absence of it is not fatal and the commitment can, in view of S 532, be accepted by the Court of Session⁷

This section does not require that the particulars in regard to which the pardon is alleged to have been forfeited should be given in the certificate, and a certificate cannot be said to be defective if it does not mention such particulars⁸

It has been held that the person who is authorized to grant a certificate under this section is the Public Prosecutor who conducted the case in which the pardon was granted and that he need not necessarily occupy the position of Public Prosecutor on the date on which he grants the certificate⁹ But where a case was conducted by an Assistant Public Prosecutor in the Sessions Court and he expressed his intention not to take action against the approver, but subsequently the Public Prosecutor issued a certificate under this section, it was held that the certificate was not without jurisdiction¹⁰

3. "Any person who has accepted such tender." — In a proceeding against the approver under this section, it should first be proved that the approver accepted the conditions of the pardon,¹ that is, that the conditions were fully explained to him, that he was free to accept or refuse the conditions and that he accepted the tender of pardon on a full understanding of such conditions² It is also open to a person, who has accepted a pardon in the first instance, to resile from such acceptance and say that he may be tried in respect of the original offence in order that his character may be cleared. In such cases, the provisions of this section do not apply and he may be tried *jointly* with the other accused³ See also s 337

4 Non-compliance with the conditions — Prior to the Code of 1898, the Magistrate or the Sessions Judge had to *withdraw* the pardon tendered to an approver

(26) 27 Cr L Jour 940 (941) 98 Ind Cas 896 (Lab) *Lal Shah v Emperor* (Do)
[See also (44) 31 AIR 1944 Sind 184 (185, 186) 1 I L R (1944) Kar 97 46 Cr L Jour 218 217 Ind Cas 177 (DB) *Emperor v Fu Imamshah* (District Magistrate has no power to withdraw pardon after once it has been given)
5 (25) 12 AIR 1925 Bom 135 (136 137) 26 Cr L Jour 469, *Emperor v Maria Basappa*
[See (43) 30 AIR 1943 Pat 146 (151) 22 Pat 27 44 Cr L Jour 494 206 Ind Cas 109 *Nawal Kishore Rai v Emperor* (When a pardon has been tendered and accepted, it cannot be withdrawn)]

Also see s 532, Note 2
8 *Pal v Emperor*
9 *Pal v Emperor*
10 *Emperor v Shahdino* (The general powers of a Public Prosecutor are sufficiently wide to justify a prosecution being taken out of the hands of a particular Assistant Public Prosecutor at any stage of the proceedings and there is nothing in the Criminal Procedure Code which requires that when a Public Prosecutor has once appeared in a case all further proceedings must be conducted by him)

Note 3
1 (69) 12 Soth W R Cr 80 (81) 6 Deng L R App 50, *Queen v Gagalu Magalu*
(24) 11 AIR 1924 All 501 (501) 26 Cr L Jour 336, *Palati Rai v Emperor* (A person to whom pardon is tendered and who expresses a complete ignorance and states that he is indifferent whether a pardon

under s 337 or s 338, before the approver could be tried for the offence, in respect of which the pardon was tendered¹ Under the present Code however, no such order is necessary and the only question, which the Court has to consider before trying the approver for the original offence, is whether he has, by some act or omission on his part, failed to comply with the conditions of pardon² It is the duty of the prosecution to establish that the approver has failed to comply with the conditions of the pardon³ either —

(a) by wilfully concealing anything essential or

(b) by wilfully giving false evidence⁴

The mere fact that his alleged associates in crime against whom he had given evidence have been acquitted⁵ or that the Sessions Judge or the Magistrate is of opinion that he was not telling the truth⁶ or that the facts stated by him are not probable⁷ or the mere fact that some discrepancies have been elicited from him in cross examination⁸ or that there are certain inconsistencies in his evidence on immaterial points,⁹ is not sufficient to show that the condition of the pardon has not been complied with Where however the approver wilfully introduces discrepancies into his deposition in order that the Court may hold that he is not a reliable witness, he forfeits his pardon¹⁰

The Lahore High Court has held that it is not strictly necessary that the prosecution should have actually examined the approver as a witness, both before the Magistrate's Court and the Sessions Court before proceedings are instituted against him for non-compliance with the conditions of pardon and that it is enough, if he is shown to have made a statement absolutely inconsistent with the statement that he made at the time the pardon was tendered to him¹¹ But the Sind Judicial Commissioner's Court has taken a

Notes 4

1 See (19) 6 AIR 1919 Lah 449 (150) 1916 Pun Re No 24 Cr 19 Cri L Jour 926, *Suraj Bhan v Emperor*

2 (01) 25 Bom 675 (679 680) 3 Bom L R 271 *King Emperor v Dala*

(22) 9 AIR 1922 Sind 31 (32) 16 Sind L R 131 23 Cri L Jour 611 *Emperor v Haji Jand*

(19) 6 AIR 1919 Lah 449 (150) 1916 Pun Re No 24 Cr 19 Cri L Jour 926 *Suraj Bhan v Emperor*

(17) 4 AIR 1917 All 316 (317) 39 All 505 18 Cri L Jour 444 *Khali v Emperor*

3 (40) 27 AIR 1940 Nag 77 (77) 40 Cri L Jour 956 *Horisal v Emperor*

(35) 22 AIR 1935 Lah 799 (800) 37 Cri L Jour 79 *Dip Chand v Emperor* (Onus of proving forfeiture is on prosecut on)

(30) 1930 Mad W N 773 (775) *Soliyan v Emperor*

Also see S 339A Note 3

4 (09) 9 Cri L Jour 571 (575) 32 Mad 173 2 Ind Cas 343 *Kullan v Emperor*

(13) 14 Cri L Jour 401 (403) 20 Ind Cas 225 7 Low Bur Rul 1, *Nga To Gale v Emperor*

(15) 2 AIR 1915 Cal 397 (398) 42 Cal 756 16 Cri L Jour 120, *Emperor v Saber Akunzi*

(15) 2 AIR 1915 Cal 667 (673) 42 Cal 836 16 Cri L Jour 65 *Sashi Rajbanshi v Emperor*

(02) 1902 Pun Re No 31 Cr p 88 (33) 1902 Pun L R No 126, *Kanwar Singh v Emperor*

(04) 1 Cri L Jour 1082 (1087) 1905 Pun L R No 176 1904 Pun Re No 31 Cr, *King Emperor v Kadu*

(05) 3 Cri L Jour 312 (313) 1905 Pun Re No 59 Cr *Bahadur v Emperor*

v. Emperor

cion that approver has given

different view¹² Where the evidence given by an approver in the sessions trial is not in compliance with the conditions of the pardon, the fact that he gave evidence in accordance with the conditions before the committing Magistrate does not save him from being proceeded against under this section¹³ But when the evidence given by the approver in the Sessions Court was in accordance with the conditions of his pardon and was evidence upon which, in the circumstances subsequently disclosed, reliance might have been placed then the fact that in the committing Magistrate's Court the approver gave false evidence should not necessarily be taken to be non compliance with the conditions of pardon¹⁴

5. "Wilfully concealing anything essential." — The prosecution has to establish that certain essential facts were within the knowledge of the approver, and that he had wilfully concealed such facts¹ The mere fact that the approver absconded at the time does not amount to a wilful concealment of anything essential within the meaning of the section²

As has been seen in Note 9 on S 337, it is the duty of the approver to make a thorough and complete disclosure of all facts within his knowledge bearing upon the offence or offences in respect of which he is giving evidence Thus, he is not bound, in fulfilment of the conditions of pardon, to make any disclosure relative to any offence, which was not being inquired into at the time³

6. Effect of pardon. — Where pardon is tendered to a person, on condition that he should make a true and full disclosure of the whole of the circumstances within his knowledge relative to the offence, it is a matter of utmost importance that the strictest faith should be kept with him¹ Thus, where a person is granted a pardon, and being under the impression that he has freed himself from the consequences of his incriminating statements, he makes a disclosure of his complicity in offences, other than those in respect of which he was granted a pardon, it would be improper to institute proceedings against him in respect of such other offences² See also section 337, Note 14

7 Procedure at the trial — Joint trial. — Prior to the amendment of 1932, there was a conflict of opinions as to whether an approver, who had broken the conditions of pardon, could be tried for the offence for which he was tendered a pardon along with the other accused, or whether his trial ought to be in a separate proceeding altogether It was held in one set of cases that there was no provision in the Code prohibiting a joint trial, and if an approver had been committed in time, it was not illegal to try him jointly with the other accused for the original offence¹ It was, however, held in another set of

cases that the pardon cannot be

retracted. *See* *Government v. Mulu*
samy Naicken
Indo

Note 5

1 (01) 3 Bom L R 489 (502) *King Emperor v. Trimbaka Dewji*

Also see cases cited in Note 4

2 (16) 3 AIR 1916 Low Bur 111 (112) 3 Low Bur Rul 357 17 Cri L Jour 391 *Maung Po Hla v. Emperor*

3 (10) 6 AIR 1919 Lab 449 (450) 1918 Pao Re No 24 Cr 19 Cri L Jour 926, *Suraj Dhan v. Emperor*

Note 6

See *Singh v. Emperor*
pardon has been tendered and

2. (26) 13 AIR 1926 Pat 279 (281, 286) 5 Pat 171 27 Cri L Jour 957, *Nirmadhab Chowdhury v. Emperor*.

Note 7

1. (99) 20 All 529 (532) 1898 All W N 152, *Queen Empress v. Drij Narain Man*

(99) 1899 Pun Re No 5 Cr, p 13 (16), *Queen Empress v. Mihan Singh*.

(06) 4 Cri L Jour 142 (143) 29 All 21 3 All L Jour 615 1906 All W N 258, *Emperor v. Bulkan*

cases that the trial of the approver on the original charge ought to be in a separate proceeding altogether which should commence *de novo* after the case in which he had given evidence had been fully heard and determined² and that he should not be put into the dock after his evidence is given to be tried *jointly* along with the other accused³ The proviso to sub s (1) has been introduced by the amendment of 1923 which specifically provides that the approver shall not be tried jointly with the other accused⁴

Until the termination of the trial in which the approver has given evidence he has to be in judicial custody unless he had already been admitted to bail (see sub s (3) to S 337) At the termination of the trial however he should be discharged by the Court which tries the case But the Crown may re-arrest him and proceed against him for the offence in respect of which he was granted a conditional pardon if so advised⁵ that is as has been seen in Note 2 already if the Public Prosecutor certifies that the approver had failed to comply with the conditions of the pardon In such proceedings the approver is entitled to plead the tender of pardon and the compliance of the conditions thereof in bar of the trial

(08) 6 Cr L Jour 445 (449 450) 1908 All W N 259 (261) 5 All L Jour 691 *Sultan Khan v Emperor*
[See also (01) 20 Bom 675 (679) 3 Bom L R 271 *King Emperor v Bala*
(20) 7 AIR 1920 Lah 222 (223) 20 Cr L Jour 126 *Daulat v Emperor*]

2 (08) 8 Cr L Jour 153 (153) 31 Mad 272 (275) *In re Arunachallam*

(98) 23 Bom 493 (494) *Queen Empress v Bhaw*

(01) 24 Mad 301 (304) 2 Weir 396 *Queen Empress v Ramasamy*

(90) 14 All 502 (507) 1892 All W N 95 *Queen Empress v Mulua*

(24) 11 AIR 1904 Mad 391 (392) 25 Cr L Jour 210 *Bassreddi Narappa v Emperor*

(92) 15 Mad 352 (354) 2 Weir 394 *Queen Empress v Rama Thevan*

(90) 14 All 336 (338 339) 1890 All W N 21 *Queen Empress v Sudra*

(70) 14 Suth W R Cr 10 (10) *Queen v Petumber Dhoobee*

(02) 4 Bom L R 826 (827) *Emperor v Revappa*

(03) 1903 Pun Re No 4 Cr p 11 (13 14) 1903 Pun L R No 52 *Ghulam Mohammad v Crown*

(1900) 13 C P L R Cr 123 (123) *Empress v Pawan*

(61) 7 Cal L Rep 66 (67) *In the matter of Joyudee Paramanick*

(22) 9 AIR 1922 S nd 31 (32) 16 Sind L R 131 23 Cr L Jour 611 *Emperor v Haji Jand*

(1900) 27 Cal 137 (139) *Queen Empress v Natu*

[See (01) 3 Bom L R 489 (500 503) *King Emperor v Trimbaka Dewji*. (The approver was convicted on his own plea — But sentence was only postponed till after the trial of co accused.—Held procedure illegal)]

3 (08) 31 Mad 272 (275) 6 Cr L Jour 153 3 Mad L Tim 407 *In re Arunachallam*

(92) 14 All 500 (507) 1892 All W N 95 *Queen Empress v Mulua*

(08) 7 Cr L Jour 240 (249) 1907-09 Upp Bar Ral Cr P O 7 *Nga Po Hnan v Emperor*

(80) 1880 All W N 31 (31) *Empress v Samcharan*

(90) 15 Mad 352 (354) 2 Weir 394 *Empress v Ram Thevan* (Approver should be duly committed

pardon

before

4 (30) 1937 Mad W N 679 (880) *Rasichandrayya v Emperor* (Joint commitment of approver along with other accused is illegal)

(31) 18 A I R 1931 Oudh 113 (114 115) 32 Cr L Jour 91 6 Luck 356 *Ram Lautan v Emperor* (Do)

(35) 20 AIR 1935 Oudh 226 (228) 35 Cr L Jour 893 *Chaulan v Emperor*

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for the original offence, and the Court has to decide and give its finding as to that p a. See S 339A, and the undermentioned cases⁶

8 Plea of pardon in bar — See Section 339A

9 Use of statements made by the approver — Sub section (2) — Sub section (2) provides that any statement made by a person who has accepted a tender of pardon may be used in evidence against him in case he is proceeded against under this section on account of his non compliance with the conditions of the pardon. Thus the admissibility of such a statement is not affected by S 24 of the Evidence Act¹. But it has been held in the undermentioned decisions² that S 239 (2) operates as an exception to S 24 of the Evidence Act only in respect of statements which have been induced by a promise of pardon and that statements obtained by threats or violence are still within the reach of S 24 of the Evidence Act. Before a statement of the approver is used in the trial against him it is necessary that it should be properly proved that it should be put to him and that he should be asked if he desires to offer any explanations thereon³.

Sub section (2) applies not only to statements by the approver in the committing Magistrate's Court or in the Sessions Court but also to statements made by him before the inquiry in the committing Magistrate's Court⁴ provided they were made after the offer and acceptance of pardon by the approver⁵.

6 (06) 4 Cri L Jour 346 (354) 30 Bom 611 8 Bom L R 740 *Emperor v Kothia* (Notwithstanding the withdrawal of the pardon or declaration of its forfeiture by a Magistrate or Judge — Decided before amendment of 1923)

(15) 2 AIR 1915 Cal 397 (398) 42 Cal 756 16 Cri L Jour 120 *Emperor v Sabar Akunji*

(22) 9 AIR 1922 Bom 177 (177) 46 Bom 120 22 Cri L Jour 620 *In re Dagadoo Bapu*

(98) 11 AIR 79 (85 91) 1968 All W N 289 *Queen Empress v Ganga Charan*

(15) 2 AIR 1915 All 245 (248 247) 37 All 331 16 Cri L Jour 483 *Emperor v Gangua*

(20) 7 AIR 1920 Lah 376 (376) 1 Lah 218 21 Cri L Jour 518 *Chanan Singh v Emperor*

(11) 12 Cri L Jour 928 (326) 10 Ind Cas 622 7 Nag L R 65 *Emperor v Kachri*

Note 9

1 (62) 8 Cal 560 (568) 10 Cal L Rep 389 *Empress v Nobin Chandra*

(08) 8 Cri L Jour 445 (451) 5 All L J 891 1908 All W N 259, *Sullan Khan v Emperor*

(15) 2 AIR 1915 Nag 92 (95) 16 Cri L Jour 417 (420) 11 Nag L R 59 *Local Government v Mula*

(20) 7 AIR 1920 Bom 270 (279 280) 22 Cri L Jour 68 (FD) *Emperor v Chunnna* (Per Bayard J — Shah J contra)

(33) 20 AIR 1933 Lah 910 (912) 35 Cri L Jour 168 *Anup Singh v Emperor*

(97) 1897 Pan Re No 3 Cr p 4 (6, 7) *Bhallu v Empress*

(71) 8 Bom II C R Cr 103 (107 108) *Reg v Akbhai Mitha*

[But see (67) 8 South W R Cr 53 (51) *Queen v Radanath Dosadh* (Decided under Code of 1861 which contained no provision corresponding to sub-s (2))]

(67) 8 South W R Cr L 14 (14) *In re Pudunth Dossad (Do)*

2 (28) 15 AIR 1928 Lah 320 (322) 29 Cri L Jour 413 9 Lah 608 *Ram Nath v Emperor*

(36) 23 AIR 1936 Lah 409 (415) 37 Cri L Jour 730 *Indar Pal v Emperor* (Where in spite of being in police custody an approver is neither subjected nor threatened to be subjected to any ill treatment, the statement made by him will not become inadmissible under S 24 Evidence Act)

3 (25) 12 AIR 1925 Nag 172 (173) 25 Cri L Jour 1355 *Gangaram v Emperor*

4 " v a Cas 419 (FB) under S 164 subsequent trial [40] 27

after forfeiture of the pardon for an offence in respect of which the pardon was tendered AIR 1940 Nag 218 1 L R (1941) Nag 372 41 Cri L Jour 433 approved 13 C P L R 7 implicitly overruled)

(40) 27 AIR 1910 Nag 218 (221) 41 Cri L Jour 433 (436 477) *Horsial v Emperor*

(25) 12 AIR 1925 Nag 172 (173) 25 Cri L Jour 1355 *Gangaram v Emperor* (Sub-s (1) is wide enough to cover statement made not before committing Magistrate but before pardoning Magistrate)

(28) 15 AIR 1928 Lah 320 (322) 9 Lah 608 29 Cri L Jour 413 *Ram Nath v Emperor*

[But see (22) 9 AIR 1922 Bom 138 (141) 46 Bom 61 22 Cri L Jour 728 *Motilal Horsial v Emperor* (Per Shah J — Statement referred to in S 339 (2) is the statement made by the approver as a witness at the inquiry under Chap XVIII or at the trial and no other)]

5 (43) 30 AIR 1913 Sind 166 (169 170) 1 L R (1913) Kar 285 45 Cri L Jour 118 200 Ind Cas 242 (DB) *Mural v Emperor* (Confession prior to pardon—Section 339 (2) does not apply but S 161 would

It is not absolutely necessary that the approver should have been examined as a witness as provided under S 337 sub s (2) before any statements made by him are used in evidence against him.⁶ Though the statement or deposition of the approver is not strictly a confession, it is in the nature of a confession and the Court should, in case it is retracted require that the facts contained therein should be corroborated by extrinsic evidence before convicting the approver thereon.⁷

Sub section (2) does not bar the use of the statements made by the approver in an inquiry into the offence of perjury against the approver⁸ or in a civil suit for damages brought against him by the complainant.⁹

10 Prosecution for perjury—Sanction of the High Court.—Under sub s (3) it is essential that the prosecution should obtain the sanction of the High Court before proceeding against the approver for giving false evidence and if such sanction is not obtained before the institution of the proceedings the defect affects the jurisdiction of the Court and cannot be cured under s 53.¹ The application for sanction to prosecute the approver should be made on behalf of the Crown by a regular application to the High Court and a letter of reference by the Sessions Judge is not sufficient.²

apply — In such case provisions of S 161 must be observed otherwise confession would not be admissible either under S 339 (?) or S 161 or Evidence Act, S 26.—AIR 1940 Nag 218 I L R (1941) Nag 372 41 Cri L Jour 433 relied on)

(40) 27 AIR 1910 Nag 218 (221) 41 Cri L Jour 433 (436 437), *Horsfal v Emperor* (Confession to Magistrate before offer and acceptance of pardon — Confession not recorded as required by Ss. 164 and 364 is not admissible)

6 (06) 3 Cri L Jour 5, (67 68 69) 1905 Pun Re No 41 Cr (1 B) *Siba v Emperor* (Per Chatterjee and Johnstone JJ. Leesonogton and Reid JJ. dissenting)

(08) 7 Cri L Jour 245 (249) 1907 09 Upp Bur Rel Cr P C 7, *Agar Palan v Emperor*
[But see (09) 8 Cri L Jour 153 (153) 31 Mad 272 3 Mad L T 407, *In re Arunachellam*]

7 (43) 30 AIR 1943 Sind 160 (170) I L R (1943) Kar 28, 45 Cri L Jour 118 209 Ind Cas 242 (DB) *Miral v Emperor* (In the nature of things a confession on that has been retracted does not carry the same weight and inspire the same confidence as a confession which is adhered to from first to last. In the case of an evidence of an accomplice, particularly when it is the evidence of a child of 12, the rule of prudence as to the necessity of the corroboration of the evidence of an accomplice both as to the factum of the crime and as to the identity of the criminal applies. The implication by the accused of himself in a confession long ago retracted is scarcely such corroboration of the evidence of his own identity as is sufficient to corroborate the evidence of identity by his accomplice and to satisfy the rule of prudence)

(34) 21 AIR 1934 Pe h 46 (40 47) 35 Cri L Jour 124, *Faqir Shah v Emperor*

(15) 2 AIR 1915 Lah 307 (307 308) 16 Cri L Jour 815, *Khuska v Emperor*

(30) 17 AIR 1930 Nag 259 (260) 31 Cri L Jour 661 *Shafa v Emperor*

[See (37) 24 AIR 1937 Lah 689 (691) 39 Cri L Jour 16 *Mt Aziz Begum v Emperor* (Approver's statement corroborated in general aspect and found to be true — Such statement is sufficient evidence for his conviction on forfeiture of pardon)]

[But see (38) 25 AIR 1938 Lah 135 (135) 39 Cri L Jour 375, *Puran v Emperor* (Approver's resulting from his statement in committing Magistrate's Court — Statement amounts to confession and conviction can be based on such confession without corroboration)]

8 (12) 13 Cri L Jour 33 (37) 13 Ind Cas 273 5 Sind L R 174, *Emperor v Andai*

9 (09) 4 Ind Cas 523 (596) (Cal) *Keshab Nath v Mansuruddin Sarhar*

Note 10

1 (84) 1891 1 Pun Re No 42 Cr p 92 (06) *Mt Sharina v Empress*

(04) 1 Cri L Jour 1071 (1021, 1022) 2 Low Bur Rel 302 *Emperor v Htuktatue*

(1900) 27 Cal 137 (139), *Queen Empress v Nathu*

(86) 10 Bom 190 (193) 1886 Rat 294 *Queen Empress v Dala Jita* (The sanction under sub-s (3) to prosecute for false evidence must be obtained before and not after the commencement of the prosecution)

AIR 1910 S 537, Note 7

Nallavadu

(12) 13 Cri L Jour 451 (451) 15 Ind Cas 63 (Lab) *Emperor v Raji*

The High Court is not bound to accord sanction in every case that is brought to its notice under sub s (3) of this section³ but has a discretion in the matter. The discretion vested in the High Court to sanction the prosecution of the approver for perjury should be exercised with extreme caution⁴. The necessity for obtaining the previous sanction of the High Court shows that the mere fact that the approver makes two inconsistent statements cannot be a justification for directing his prosecution⁵. The High Court before granting a sanction, should carefully consider all the circumstances in the case and decide the cardinal question, whether the previous statement or confession was true and voluntary⁶. If it is of opinion that such previous statement is true on the facts before it, then his subsequent statement ought to be false, and in such cases it is not only desirable but also expedient to sanction the prosecution⁷. If, however, the first statement or confession is not true but that his later statement is the true one, then the inference may be drawn that the first statement or confession was obtained by threat or inducement and in such cases it would be undesirable to sanction the prosecution⁸. The High Court has also a discretion in cases where the approver is induced to make certain statements in connexion with a capital charge to allow him every possible *locus penitentiae* in respect of such a statement⁹. Where the approver is proceeded against for the original offence itself in respect of which he was tendered a pardon it is not proper to sanction his prosecution for perjury¹⁰. Such sanction should be granted only in case it appears to the High Court that a conviction for the original offence is unlikely for any reason or that even on a conviction on the original charge the sentence that could be passed would be too light in the circumstances of the case¹¹.

Sub section (3) merely imposes an additional condition to the institution of a prosecution for perjury and does not have the effect of overriding the provisions of s. 16. Thus even where the sanction of the High Court is obtained the prosecution could be instituted only in accordance with the provisions of ss 195 and 476¹². The High Court may

(29) 16 AIR 1929 Oudh 527 (527) 5 Luck 452 31 Cri L Jour 204 *Emperor v Ghanley* (Held that such a condition is not imposed by the section itself)

3 (37) 24 AIR 1937 Lah 551 (551) 38 Cri L Jour 1079 *Emperor v Prabhu*

4 (37) 24 AIR 1937 Lah 551 (551) 38 Cri L Jour 1079 *Emperor v Prabhu*

(34) 21 AIR 1934 All 43 (45) 56 All 288 35 Cri L Jour 444 *Emperor v Mathura*

5 (37) 24 AIR 1937 Lah 551 (552) 38 Cri L Jour 1079 *Emperor v Prabhu*

(34) 21 AIR 1934 All 43 (45) 56 All 288 35 Cri L Jour 444 *Emperor v Mathura*

(14) 15 Cri L Jour 76 (77) 22 Ind Cas 428 (All) *Emperor v Bodha*

(25) 12 AIR 1925 Rang 286 (286) 3 Rang 224 26 Cri L Jour 1396 *Emperor v Nga Do Gyi*
(Sanction for prosecution for perjury should not be granted, when material has only been provided by an unnecessary examination on oath)

and (Sanction cannot undue influence)

6

(3) 24 AIR 1937 Lah 551 (551) 38 Cri L Jour 1079 *Emperor v Prabhu*

7 (37) 24 AIR 1937 Lah 551 (551) 38 Cri L Jour 1079 *Emperor v Prabhu*

(34) 21 AIR 1934 All 43 (45) 56 All 288 35 Cri L Jour 444 *Emperor v Mathura*

(14) 15 Cri L Jour 76 (77) 22 Ind Cas 428 (All) *Emperor v Bodha*

(25) 12 AIR 1925 Rang 286 (286) 3 Rang 224 26 Cri L Jour 1396 *Emperor v Nga Do Gyi*

(37) 24 AIR 1937 Lah 551 (552) 38 Cri L Jour 1079 *Emperor v Prabhu*

(34) 21 AIR 1934 All 43 (45) 56 All 288 35 Cri L Jour 444 *Emperor v Mathura*

(14) 15 Cri L Jour 76 (77) 22 Ind Cas 428 (All) *Emperor v Bodha*

(25) 12 AIR 1925 Rang 286 (286) 3 Rang 224 26 Cri L Jour 1396 *Emperor v Nga Do Gyi*

(37) 24 AIR 1937 Lah 551 (551) 38 Cri L Jour 1079 *Emperor v Prabhu*

(34) 21 AIR 1934 All 43 (45) 56 All 288 35 Cri L Jour 444 *Emperor v Mathura*

(14) 15 Cri L Jour 76 (77) 22 Ind Cas 428 (All) *Emperor v Bodha*

(25) 12 AIR 1925 Rang 286 (286) 3 Rang 224 26 Cri L Jour 1396 *Emperor v Nga Do Gyi*

(37) 24 AIR 1937 Lah 551 (551) 38 Cri L Jour 1079 *Emperor v Prabhu*

(34) 21 AIR 1934 All 43 (45) 56 All 288 35 Cri L Jour 444 *Emperor v Mathura*

grant sanction for prosecution on the strength of a statement made by the approver which is *prima facie* false it is not necessary that the approver should have been examined as a witness in the case, as required by section 337, sub-section (2) ¹³

Procedure in trial of
person under S 339

339A. (i) The Court trying under section 339 a person who has accepted a tender of pardon shall —

(a) if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under section 271, sub-section (i), and

(b) if the Court is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made

(2) If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court with the aid of the assessors, or the Magistrate, as the case may be, shall, before judgment is passed in the case find whether or not the accused has complied with the conditions of the pardon, and, if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal

1 Legislative changes — This section has been introduced by the Code of Criminal Procedure (Amendment) Act 18 (XVIII) of 1923 see Note 3

2 Plea of pardon. — The procedure laid down under this section should be strictly followed ¹ It is the duty of the Court to explain the provisions of this section clearly to the accused and to tell him that he is entitled to plead that he has complied with the conditions of the pardon ² The mere fact that the accused raised such a plea before the committing Magistrate and that the Magistrate had given his finding on such a plea does not absolve the Sessions Judge from the duty cast upon him under this section of asking the accused, if he pleads compliance with the conditions of the pardon ³

3 Procedure under this section — Before the introduction of this section in 1923 it was held that where the approver raised a plea that he had complied with the conditions of the pardon it was the duty of the Court to decide and give a finding on that issue first before trying him for the offence in respect of which the pardon was tendered ⁴ Such a course necessarily led to complications inasmuch as in deciding the preliminary

13 (13) 14 Cr L Jour 64 (64) 18 Ind Cas 353 (Lab) *Emperor v Raja*
(05) 3 Cr L Jour 55 (58) 1905 Pun Re No 41 Cr Suba v *Emperor*

Section 339A — Note 2

1 (29) 16 AIF 1929 Oudh 256 (256) 30 Cr L Jour 559 *Ituani v Emperor*
(25) 12 AIR 1925 Lab 15 (15 16) 5 Lab 379 26 Cr L Jour 237 *Ali v Emperor*
2 (40) 27 AIR 1940 Nag 77 (77) 40 Cr L Jour 956 *Horiatal Mohantai v Emperor*
(25) 12 AIR 1925 Lab 15 (15 16) 5 Lab 379 26 Cr L Jour 237 *Ali v Emperor*

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Note 3

1 (05) 3 Cr L Jour 317 (343) 1905 Pun Re No 59 Cr *Bahadur v Emperor*
(17) 4 AIR 1917 Low Bur 143 (145) 17 Cr L Jour 337 (339) 8 Low Bur 141 44 *Emperor v*
Nga Po Ke
(09) 9 Cr L Jour 571 (575) 32 Mad 173 2 Ind Cas 343 *Krishan v Emperor*
(13) 14 Cr L Jour 401 (403) 7 Low Bur 141 26 Ind Cas 25 *Nga To Ga v Emperor*
(1) 1902 Pun Re No 31 Cr L Jour 189 (193) 1902 Pun L R No 196 *Krishan v Emperor*

issue, the Court had very often to investigate into the facts of the case and to prejudge it on the merits.² These cases are no longer of any importance in view of this section, which provides specifically for the procedure to be adopted in such cases.³ Under this section the accused should be asked at the very commencement of the proceeding, whether he pleads compliance with the conditions of the pardon. The Court has to record such a plea in case he so pleads and to *proceed with the trial*. In the course of the trial, however, and before judgment is pronounced, the Court should decide the question whether the accused has complied with the conditions of the pardon. If it is found that he has so complied with them, the Court has to pass at once a judgment of acquittal, whatever its finding may be as to the guilt of the accused in respect of the offence.⁴ It is for the *Crown* to prove that the pardon has been forfeited by the approver.⁵

In a case triable by the jury, the question whether the accused has complied with the conditions of the pardon should be left to the jury to be decided, like any other question of fact in the case⁶ and in a case triable with the aid of assessors, the Court should after recording the plea, call upon the assessors to deliver their opinions on that plea and then record its own finding.⁷

Where on grant of pardon the approver admits his complicity in the offence but later resiles completely from his position and he is tried under S 339, it is impossible to decide whether he has complied with the condition of his pardon without deciding the question of his innocence or guilt. Hence, in such cases, the provision in sub s (2) of this section viz, that the question as to compliance with the condition of the pardon should be decided before judgment is passed in the case, cannot apply.⁸

4. Non-compliance with the section.—Failure to conform to the provisions of the section vitiates the trial.¹ It has, however, been held in the undermentioned case² that where the charge had been read out to the accused and he had been made to plead to it *before* and *not after* he had been asked to plead whether or not he had complied with the terms of the pardon, the irregularity was curable under the provisions of section 537.

Right of person against whom proceedings are instituted to be defended and his competency to be a witness

***340.* (1)** Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.

Right of accused to be defended

*** Code of 1898, original S 340**
340 Every person accused before any Criminal Court may of right be defended by a pleader

1882 S 340, 1872 S 185, 1861 S 432

wamy Naichen))

error

(35) 22 AIR 1935 Lah 133 (800) 37 Cri L Jour 79, *Dipchand v Emperor*

Also see S 339, Note 4

6 (10) 11 Cri L Jour 251 (255) 33 Mad 514 5 Ind Cas 831, *In re Alagiriswamy Naichen*

Also see S 298, Note 8

7. (40) 27 AIR 1910 Nag 77 (77) 40 Cri L Jour 956, *Horilal Mohanlal v Emperor*

8 (39) 26 AIR 1939 Lah 66 (67) 40 Cri L Jour 614 ILR (1939) Lah 216, *Gurdit v Emperor*

Note 4

1. (40) 27 AIR 1910 Nag 77 (77, 78) 40 Cri L Jour 956, *Horilal Mohanlal v Emperor* (Total non-compliance—Conviction quashed and re trial ordered)

6, *Gurdit v Emperor*

(2) Any person against whom proceedings are instituted in any such Court under section 107, or under Chapter X, Chapter XI, Chapter XII or Chapter XXXVI, or under section 552, may offer himself as a witness in such proceedings.

* This section was substituted for original S 310 by the Code of Criminal Procedure (Amendment) Act 18 [VIII] of 1923

Synopsis

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| <p>1 Scope</p> <p>2 'Proceedings under this Code</p> <p>2a 'Criminal Court'</p> <p>3 Appellate and revisional Courts</p> <p>4 'May of right be defended</p> <p>5 Right of accused while in custody</p> <p>6 Choice of pleader</p> | <p>6a Appointment of defence counsel by the Crown</p> <p>7 Arguments</p> <p>8 Citing accused's counsel as witness</p> <p>9 Court and pleader</p> <p>10 'Pleader'</p> <p>11 Muktears and other persons</p> <p>12 Sub-section (2)</p> |
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NOTE to the Synopsis See the Notes indicated for the following topics

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| Accused per on—Meaning of See Note 1 | 'Pleader' — Whether includes persons other than legal practitioners See Note 11 |
| Agents of the accused — Whether can appear See Note 11 | Pleader — Interview with accused to be allowed See Note 6 |
| Limiting of arguments—Power of See Note 7 | Written arguments See Note 7 |
| Memorandum of appearance See Note 10 | |

1. Scope —The old section which read 'every person accused before any Criminal Court may of right be defended by a pleader' gave rise to speculation as to the scope of the word 'accused'. Some decisions favoured a wide interpretation of the word so as to cover any person over whom a Magistrate or other Court exercises jurisdiction¹. Consonant to this interpretation the section was held to apply to persons against whom proceedings were instituted under Chapter VIII² and Chapter XI³. Other decisions however regarded the above definition as too wide and confined the word 'accused' to those persons who were accused of an offence⁴. In conformity with this view the section was held inapplicable to persons concerned in proceedings under Division C of Chapter VIII⁵. It was also doubted whether pleaders could appear in proceedings under S 62 of the Code of 1861 corresponding

Section 340 — Note 1

- 1 (92) 16 Bom 661 (668) *Queen Empress v Mona Puna*
 (08) 21 All 107 (109) 1898 All W N 185 *Queen Empress v Mulasaddi Lall* (The petitioner was asked to furnish security for good behaviour)
 (01) 3 Bom L R 437 (440) *King Emperor v Annaya*
 (03-04) 2 Low Bar Rul 80 (83 84) *Ebrahim v King Emperor* (Petitioner was asked to enter into bond for good behaviour)
 (09) 9 Cri L Jour 36 (17) 36 Cal 163 *Bhom Lal Chowdhury v R F Hopcroft* (Petitioner was asked to furnish security for peace)
 2 (96) 23 Cal 493 (491 495) *Jhaja Singh v Queen Empress* (Such a person has a right to be heard under this section)
 (1900) 4 Cal W N 797 (798) *Abinash Malakar v Empress*
 (03) 25 All 375 (377) 1903 All W N 79 *Emperor v Girand*
 (1900) 1900 Pan Pe No 15 Cr p 31 (38) 1900 Pan L R No 53 *Crown v Ida*
 (1900) 4 Cal W N cxxx
 (1900) 27 Cal 656 (658) *Nahhalal Jha v Queen Empress*
 3 (33) 20 A I R 1933 Lah 145 (146) 31 Cri L Jour 616 *Turab Ali Khan v Shromani Gurdwara Parbandhak Committee*
 4 (05) 2 Cri L Jour 575 (576 577) 2 Cal L Jour 149 9 Cal W N 933 *Hiranandji Ojha v Emperor* (Proceedings under S 133 of this Code are more of a civil nature and persons against whom they are taken are not accused persons)

L Jour 1194 (F B) *Narendra*

Krishen Doya v Corporation

- 5 (10) 11 Cri L Jour 501 (502) 7 Ind Cas 606 4 Sind L R 43 *Emperor v Talavali* (Proceeding relating to the fitness of the sureties offered under S 122)

when witnesses are examined in chief, not only to check leading questions but to prevent irrelevant evidence being recorded⁷

A Magistrate exercises jurisdiction with material irregularity when he holds a trial at a place where the accused are totally incapable of making a proper defence and are deprived of the opportunity of being represented by a pleader⁸ Where a Magistrate held Court on a Sunday, it was held that, though holding Court on a Sunday was in itself not an illegality, yet the effect having been to prejudice the accused and deprive him of the right given to him under S 340, the conviction should be set aside⁹ A conviction was however, allowed to stand, where though the action of a Magistrate in accelerating a case had resulted in depriving the accused of the services of his senior counsel, the accused had, nevertheless, not been prejudiced thereby¹⁰

An appellant is entitled to be heard through his pleader¹¹ A Judge contravenes the provisions of the Code in deciding an appeal without hearing counsel on such a date as to make it physically impossible for counsel to attend when the Judge had before him a petition from the accused's counsel praying to be heard¹²

When a person is not defended, the Magistrate or Judge ought, in the interests of justice, to test the accuracy of statements of witnesses by questions in the nature of cross-examination,¹³ and in the cases of ignorant individuals accused of technical offences, to assist them in putting up obvious defensive pleas¹⁴

Similarly, in cases where the prisoner being too poor to defend himself, a lawyer has been engaged to defend him at the expense of the Crown, the trial Judge must use his greater experience to cross examine the witnesses when he sees that the defence lawyer is incompetent He should not however, do this unnecessarily but only when it is desirable in the interest of justice¹⁵

5. Right of accused while in custody.—The section not only contemplates that the accused should be defended by a pleader at the time proceedings are actually going on, but also implies that he shall have a reasonable opportunity, if in custody, of getting into communication with his pleader and preparing for his defence¹ So, when accused is

7 (25) 12 AIR 1925 Mad 1153 (1154) 27 Cr L Jour 33 *Mannargan v Emperor*
8 (18) 5 AIR 1918 Pat 197 (199) 19 Cr L Jour 249 3 Pat L Jour 147, *Mewa Lal v Emperor* (Case under S 145 of this Code)

Also see S 352, Note 4

9 (15) 2 AIR 1915 Bom 254 (255) 16 Cr L Jour 752, *Baban Daud v Emperor*

(30) 17 AIR 1930 Nag 255 (257) 31 Cr L Jour 705, *Girdhari v Emperor*

[See also (25) 12 AIR 1925 Pat 772 (782) 4 Pat 646 26 Cr L Jour 1441, *Emperor v Ahluwalia Prasad* (Court not to sit beyond the prescribed hours except with the consent of the pleaders on both sides)]

Also see S 344, Note 9 and S 537, Note 25

10 (98) 1898 Pun Re No 14 Cr, p 32 (33) *Karam Din v. Empress*

11 (08) 9 Cr L Jour 189 (190) 12 Cal W N 248, *Rajkumar Singha v Tincowar Masumdar* (An appeal against order of sanction to prosecute should not be summarily rejected without hearing appellant's pleader)

12. (70) 1870 Pun Re No 81 Cr, p 49, *Fuzl v. Crown* (Per Cunningham and Lindsay, JJ, Campbell J., dissenting)

13 (20) 2 All 160 (160) 1994 All W N 214

see under S 19(a).

Sal v Emperor
necessity of selection
as a matter of

on remand, he has a right to have access to his legal adviser subject to such legitimate restrictions as may be necessary to prevent interference with the course of investigation² A remand is a process of Court and it would be an abuse of that process if the police were to take advantage of it to prevent the accused from having access to his legal advisers. The High Court can therefore, interfere under S 561A to prevent such abuse³

Where the accused were arrested and placed in custody and then suddenly called upon to conduct their case without any opportunity having been given to them of obtaining legal assistance, the procedure was held to be irregular⁴

Pending his trial, a police officer was put under certain restraints by his superior officers which hampered him in arranging for his defence. It was held that full opportunity should be given to the under trial officer to consult his legal advisers and that all reasonable facilities should be afforded to him for the conduct of his defence⁵ While it is beyond the province of the High Court to interfere with the discipline of the police force or the exercise by the superior officers of their lawful powers, it is nevertheless bound to satisfy itself that the conditions under which the accused is being tried do not hamper him in his defence⁶

Although sufficient means should be adopted to prevent under trial prisoners from escaping when holding an interview with their valiks, police or other persons should not be placed sufficiently near to overhear their conversation⁷

6. Choice of pleader — Prisoners are to have the fullest opportunity to execute *tahalatnamas* to whomsoever they please¹

An accused person has a right to be defended by a pleader of his choice and a Magistrate has no right to tell him to engage another pleader as the one he had engaged did not know how to behave² No Court has any authority to force upon an accused person the services of a counsel if he is unwilling to accept them³ Where the accused declines to accept the services of a counsel appointed by the Court and raises his objection at the earliest possible opportunity and neither instructs such counsel nor is allowed to conduct his own defence, the irregularity of the procedure results in an illegal trial and hence in a failure of justice. In such cases the High Court will order a new trial⁴ The Magistrate is bound to afford the accused and his friends every opportunity of making

cannot communicate with him and legal assistance cannot be availed of — The matter is really reduced to a farce if interviews are allowed only after a confession has been recorded)

2 (30) 17 AIR 1930 Lah 945 (947) 12 Lah 16 32 Cri L Jour 339 *Sunder v Emperor*

(32) 19 AIR 1932 Lah 13 (14) 12 Lah 211 32 Cri L Jour 1072 *Amolak Ram v Emperor*

Also see Note 2 and S 167 Note 10

3 (26) 13 AIR 1924 Bom 551 (553) 50 Bom 741 27 Cri L Jour 1169 *In re Lilewelyn Evans*

4 (20) 7 AIR 1920 All 268 (269) 42 All 646 22 Cri L Jour 228, *Rajbansi v Emperor* (Accused were arrested under S 55 of this Code as habitual thieves and were also detained in custody)

7 (71) 8 Bom H C R Cr 126 (157) (F B) *Reg v Kashnath*

(30) 17 AIR 1930 Lah 945 (947) 12 Lah 16 32 Cri L Jour 339 *Sunder Singh v Emperor*

(35) 22 AIR 1935 Cal 101 (102) 62 Cal 384 36 Cri L Jour 615 *Sudhasindhu Dey v Emperor* (But the professional privilege of advocates can only be upheld if they honourably bear in mind that they are officers of the Court and do not lend themselves in any way to act as go-betweens to facilitate improper communications with other undetected criminal associates of the accused)

Note 6

1 (1863) 1 Bom H C R Cr 16 (16) *In re Shek Dadabhai*

(29) 16 AIR 1929 Lah 705 (706) 11 Lah 220 31 Cri L Jour 977 *Emperor v Sultan De*

4 (37) 39 Pun L R 311 (312) *Murti H v Emperor*

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Similarly, in cases where the prisoner being too poor to defend himself, a lawyer has been engaged to defend him at the expense of the Crown, the trial Judge must use his greater experience to cross examine the witnesses when he sees that the defence lawyer is incompetent. He should not, however, do this unnecessarily but only when it is desirable in the interest of justice¹⁵.

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8 (18) 5 AIR 1918 Pat 197 (199) 19 Cr L Jour 249 3 Pat L Jour 147, *Mewa Lal v Emperor* (Case under S 145 of this Code)
Also see S 352, Note 4

Emperor v Akhleswar
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12 (70) 1870 Pun Re No 31 Cr, p 49, *Furl v Crown* (Per Cunningham and Lindsay, JJ, Campbell J, dissenting)

Case under S.19(a)

Also see S 244, Note 1

15 (42) 29 AIR 1912 Pat 90 (93) 43 Cr L Jour 36 196 Ind Cas 597 (DB), *Dikson Mah v Emperor*
(38) 25 AIR 1936 Pat 153 (158) 39 Cr L Jour 384, *Darpan Potdarin v Emperor* (Necessity of selecting defence counsel in such cases from among young men of marked ability and not as a matter of patronage pointed out)

Note 5

1 (26) 13 AIR 1926 Bom 551 (552) 50 Bom 741 27 Cr L Jour 1169, *In re Llewellyn Evans*.
(35) 22 AIR 1935 Lah 230 (244) 35 Cr L Jour 1180, *Jahangiri Lal v Emperor* (These rules cannot be evaded by removing him to a place so that nobody knows where he is and his relations and friends

on remand, he has a right to have access to his legal adviser subject to such legitimate restrictions as may be necessary to prevent interference with the course of investigation.² A remand is a process of Court and it would be an abuse of that process if the police were to take advantage of it to prevent the accused from having access to his legal adviser. The High Court can, therefore, interfere under S 561A to prevent such abuse.³

Where the accused were arrested and placed in custody and then suddenly called upon to conduct their case without any opportunity having been given to them of obtaining legal assistance, the procedure was held to be irregular.⁴

Pending his trial a police officer was put under certain restraints by his superior officers which hampered him in arranging for his defence. It was held that full opportunity should be given to the under trial officer to consult his legal advisers and that all reasonable facilities should be afforded to him for the conduct of his defence.⁵ While it is beyond the province of the High Court to interfere with the discipline of the police force or the exercise by the superior officers of their lawful powers, it is nevertheless bound to satisfy itself that the conditions under which the accused is being tried do not hamper him in his defence.⁶

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2 (30) 17 AIR 1930 Lah 945 (947) 12 Lah 16 32 Cri L Jour 339 *Sunder v Emperor*

(32) 19 AIR 1932 Lah 13 (14) 12 Lah 211 32 Cri L Jour 1092 *Amolak Ram v Emperor*

Also see Note 2 and S 167 Note 10

3 (26) 13 AIR 1926 Bom 551 (553) 50 Bom 741 27 Cri L Jour 1169 *In re Llewellyn Evans*

4 (20) 7 AIR 1920 All 268 (269) 42 All 646 22 Cri L Jour 228, *Tajbans v Emperor* (Accused were arrested under S 53 of this Code as habitual thieves and were also detained in custody)

5 (19) 6 AIR 1919 Cal 156 (156) 20 Cri L Jour 230 *Harshar Roy v Emperor*

(32) 19 AIR 1932 Cal 295 (286) 58 Cal 1132 33 Cri L Jour 15 *Ram Gopal v Emperor* (Confinement of a police-officer under suspension to police lines is illegal and unreasonable)

6 (19) 6 AIR 1919 Cal 383 (385) 20 Cri L Jour 675 *Harshar Roy v Emperor*

7 (71) 8 Bom H C R Cr 126 (157) (F B) *Reg v Kashmath*

(30) 17 AIR 1930 Lah 945 (947) 12 Lah 16 32 Cri L Jour 339 *Sunder Singh v Emperor*

(35) 22 AIR 1935 Cal 101 (107) 62 Cal 381 36 Cri L Jour 615 *Sudhasindhu Dey v Emperor* (But the professional privilege of advocates can only be upheld if they honourably bear in mind that they are officers of the Court and do not lend themselves in any way to act as go-betweens to facilitate improper communications with other undetected criminal associates of the accused)

Note 6

his defence and should not personally interpose between them. He is not justified in refusing the pleader an interview with the accused or a seat in Court.⁵ A Judge cannot, however, be said to act contrary to S 340, by interfering in a dispute between a counsel assigned for the defence and another counsel who is asked to associate himself with the former and in deciding that the defence should be conducted by the former.⁶

6a. Appointment of defence counsel by the Crown. — There is no law providing for the employment of counsel at the expense of the Government in an enquiry before a Magistrate, but on principle there is no objection to such employment if the Crown is prepared to pay for the services of a pleader. But when the Sessions Judge or the Magistrate engages a counsel for the defence of an accused, he does so with the express or implied consent of the latter and the Court has no authority to force upon him the services of a counsel if he is unwilling to accept them.¹ See also Note 6.

In selecting lawyers to defend prisoners who are too poor to instruct counsel on their own account, those whose duty it is to select lawyers to defend at the expense of the Crown, should not treat the selection as a matter of patronage for the benefit of the lawyers so appointed. The selection should be made from among young men of marked ability.²

See also Criminal Rules of Practice (Madras) 1931, Rr 117, 157, 158, 159 and 160 as to the appointment of advocates for the defence of accused who have no advocates of their own. See also the undermentioned case.³

7. Arguments — A Court is bound to hear arguments offered at any criminal trial or proceeding.¹ It is not a question of indulgence but of right as it is an elementary principle of law that no order ought to be made to a man's prejudice without hearing him.² Refusal to hear arguments is not a mere irregularity but an illegality.³ But where the pleaders do not attend on the day fixed for hearing arguments, the Court can pronounce judgment without hearing them⁴ and a Magistrate may cut short an argument which has proceeded for an inordinate length of time.⁵ However, a Magistrate cannot arbitrarily fix a brief period for the defence to complete its arguments, and if he refuses to extend that period and the defence thereupon does not advance any argument there is no proper trial of the case and consequently the conviction of the accused cannot be justified.⁶ Where a court witness was examined after the close of both parties' case and

5 (93) 1 Bom L R 856 (856), *Queen Empress v Wasudev Hari*

(93) 21 Cal 612 (661, 662), *Queen Empress v Sagal Samba*

6 (29) 16 AIR 1929 Cal 1 (3, 6) 60 Cr L Jour 494, *Bazlur Rahman v Emperor*

Note 6a

1 (27) 30 D. & W. 211 (210) 35 277

2 10 Cr L Jour 100

3 10 Cr L Jour 100

4 10 Cr L Jour 100

5 10 Cr L Jour 100

6 10 Cr L Jour 100

7 10 Cr L Jour 100

8 10 Cr L Jour 100

9 10 Cr L Jour 100

10 10 Cr L Jour 100

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18 10 Cr L Jour 100

19 10 Cr L Jour 100

20 10 Cr L Jour 100

21 10 Cr L Jour 100

22 10 Cr L Jour 100

23 10 Cr L Jour 100

24 10 Cr L Jour 100

25 10 Cr L Jour 100

Sukh Deo
Lson Mali v Emperor

42 In re Karichappi

Goundan (It would be well in sessions cases in cases of rape, at least in some of them if the Sessions Judges appointed a member of the Bar as *amicus curiae*)

Note 7

1 (25) 12 AIR 1925 All 282 (283) 26 Cr L Jour 810, *Malik v Emperor*

(25) 12 AIR 1925 Oudh 228 (229) 27 Oudh Cas 323 25 Cr L Jour 1330 *Baj Nath v Emperor*

(25) 12 AIR 1925 Oudh 228 (229) 27 Oudh Cas 323 25 Cr L Jour 1330 *Baj Nath v Emperor*
(Magistrate's hearing arguments)
dh Cas 323 25

Emperor
or (Court was in camp)

and the parties had due notice of this)

Also see S 422, Note 1

W N 299 Chintamon v Emperor
or. (The fact that arguments were

arguments, and the Magistrate was not requested to hear further arguments, it was held that no objection could be entertained in revision⁷

Where a counsel is entitled to be heard, he is entitled generally to be heard by an oral address and not by a *written speech*⁸. It is the duty of the presiding officer to take such notes of the arguments as he thinks fit when they are being submitted to the Court⁹. The practice of allowing counsel to file memoranda of arguments has been held to be improper, especially so when they are taken behind the back of one of the parties¹⁰. If in any case a pleader desires to submit to the Court the notes of his argument or of any further argument, which he thinks in the interest of his client ought to be put before the Court, he should submit them to the pleader for the opposite party, so that the latter may have an opportunity of making any remarks or any criticism in respect thereof¹¹. Not hearing counsel, but requiring him to file a written argument, is, however, not an illegality but an irregularity which may be waived¹². Where a counsel on behalf of his client is entitled to be last heard in the matter, he cannot be deprived of the right¹³ but the violation of the right is only an irregularity which may be cured by s 537¹⁴. Writing of judgment during the arguments is irregular, but curable under Section 537¹⁵.

8. Citing accused's counsel as witness. — It is very reprehensible for the prosecution to call as a witness, in the course of the proceeding, a counsel who is actually defending an accused person. It not only affects the proper conduct of the defence but gives a handle to the prosecution to prevent a counsel who is acquainted with the facts of the case from conducting the defence. If the prosecution wants to call the defence counsel as a witness, sufficient notice ought to be given to the accused to enable him to engage a competent counsel¹. Where the accused's counsel is cited as a witness, the rule as to exclusion of witnesses from the Court will not apply to him, for it would conflict with the provisions of Section 340².

It is desirable that counsel do not appear in cases where it is probable their evidence would be material³. No self-respecting counsel would like to conduct a case for the defence after having been called as a witness for the prosecution⁴. The real objection is not to his giving evidence (because he is a competent witness) but to his continuing as a counsel in the case in which he knows he is likely to be examined as a witness⁵.

7. (24) 11 AIR 1921 Cal 980 (980) 25 Cri L Jour 1107, *Abdul v. Mafizuddin Sarkar*
 8. (21) 8 AIR 1921 Cal 426 (428), *Amjad Ali v. Suresh Ranjan Pal* (Submission of 'notes' in the form of a draft judgment condemned)
 (28) 15 AIR 1928 Bom 557 (559) 53 Bom 119 30 Cri L Jour 185, *Vinayak v. Emperor*
 9. (21) 8 AIR 1921 Cal 426 (428), *Amjad Ali v. Suresh Ranjan Pal* (If he feels that he has not fully appreciated any part of the arguments which have been submitted to him, it is open to him to call the parties before him so that any further argument may be presented in open Court in the presence of the other side)
 10. (28) 15 AIR 1928 Mad 1130 (1131) 29 Cri L Jour 929 (929) *Venkayya v. Emperor*.
 (28) 15 AIR 1928 Bom 557 (559) 53 Bom 119 30 Cri L Jour 185, *Vinayak v. Emperor*
 (26) 13 AIR 1926 Sind 194 (194) 21 Sind L R 293 27 Cri L Jour 711 *Crowder v. Morrison* (If notes of arguments are accepted, they should form part of the record)
 11. (21) 8 AIR 1921 Cal 426 (428) 73 Ind Cas 706, *Amjad Ali v. Suresh Ranjan Pal*
 12. See (28) 15 AIR 1928 Bom 557 (559) 53 Bom 119 30 Cri L Jour 185, *Vinayak v. Emperor*
 13. (28) 15 AIR 1928 Bom 557 (559) 53 Bom 119 30 Cri L Jour 185 *Vinayak v. Emperor*
 (06) 11 Cal W N 1414 (1414), *Promoda v. Emperor*
 14. (28) 15 AIR 1928 Bom 557 (559) 53 Bom 119 30 Cri L Jour 185, *Vinayak v. Emperor*
 15. (93) 21 Cal 121 (128, 129), *Danu Senapati v. Sridhar Rajwar*.

Note 8

9. Court and pleader. — A Magistrate should not conduct himself unpleasantly towards persons brought before him for trial or their legal advisers,¹ and it is highly improper for the Court or for persons in charge of the prosecution to intimidate either the accused or the pleaders appearing for them.²

A Magistrate has no right to ask a pleader to sit down in the middle of his examination because he was asking irrelevant questions. He can only rule out the questions as irrelevant. He cannot refuse to allow the pleader to cross examine witnesses or permit him to do so only on condition of his apologizing for his previous contumacious behaviour.³ It is improper to suspend a pleader before the close of a case, as grave injustice might be done to the clients by depriving them of his services.⁴

Advocates have ample discretion in the conduct of the case of which they are in charge and Courts cannot fetter their discretion by insisting that their case should be put to this witness or that.⁵ As a rule, the Court should leave witnesses to the pleaders to be dealt with.⁶

A pleader has a general authority to act in the interests of his client in the manner he thinks best, he cannot be charged with misconduct if he writes out petitions without asking the client and asks or advises him to present the same.⁷

As to the authority of a pleader or counsel to make admissions on behalf of his client in criminal cases, see the undermentioned decisions.⁸

While Judges should be careful not to offer discourtesy or insult to the professional gentlemen who appear before them, counsel should also recognize their responsibility and their duties towards the Court and to the public and should endeavour by their conduct to prevent any unpleasantness and to avoid provoking the Court to offer discourtesy.⁹

Some latitude should be allowed to a member of the bar, insisting in the conduct of his case upon his question being taken down or his objections being noted, where the Court thinks the question inadmissible or the objections untenable. There ought to be a spirit of give and take between the Bench and the Bar in such matters.¹⁰

It is improper for one and the same counsel to appear for two accused having conflicting defences.¹¹ A pleader who is himself interested in a case ought not to appear for the accused as he is prone to allow himself to be swayed by his own feelings and improperly obstruct the course of justice.¹²

It is not the duty of an advocate to approach the trial Judge and apprise him that in his opinion the man whose fate has been entrusted to his care has no defence to make. *Ho*

Note 9

1. "The accused is always of grave anxiety" — *v. Emperor* (As the position of
3. "The accused is always of grave anxiety" —
- 4.
5. *v. Emperor*
6. 1226, *Janki v. Shro Narain Singh*
7. (13) 14 Cr L Jour 438 (439) 20 Ind Cas 598 (Oudh), *Satgur Prasad v. Emperor*
8. (28) 15 AIR 1928 Bom 241 (242, 243) 52 Bom 688 29 Cr L Jour 990, *Dansilal Gangaram v. Emperor* (Pleader's admission is binding on the party)
- (20) 7 AIR 1920 All 99 (101) 21 Cr L Jour 777, *Shro Narain Singh v. Emperor* (It is better in a capital case not to take admissions from defence counsel — The more prudent course is to have every fact strictly proved on the record)
- Also see S 271, Note 10
9. (17) 4 AIR 1917 Pat 437 (438) 18 Cr L Jour 670 (671), *Nisaran Chandra v. Emperor*
10. (54) 1 Cr L Jour 612 (613) 0 Bom L R 541, *In re Dattatraya Venkatesh*.
11. (90) 1890 Pun Re No 13 Cr, p 25 (25) *Hira v. Empress* (Especially in a murder case where the life of each is in peril)
2. (33) 20 AIR 1933 Rang 34 (34) 34 Cr L Jour 466, *In re U. a Higher Grade Pleader, Taungoo*.

duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence of which he is charged¹³

10. "Pleader." — The word "pleader" means and includes a pleader, muktear, advocate, vakil and attorney of a High Court authorized by law to practise in any Court. see S 4 (1), cl (r) Rule 10 of the Appellate Side Rules of the Bombay High Court debars advocates who are not advocates on the original side from appearing, pleading or acting in any suit or in the High Court in any matter of ordinary original jurisdiction, civil or criminal. Hence, advocates on the appellate side do not come within the definition of pleader *quoad* the High Court Sessions¹

The question whether a vakil can act for a party in a criminal appeal from the original side of the High Court or whether the appearance can be only by an attorney depends upon the rules of that Court and is not concluded by anything in this Code². A Munsif's Court pleader comes within the category of "authorized pleader"³. But a person who is licensed to appear only in certain districts cannot be said to be authorized to practise in a Court beyond those limits. But it is in the discretion of the Magistrate to permit him to appear for an accused person. The discretion should, however, be exercised judicially and sparingly⁴.

A Magistrate has no power to forbid a duly qualified pleader to appear⁵. No *vakalat* is necessary when an authorized pleader appears in defence of an accused person either at the original trial or in an appeal. A memorandum of appearance is sufficient⁶. Even this has been held to be unnecessary when the party also is present⁷.

District Judges have no power to forbid legal practitioners from practising pending renewal of their certificates. Any such orders must proceed from the High Court⁸.

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with the necessity for permission so far as muktears are concerned. As regards other persons, the provision regarding permission still holds good. An estate manager may be a pleader provided he has the permission of the Court to plead.⁴ A Prosecuting Inspector may, with the Court's permission, defend an accused person.⁵ In the undermentioned case,⁶ third class advocates in Burma would appear to have required permission to plead and act in a Sessions Court. See also Notes on S 4 (1) (r).

Though prior to the amendment muktears required the Court's permission to constitute them pleaders in a particular case, it was held that it would rarely be a wise discretion on the part of the Court to refuse permission to a muktear to appear for the defence as it would be depriving parties of legal aid which they can frequently obtain at a moderate cost.⁷

The practice of permitting private vakils to defend parties is not illegal as it is left to the discretion of the Magistrate to hear such agents or not.⁸

The discretion must be exercised in respect of each case individually and a general order prohibiting a person from appearing in any case in any Court or Courts is illegal.⁹ If a person is aggrieved by the refusal of a Magistrate to allow him to appear in a particular case he may move the High Court in revision.¹⁰ But when the case is ended, it would be useless to proceed with a revision petition in respect of the order refusing permission, the accused may, however, take it as a ground of appeal that he has been deprived of legal assistance.¹¹

12 Sub-section (2) — It was assumed in the undermentioned case¹ that the class of persons specified in this sub section referred to *accused* persons and it was held that the Legislature removed, in the case of this particular class of persons, a disability which ordinarily attached to accused persons. According to another view, the new sub-section does not remove the restraint from any class of accused persons but only makes it clear that the persons mentioned therein are not *really* accused persons: to whom the restriction against being put on oath would apply.²

Even prior to this amendment it was held that the following persons were competent witnesses and that the restriction in cl (4) of S 342 did not apply to them

(1) Persons against whom an order of maintenance is sought under S 498³

(11) 12 Cri L Jour 118 (118) 9 Ind Cas 711 • 4 Sind L R 195, *Topanmall v Emperor* (6 Bom 14, distinguished)

Also see S 4 (1) (r) Note 1

4 (26) 13 AIR 1926 Bom 218 (222) 50 Bom 250 27 Cri L Jour 440, *Dorabshah Bomanji v Emperor* (There must be something on record to show that such person has been duly appointed by the accused and permitted by the Court to do so)

5 (30) 17 AIR 1930 Nag 150 (151) 26 Nag L R 172 31 Cri L Jour 419, *Emperor v Chotekhan*

6 (72 92) 1872 1892 Low Bur Ral 260, *In re Traters Drapes*

7 (11) 12 Cri L Jour 111 (112) 38 Cal 488, *Ishan Chandra v Emperor*

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(70) 14 Suth W R Cri Cir 5 (5)

(1864) 1 Suth W R Cr 34 (34), *Queen v Sham Chand*

10 (23) 10 AIR 1923 Mad 183 (184), *In re Nagaswamy Iyer*.

11 (23) 10 AIR 1923 Mad 484 (485), *In re Alakuri Saravayya*.

Note 12

1 (25) 12 AIR 1925 Cal 822 (823) 52 Cal 721 26 Cri L Jour 1194 (FB), *Narendra Chandra Fudra Pal v Sabarali Dhuiya*.

Calcutta.

(2) Parties proceeded against under S 145⁴ and a party to proceeding under S 133⁵

As regards persons proceeded against under S 488, in a case decided after the amendment it was held that by the omission of the word "accused" in subs (9) of S 488 the Legislature intended that such persons should no longer be looked upon as accused persons⁶

341.* If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial, and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

Synopsis

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| <p>1 Scope</p> <p>2 Duties and powers of Court other than the High Court</p> <p>3 Proceedings shall be forwarded to the High Court</p> | <p>3a Non-compliance with the section—Effect</p> <p>4. "High Court shall pass thereon such order as it thinks fit"</p> <p>5 Criminal responsibility of deaf mutes</p> |
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NOTE to the Synopsis See the Notes indicated for the following topics

<p>Competency of Magistrate to make order under S 56¹ See Note 2</p> <p>Discretion of the High Court See Note 4</p> <p>Enquiry as to state of mind of accused See Note 1</p> <p>Findings as to inability to understand See Note 3</p> <p>Magistrate's views — Whether to be stated in reference See Note 3</p> <p>Order for discharge See Note 4</p>	<p>Order for keeping in custody See Note 4</p> <p>Persons of unsound mind See Note 1</p> <p>Reference to High Court — Conditions for See Notes 2 and 3</p> <p>Remand for recording a conviction See Note 3</p> <p>Summary procedure See Note 2</p> <p>Where accused is able to understand See Note 1</p> <p>Whether a Magistrate can pass sentence See Note 3</p>
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1 Scope — The provisions of this section do not apply to a person who is of *unsound mind*. They apply to persons who are unable to understand the proceedings from deafness or dumbness or ignorance of the language of the country or other similar cause¹. Where the inability to understand the proceedings is due to unsoundness of mind, the procedure to be followed is that provided for in Chap XXVII.² Where a Magistrate found an accused to be of poor wits and wanting in apprehension of the serious consequences of his acts and incapable of understanding anything, the High Court directed that the Magistrate should hold an enquiry into the question, whether the accused was a lunatic at the time of the trial or at the time he committed the act, that if he found that he was not a lunatic at either of those times he should proceed under S 341 and that if he convicted the accused he should report the case to the High Court³. The fact that the accused is deaf and dumb does not *per se* justify a reference under S 341. He must also be *unable to understand* the proceedings⁴.

* 1882 S 341, 1872 S 186 para 3, 1861 Nil

- 4 (25) 12 AIR 1925 Oadh 286 (286) 26 Cr L Jour 70 *Mohammad Ayub v Sarfaraz Ahmad*
 5 (65) 2 Cr L Jour 575 (577) 9 Cal W N 127 2 Cal L Jour 149 *Hirananda Ojha v Emperor*
 6 (25) 12 AIR 1925 Cal 339 (339) 25 Cr L Jour 1091, *Bachai Kalwar v Jamuna Kalwarin*
 Also see S 488 Note 5

Section 341 — Note 1

- I (43) 30 AIR 1913 Snd 237 (241) I L R (1913) Kar 326 45 Cr L Jour 139 202 Ind Cas 335 (DL)

with the necessity for permission so far as muktears are concerned. As regards other persons the provision regarding permission still holds good. An estate manager may be a pleader provided he has the permission of the Court to plead.⁴ A Prosecuting Inspector may, with the Court's permission, defend an accused person.⁵ In the undermentioned case⁶ third class advocates in Burma would appear to have required permission to plead and act in a Sessions Court. See also notes on S 4 (1) (r).

Though prior to the amendment muktears required the Court's permission to constitute them pleaders in a particular case, it was held that it would rarely be a wise discretion on the part of the Court to refuse permission to a muktear to appear for the defence as it would be depriving parties of legal aid which they can frequently obtain at a moderate cost.⁷

The practice of permitting private vakils to defend parties is not illegal as it is left to the discretion of the Magistrate to hear such agents or not.⁸

The discretion must be exercised in respect of each case individually and a general order prohibiting a person from appearing in any case in any Court or Courts is illegal.⁹ If a person is aggrieved by the refusal of a Magistrate to allow him to appear in a particular case he may move the High Court in revision.¹⁰ But when the case is ended, it would be useless to proceed with a revision petition in respect of the order refusing permission the accused may however take it as a ground of appeal that he has been deprived of legal assistance.¹¹

12 Sub-section (2) — It was assumed in the undermentioned case¹ that the class of persons specified in this sub section referred to *accused persons* and it was held that the Legislature removed in the case of this particular class of persons a disability which ordinarily attached to accused persons. According to another view, the new sub section does not remove the restraint from any class of accused persons but only makes it clear that the persons mentioned therein are not *really accused persons* to whom the restriction against being put on oath would apply.*

Even prior to this amendment it was held that the following persons were competent witnesses and that the restriction in cl (4) of S 342 did not apply to them

(1) Persons against whom an order of maintenance is sought under S. 493.²

(11) 12 Cr L Jour 118 (119) 9 Ind Cas 711 4 Sind L R 195 *Topanmall v Emperor* (6 Bom 14, distinguished)

Also see S 4 (1) (r) Note 1

4 (26) 13 AIR 1926 Bom 218 (222) 50 Bom 250 27 Cr L Jour 440 *Dorabshah Domanji v Emperor* (There must be something on record to show that such person has been duly appointed by the accused and permitted by the Court to do so)

5 (30) 17 AIR 1930 Nag 150 (151) 26 Nag L R 172 31 Cr L Jour 419 *Emperor v Cholekhan*

6 (72 92) 1872 1892 Low Bar Rul 260 *In re Travers Drapes*

7 (11) 12 Cr L Jour 111 (112) 39 Cal 488 *Ishan Chandra v Emperor*

8 (74) 14 Cr L Jour 111 (112) 39 Cal 488

9 (74) 14 Cr L Jour 111 (112) 39 Cal 488

10 (74) 14 Cr L Jour 111 (112) 39 Cal 488

11 (74) 14 Cr L Jour 111 (112) 39 Cal 488

applicant wanted general permis-

(70) 2 Weir 400 (401)

(11) 12 Cr L Jour 111 (112) 39 Cal 488 9 Ind Cas 661, *Ishan Chandra v Emperor*

12 (74) 14 Cr L Jour 111 (112) 39 Cal 488

13 (74) 14 Cr L Jour 111 (112) 39 Cal 488

14 (74) 14 Cr L Jour 111 (112) 39 Cal 488

15 (74) 14 Cr L Jour 111 (112) 39 Cal 488

16 (74) 14 Cr L Jour 111 (112) 39 Cal 488

17 (74) 14 Cr L Jour 111 (112) 39 Cal 488

18 (74) 14 Cr L Jour 111 (112) 39 Cal 488

19 (74) 14 Cr L Jour 111 (112) 39 Cal 488

20 (74) 14 Cr L Jour 111 (112) 39 Cal 488

21 (74) 14 Cr L Jour 111 (112) 39 Cal 488

22 (74) 14 Cr L Jour 111 (112) 39 Cal 488

23 (74) 14 Cr L Jour 111 (112) 39 Cal 488

24 (74) 14 Cr L Jour 111 (112) 39 Cal 488

25 (74) 14 Cr L Jour 111 (112) 39 Cal 488

12 Cr L Jour

1 (25) 12 AIR 1925 Cal 822 (828) 52 Cal 21 26 Cr L Jour 1104 (1105) *Narendra Chandra Rudra Pal v Sabarshi Bhuiya*

2 (27) 14 AIR 1927 Cal 509 (511) 54 Cal 532 28 Cr L J 407, *Krishen Doyal v Corporation of Calcutta*

3 (95) 18 All 107 (108) 1895 All W N 219, *Hira Lal v Saheljan*

(89) 16 Cal 781 (787) *Aur Mahomed v Pismullayan* (Such proceedings are of a civil nature)

to see S 488 Note 5

(2) Parties proceeded against under S 145⁴ and a party to proceeding under S 131⁵

As regards persons proceeded against under S 488 in a case decided after the amendment it was held that by the omission of the word 'accused' in sub s (9) of S 488 the Legislature intended that such persons should no longer be looked upon as accused persons⁶

341. If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial, and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

Synopsis

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| 1 Scope | 3a Non-compliance with the section—Effect |
| 2 Duties and powers of Court other than the High Court | 4 'High Court shall pass thereon such order as it thinks fit' |
| 3 Proceedings shall be forwarded to the High Court | 5 Criminal responsibility of deaf mutes |

NOTE to the Synopsis See the Notes indicated for the following topics

Competency of Magistrate to make order under S 562 See Note 2

Discretion of the High Court See Note 4

Enquiry as to state of mind of accused See Note 1

Findings as to inability to understand See Note 3

Magistrate's views—Whether to be stated in reference See Note 3

Order for discharge See Note 4

Order for keeping in custody See Note 4

Persons of unsound mind See Note 1

Reference to High Court—Conditions for See Notes 2 and 3

Remand for recording a conviction See Note 3

Summary procedure See Note 2

Where accused is able to understand See Note 1

Whether a Magistrate can pass sentence See Note 2

1 Scope—The provisions of this section do not apply to a person who is of *unsound mind*. They apply to persons who are unable to understand the proceedings from deafness or dumbness or ignorance of the language of the country or other similar cause¹ Where the inability to understand the proceedings is due to unsoundness of mind the procedure to be followed is that provided for in Chap XXIV² Where a Magistrate found an accused to be of poor wits and wanting in apprehension of the serious consequences of his acts and incapable of understanding anything, the High Court directed that the Magistrate should hold an enquiry into the question, whether the accused was a lunatic at the time of the trial or at the time he committed the act, that if he found that he was not a lunatic at either of those times he should proceed under S 311 and that if he convicted the accused, he should report the case to the High Court³ The fact that the accused is deaf and dumb does not *per se* justify a reference under S 311 He must also be *unable to understand the proceedings*⁴

* 1882 S 341, 1872 S 186 para 3, 1861 N1

- 4 (25) 12 AIR 1925 Oudh 286 (286) 26 Cr L Jour 70, *Mohammad Ayub v Sarfaraz Ahmad*
 5 (05) 2 Cr L Jour 575 (577) 9 Cal W N 127 2 Cal L Jour 149 *Hirananda Ojha v Emperor*
 6 (25) 12 AIR 1925 Cal 339 (339) 25 Cr L Jour 1091, *Bachai Kalwar v Jamuna Kalwarin*
 Also see S 488, Note 5

Section 341—Note 1

- 1 (43) 30 AIR 1913 Sind 237 (241) 1 L R (1913) Kar 326 45 Cr L Jour 139 209 Ind Cas 335 (DB),
Iso Gaman Khoso v Emperor

with the necessity for permission so far as muktears are concerned. As regards other persons, the provision regarding permission still holds good. An estate manager may be a pleader provided he has the permission of the Court to plead.⁴ A Prosecuting Inspector may, with the Court's permission, defend an accused person.⁵ In the undermentioned case⁶ third class advocates in Burma would appear to have required permission to plead and act in a Sessions Court. See also Notes on S 4 (1) (r).

Though prior to the amendment muktears required the Court's permission to constitute them pleaders in a particular case it was held that it would rarely be a wise discretion on the part of the Court to refuse permission to a muktear to appear for the defence as it would be depriving parties of legal aid which they can frequently obtain at a moderate cost.⁷

The practice of permitting private vakils to defend parties is not illegal as it is left to the discretion of the Magistrate to hear such agents or not.⁸

The discretion must be exercised in respect of each case individually and a general order prohibiting a person from appearing in any case in any Court or Courts is illegal.⁹ If a person is aggrieved by the refusal of a Magistrate to allow him to appear in a particular case he may move the High Court in revision.¹⁰ But when the case is ended, it would be useless to proceed with a revision petition in respect of the order refusing permission; the accused may, however, take it as a ground of appeal that he has been deprived of legal assistance.¹¹

12 Sub-section (2) — It was assumed in the undermentioned case¹ that the class of persons specified in this sub-section referred to *accused* persons and it was held that the Legislature removed, in the case of this particular class of persons a disability which ordinarily attached to accused persons. According to another view, the new sub-section does not remove the restraint from any class of accused persons but only makes it clear that the persons mentioned therein are not *really accused persons* to whom the restriction against being put on oath would apply.²

Even prior to this amendment it was held that the following persons were competent witnesses and that the restriction in cl (4) of S 312 did not apply to them

(1) Persons against whom an order of maintenance is sought under S 493.³

(11) 12 Cri L Jour 118 (118) 9 Ind Cas 711 4 Sind L R 195 *Topanmall v Emperor* (6 Dom 14, distinguished)

Also see S 4 (1) (r) Note 1

4 (26) 13 AIR 1926 Bom 218 (222) 50 Bom 250 27 Cri L Jour 440 *Dorabshah Domanji v Emperor* (There must be something on record to show that such person has been duly appointed by the accused and permitted by the Court to do so)

5 (30) 17 AIR 1930 Nag 150 (151) 25 Nag L R 172 31 Cri L Jour 419 *Emperor v Cholekhan*

6 (72 92) 1872 1892 Low Bur Bul 260 *In re Travers Drapes*

7 (11) 12 Cri L Jour 111 (112) 38 Cal 488 *Ishan Chandra v Emperor*

8 (11) 12 Cri L Jour 111 (112)

applicant wanted general perm 3-

(75) 2 Weir 400 (401)

(11) 12 Cri L Jour 111 (112) 38 Cal 488 9 Ind Cas 661, *Ishan Chandra v Emperor*

(70) 14 Suth W R Cri Cir 5 (5)

1 (25) 12 AIR 1925 Cal 822 (824) 52 Cal 721 26 Cri L Jour 1101 (FB) *Narendra Chandra Rudra Jal v Sabarath Dhruva*.

2 (27) 14 AIR 1927 Cal 509 (511) 51 Cal 532 28 Cr L J 407, *Krishen Dojal v Corporation of Calcutta*

3 (95) 18 All 107 (109) 1895 All W N 217 *Hira Lal v Sahabjan*

(82) 16 Cal 781 (787) *Nur Mahomed v Ismullajan* (Such proceedings are of a civil nature)

Also see S 454 Note 5

(2) Parties proceeded against under S 145,⁴ and a party to proceeding under S 131⁵

As regards persons proceeded against under S 488, in a case decided after the amendment, it was held that by the omission of the word "accused" in subs (9) of S 488, the Legislature intended that such persons should no longer be looked upon as accused persons⁶

341.* If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial, and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

Synopsis

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| <p>1 Scope</p> <p>2 Duties and powers of Court other than the High Court</p> <p>3 Proceedings shall be forwarded to the High Court</p> | <p>3a Non-compliance with the section—Effect</p> <p>4 "High Court shall pass thereon such order as it thinks fit"</p> <p>5 Criminal responsibility of deaf mutes</p> |
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NOTE to the Synopsis See the Notes indicated for the following topics

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| <p>Competency of Magistrate to make order under S 562 See Note 1</p> <p>Discretion of the High Court See Note 1</p> <p>Enquiry as to state of mind of accused See Note 1</p> <p>Finding as to inability to understand See Note 3</p> <p>Magistrate's views—Whether to be stated in reference See Note 3</p> <p>Order for discharge See Note 4</p> | <p>Order for keeping in custody See Note 4</p> <p>Persons of unsound mind See Note 1</p> <p>Reference to High Court—Conditions for See Notes 2 and 3</p> <p>Remand for recording a conviction See Note 3</p> <p>Summary procedure See Note 2</p> <p>Where accused is able to understand See Note 1</p> <p>Whether a Magistrate can pass sentence See Note 1</p> |
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1 Scope—The provisions of this section do not apply to a person who is of *unsound mind*. They apply to persons who are unable to understand the proceedings from deafness or dumbness or ignorance of the language of the country or other similar cause¹. Where the inability to understand the proceedings is due to unsoundness of mind the procedure to be followed is that provided for in Chap XXXIV². Where a Magistrate found an accused to be of poor wits and wanting in apprehension of the serious consequences of his acts and incapable of understanding anything, the High Court directed that the Magistrate should hold an enquiry into the question whether the accused was a lunatic at the time of the trial or at the time he committed the act that if he found that he was not a lunatic at either of those times, he should proceed under S 341 and that if he convicted the accused, he should report the case to the High Court³. The fact that the accused is deaf and dumb does not *per se* justify a reference under S 341. He must also be *unable to understand the proceedings*⁴.

* 1882 S 341, 1872 S 186 para 3, 1851 Nil

- 4 (25) 12 AIR 1925 Oudh 286 (246) 26 Cri L Jour 70, *Mohammad Ayub v Sarfaraz Ahmad*
 5 (65) 2 Cri L Jour 575 (577) 9 Cal W N 127 2 Cal L Jour 149, *Hirananda Ojha v Emperor*
 6 (23) 12 AIR 1925 Cal 339 (339) 25 Cri L Jour 1091, *Bachai Kalwar v Jamuna Kalwarin*
 Also see S 488, Note 5

Section 341—Note 1

- 1 (43) 80 AIR 1913 S nd 237 (241) 1 L R (1913) Kar 326 45 Cri L Jour 138 209 Ind Cas 335 (DL),
Iso Gaman Khoso v Emperor

2. Duties and powers of Court other than the High Court. — If the Magistrate is of opinion that the accused cannot be made to understand the proceedings, he should nevertheless proceed with the enquiry or trial till the end and if it results in a conviction or committal, the proceedings should be forwarded to the High Court with a report as to the circumstances of the case¹ He should not proceed to pass sentence on the accused, but having convicted him should stay proceedings and report the matter to the High Court for orders² Nor is he empowered to pass an order under S 562 of the Code³

The view being, that it is impossible for a deaf mute to have lived to maturity, without being able to communicate with his relatives, High Courts have insisted on Magistrates attempting to find out whether the accused (if he is deaf and dumb) has any friends or relatives, who are accustomed to communicate with him, his antecedents and ordinary mode of life, and the manner in which he was communicated with, in the ordinary affairs of life. The Magistrate should attempt to get into communication with the accused with the assistance of his relatives⁴ The omission to attempt to communicate with the accused is clearly wrong, where there was such a failure, and the High Court was not able to say that the accused were not prejudiced, the conviction was set aside⁵ If no failure of justice has, however, occurred the High Court may decline to interfere with the conviction⁶

Summary procedure is not suitable to the case of accused who cannot be made to understand the proceedings⁷

3. Proceedings shall be forwarded to the High Court.—There should be a conviction or committal before a reference is made to the High Court¹ If a reference is

(37) 1937 Mad W N 1121 (1121) *Public Prosecutor v Subbayya* (Accused found to be deaf and dumb, it being impossible to communicate with him or to understand him — S 341 applies)

(27) 14 AIR 1927 Lah 799 (799) 28 Cri L Jour 656, *Emperor v Gunga*

(29) 16 AIR 1929 Lah 840 (840) 10 Lah 566 29 Cri L Jour 1104, *Alla Dia v Emperor*

v Barhna Singh

It does not apply where the accused

Note 2

1. (97) 1897 Bat 879 (879) *In re A dumb man*

(75) 2 Weir 403 (404)

our 138 209 Ind Cas 335

v Nga San Myin

v District Magistrate of

Magapatam

Also see S 562 Note 7

4 (43) 80 AIR 1913 Sind 237 (240) 1 L R (1913) Kar 326 45 Cri L Jour 138 209 Ind Cas 335 (DB).

Issa Gaman Khoso v Emperor

Nga San Myin

138 209 Ind Cas 335

Also see S 562, Note 3

6 (70) 2 Weir 402 (403)

7 (06) 1 Cri L Jour 411 (415) 8 Bom L R 819, *In re A deaf and dumb man*

Also see S 260, Note 4

Note 3

v Dowra

made before a conviction or committal the record will be returned to the trying Magistrate to be reported by him only if he convicts or commits the accused²

In submitting a case to the High Court under this section the Magistrate must state his view of the conduct of the accused in the commission of the offence his previous history and habits. There must also be a finding whether the accused was capable of understanding and did in fact understand the nature of the proceedings and the purport of the evidence given by the witnesses³ the report should also state the reason for the Magistrate's holding that the accused did not understand the proceedings what means were used to make him understand them and the reason why such means were unsuccessful⁴

The proceedings to be forwarded to the High Court under this section are only those relating to an accused person who cannot be made to understand the proceedings though not insane. If in a case there are two accused and one of them though not insane is not able to understand the proceedings the Magistrate is not to refer the proceedings of both to the High Court and the High Court under this section will have no jurisdiction to pass any order with regard to the accused who is able to understand the proceedings⁵

3a Non compliance with the section—Effect — In the undermentioned case¹ the accused a deaf mute unable to understand the proceedings was committed to the sessions for trial. Instead of submitting the case to the High Court under the provisions of this section the Sessions Judge tried the case and acquitted the accused. It was held that though the Sessions Judge was wrong in proceeding to try the accused the trial was not completely void under S 530

4 "High Court shall pass thereon such order as it thinks fit" — The High Court has in a case reported under this section full discretion to do whatever the circumstances of the case require¹. Although the prisoner had not been able to understand the proceedings and therefore those proceedings had not according to the principles of English common law constituted a fair and proper trial yet under special circumstances if the High Court should think fit it might treat them as amounting to a sufficient trial and pass sentence according to the facts which seem to be established in the course of and as a result of those proceedings²

The unrestricted powers vested in the High Court in dealing with cases under this section warrant its ordering that the accused be confined in a suitable place of safe custody

2 (81) 1881 All W N 15 (15) *Empress v Mathuria*

v Trimbak Damodar

Note 3a

1 (37) 1937 Mad W N 1121 (1121) *Public Prosecutor v Subbayya* (On appeal from acquittal by the Sessions Judge High Court heard the case on the merits and declined to interfere with the order of acquittal)

Note 4

1 (30) 1935 Mad W N 1287 (1288) *In re Public Prosecutor Madras*

2 (43) 30 AIR 1943 S 237 (211) I L R (1943) Kar 326 45 Cr L Jour 138 409 Ind Cas 335 (DB) *Issa Gaman Kloss v Emperor*

(41) 29 AIR 1911 Mad 275 (226) 47 Cr L Jour 315 192 Ind Cas 674 *In re Daya Palamma* (Accused confessing before Magistrate that she killed deceased and producing jewels worn by deceased — Accused seen leaving deceased's house on night of murder — Accused understanding proceedings up to stage of questioning under S 342 Cr P C but pleading deafness afterwards — Conviction for murder held just fled — Inability of Sessions Judge to further question accused with regard to evidence against her held did not vitiate conviction)

(74) 27 Soth W R Cr 35 (36) *Queen v Bowka Hara*

(1900) 27 Cal 363 (369) *Empress v Somir Douya* (Where accused cannot understand the proceedings the proceedings do not represent a complete trial)

(11) 12 Cr L Jour 346 (346) 11 Ind Cas 50 1 Upp Bar Ral 57 *Emperor v Ngi San Myi*

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed

(4) No oath shall be administered to the accused

Synopsis

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| <ol style="list-style-type: none"> 1 Legislative changes 2 Scope of the section <ol style="list-style-type: none"> 3 Applicability to summons cases and summary trials 4 Applicability to trials before Presidency Magistrates 5 Applicability to proceeding under Chapter VIII 6 Applicability to proceeding under section 363 of the Calcutta Municipal Act 7 Applicability of section to proceeding under S 488 8 Applicability to proceeding under S 476 9 When questions should be put 10 Examination after framing charge 11 "Evidence, meaning of" 12 Examination must be by the Court itself and not by others <ol style="list-style-type: none"> 13 De novo trial—Examination by accuser 14 Nature of examination contemplated by the section <ol style="list-style-type: none"> 15 'Question him generally on the case' 16. Without previously warning the accused" 17 Examination of pleader of accused 18 Written statement of accused if sufficient 19 Examination by committing Magistrate | <ol style="list-style-type: none"> 20 Examination of accused in sessions trials 21 Refusal to answer—Sub-s (2) 22 Giving false answers—Sub-s (2) 23 Answers given to be taken into consideration <ol style="list-style-type: none"> 24 Irrelevant answers 25 Answers making defamatory statements 26 Answers amounting to contempt of Court 27 Answers by one accused if can be considered against co accused 28 Several accused—Each to be examined separately 29 Accused's defence in general 30 Court if can ask accused to give thumb-impressions 31 "No oath shall be administered to the accused—Sub s (4) <ol style="list-style-type: none"> 32 Examination of accused in a cross-case as a witness <ol style="list-style-type: none"> 32a Applicability of section to proceedings under S 14 of the Legal Practitioners Act 32b Applicability to proceedings under S 145 33 Examination of accused—How recorded See S 864 34 Destruction of record—Proof of examination 35 Non compliance with the section—Effect of |
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NOTE to the Synopses See the Notes indicated for the following topics

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| <p>Accused—not in a different trial See Note 31</p> <p>Accused not on trial See Note 31</p> <p>Additonal evidence See Note 9</p> <p>After amendment of charges See Note 9</p> <p>After confession not accused See Note 31</p> <p>After conviction not accused See Note 31</p> <p>After court witness See Note 9</p> <p>After re-call of prosecution witnesses See Note 9</p> <p>After withdrawal not accused See Note 31</p> <p>Alternative or inconsistent defences See Note 29</p> <p>Appeal—Continuation of case See Note 31</p> <p>Bombay Gambling Act 1887 See Note 31</p> <p>Careful questioning See Note 15</p> <p>Circumstantial evidence and explanation See Note 3</p> <p>Cross-examination of accused See Notes 14 and 35</p> <p>Defence how far to explain See Notes 29 and 23</p> <p>Defence not to aid prosecution See Note 29</p> <p>Effect of S 249 See Note 20</p> | <p>Effect of S 209 See Note 19</p> <p>Examination after defence let in See Note 9</p> <p>Examination after further cross-examination See Notes 9 and 10</p> <p>Examination before process—Illegal See Note 31</p> <p>Examination before trial begins See Note 35</p> <p>Examination in cross-case See Note 32</p> <p>Examination of accused not to aid prosecution See Note 14</p> <p>Examination under first part and under second part—Discretionary and mandatory See Notes 2, 9 and 35</p> <p>Evidence of co accused in joint trials See Note 31</p> <p>False answers—No offence See Note 22</p> <p>Illegal pardon—Still accused See Note 31</p> <p>Inapplicability to summons cases See Note 3</p> <p>Long composite questions See Note 15</p> <p>No addition to statement before Magistrate See Note 15</p> <p>No examination before committal See Note 19</p> |
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No examination if no evidence against accused See Note 14	Questions and not statements of accused See Notes 2 18 and 21
No inquisitorial proceedings against accused See Notes 14 and 21	Record of refusal to answer See Note 21
Non compliance—Effect See Note 35	Refusal to answer—No offence See Note 21
Object of examination See Notes 2 and 14	Refusal to give handwriting — Adverse inference drawn See Note 30
Pardon by Government subsequent to trial — Still accused See Note 31	Revision See Note 35
Personal examination of accused See Note 17	Section 161 statement See Note 16
Petty cases and technical offences See Note 35	Statement not to be used against others See Notes 23 and 27
Prior convictions—Questions See Note 14	Statement of accused to be taken as a whole See Note 23
Prosecution instructing for examination of accused —Improper See Note 12	Time of questioning accused See Notes 9 and 31

1 Legislative changes. — Under the Code of 1861, it was not incumbent on the Magistrate to examine the accused, whether before or after the close of the prosecution case¹ It was in the discretion of the Court to do so or not² In the Code of 1872, the discretionary nature of the examination was retained so far as enquiries and trials, other than sessions trials, were concerned So far as sessions trials were concerned, such examination was made compulsory³ In the Code of 1882, the purpose of the examination was set forth in the section

2 Scope of the section. — This section provides for the examination by the Court of accused persons and except under the circumstances and restrictions set forth in this section an accused person is incapable of being examined by the Court⁴

The section is based on the principle involved in the maxim *audi alteram partem*, namely, that no one should be condemned unheard,⁵ and the accused should be heard, not merely on what is *prima facie* proved against him, but on every circumstance appearing in evidence against him⁶

The section does not purport to be only in the interest of the accused, its object is to enable the accused to explain any circumstances appearing against him in the evidence, the intention of the provision is for the furtherance of justice and to enable the Court to decide the question of the guilt of the accused⁷ The result of the examination may be beneficial to the accused but it may equally be injurious to him⁸

Section 342 — Note 1

1 (1865) 2 Suth W R Cr 50 (50), *Queen v Hurnath* (Examination before committal held not necessary)

(65) 2 Suth W R Cr L 11 (12) (Do)

2 (25) 12 AIR 1925 Cal 361 (363) 52 Cal 523 26 Cri L Jour 631, *Emperor v Ahmuddi*

(1863) 1 Mad H C R Cr 199 (200) *Ex parte Virabhadra Gaud*

(68) 10 Suth W R Cr 23 (25) 1 Beng L R 100 *Queen v Shama Sunkar*

(71) 16 Suth W R Cr 21 (22), *In re Dinoo Roy*

Note 2

1 (97) 19 All 200 (201) 1897 All W N 23, *In the matter of Barkat* (He cannot be examined as a

Shankar.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed

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| <ol style="list-style-type: none"> 1 Legislative changes 2 Scope of the section <ol style="list-style-type: none"> 3 Applicability to summons cases and summary trials 4 Applicability to trials before Presidency Magistrates 5 Applicability to proceeding under Chapter VIII 6 Applicability to proceeding under section 363 of the Calcutta Municipal Act 7 Applicability of section to proceeding under S 488 8 Applicability to proceeding under S 476 9 When questions should be put <ol style="list-style-type: none"> 10 Examination after framing charge 11 Evidence meaning of 12 Examination must be by the Court itself and not by others <ol style="list-style-type: none"> 13 De novo trial—Examination by successor 14 Nature of examination contemplated by the section <ol style="list-style-type: none"> 15 'Question him generally on the case 16. Without previously warning the accused 17 Examination of pleader of accused 18 Written statement of accused if sufficient 19 Examination by committing Magistrate | <ol style="list-style-type: none"> 20 Examination of accused in sessions trials 21 Refusal to answer—Sub s (2) 22 Giving false answers—Sub-s (2) 23 Answers given to be taken into consideration <ol style="list-style-type: none"> 24 Irrelevant answers 25 Answers making defamatory statements 26 Answers amounting to contempt of Court 27 Answers by one accused if can be considered against co accused 28 Several accused—Each to be examined separately 29 Accused's defence in general 30 Court if can ask accused to give thumb-impresions 31 No oath shall be administered to the accused—Sub s (4) <ol style="list-style-type: none"> 32 Examination of accused in a cross-case as a witness <ol style="list-style-type: none"> 32a Applicability of section to proceedings under S 14 of the Legal Practitioners Act 32b Applicability to proceedings under S 145 33 Examination of accused—How recorded See S 361 34 Destruction of record—Proof of examination 35 Non compliance with the section—Effect of |
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NOTE to the Synopsis See the Notes indicated for the following topics

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| <p>Accused—Not in a different trial See Note 31</p> <p>Accused not on trial See Note 31</p> <p>Additonal evidence See Note 9</p> <p>After amendment of charges See Note 9</p> <p>After confession not accused See Note 31</p> <p>After conviction not accused See Note 31</p> <p>After court witness See Note 9</p> <p>After re-call of prosecut on witness See Note 9</p> <p>After withdrawal not accused See Note 31</p> <p>Alternative or inconsistent defences See Note 9</p> <p>Appeal—Continuation of case See Note 31</p> <p>Bombay Gambling Act 1887 See Note 31</p> <p>Careful questioning See Note 15</p> <p>Circumstantial evidence and explanation See Note 23</p> <p>Cross-examination of accused See Notes 14 and 35</p> <p>Defence how far to explain See Notes 29 and 23</p> <p>Defence not to aid prosecution See Note 29</p> <p>Effect of S 289 See Note 20</p> | <p>Effect of S 209 See Note 19</p> <p>Examination after defence let in See Note 9</p> <p>Examination after further cross-examination. See Notes 9 and 10</p> <p>Examination before process—Illegal See Note 31</p> <p>Examination before trial begins See Note 35</p> <p>Examination in cross case See Note 32</p> <p>Examination of accused not to aid prosecution. See Note 14</p> <p>Examination under first part and under second part—Discretionary and mandatory See Notes 29 and 35</p> <p>Evidence of co accused in joint trials See Note 31</p> <p>False answers—No offence See Note 29</p> <p>Illegal pardon—Still accused See Note 31</p> <p>Inapplicability to summons cases See Note 3</p> <p>Long composite questions See Note 15</p> <p>No addition to statement before Magistrate See Note 15</p> <p>No examination before committal See Note 19</p> |
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No examination if no evidence against accused See Note 14	Questions and not statements of accused See Notes 2 18 and 21
No inquisitorial proceedings against accused See Notes 14 and 21	Record of refusal to answer See Note 21
Non compliance—Effect See Note 35	Refusal to answer—No offence See Note 21
Object of examination See Notes 2 and 14	Refusal to give handwriting — Adverse inference drawn See Note 30
Pardon by Government subsequent to trial — Still accused See Note 31	Revision See Note 35
Personal examination of accused See Note 17	Section 161 statement See Note 16
Petty cases and technical offences See Note 35	Statement not to be used against others See Notes 23 and 27
Prior convictions—Questions See Note 14	Statement of accused to be taken as a whole See Note 23
Prosecution instructing for examination of accused —Improper See Note 12	Time of questioning accused See Notes 9 and 31

1 Legislative changes. — Under the Code of 1861, it was not *incumbent* on the Magistrate to examine the accused whether before or after the close of the prosecution case¹ It was in the discretion of the Court to do so or not² In the Code of 1872, the discretionary nature of the examination was retained so far as enquiries and trials, other than sessions trials, were concerned So far as sessions trials were concerned, such examination was made compulsory³ In the Code of 1887, the purpose of the examination was set forth in the section

2 Scope of the section. — This section provides for the examination by the Court of accused persons and except under the circumstances and restrictions set forth in this section an accused person is incapable of being examined by the Court¹

The section is based on the principle involved in the maxim *audi alteram partem*, namely, that no one should be condemned unheard,² and the accused should be heard, not merely on what is *prima facie* proved against him but on every circumstance appearing in evidence against him.³

The section does not purport to be only in the interest of the accused, its object is to enable the accused to explain any circumstances appearing against him in the evidence, the intention of the provision is for the furtherance of justice and to enable the Court to decide the question of the guilt of the accused⁴. The result of the examination may be beneficial to the accused but it may equally be injurious to him⁵.

Section 342 — Note 1

1 (1865) 2 Suth W R Cr 50 (50), *Queen v Hurnath* (Examination before committal held not necessary)

(65) 2 Sath W R Cr L 11 (12) (Do)

2 (25) 12 AIR 1925 Cal 361 (363) 52 Cal 522 26 Cr L Jour 631, *Emperor v Alimuddin*

▼ *Alimudda*

Note 2

not be examined as a

- v *Karuna Shanlar.*

The section consists of two parts the first part giving a *discretion* to the Court⁶ the second part being *mandatory*⁷ At *any* stage of the inquiry or trial the Court may put such questions to the accused as it considers necessary for the purpose specified in the section After the prosecution witnesses have been examined and before the accused is called on for his defence the Court *shall* question generally on the case for the said purpose

The accused must be examined under the section whether he offers to produce defence or not The wording of the section does not justify the interpretation that it is necessary to examine the accused under this section only if he offers to produce defence⁸ But it has been held by the Bombay High Court that a Court is not bound under this section to give the accused an opportunity of explaining the circumstances appearing against him in the evidence of witnesses examined on behalf of a *co accused* though the Court may give him such an opportunity⁹

The power to question the accused in regard to the evidence which has been given, must be distinguished from the power to record statements which the accused may offer to make the Court can only properly question the accused under the conditions named in the section but it may record statements offered by the accused and to such statements this section does not apply¹⁰

It was held in the undermentioned cases¹¹ that this section and ss 161 and 364 are

r Singh v Sukra Singh
Emperor

Emperor v Ajahar Mandal

(20) 7 AIR 1920 Lat 471 (477) 5 Pat L Jour 430 21 Cri L Jour 705 *Raghu Bhumsj v Emperor*

or
v Emperor
n Sayanna]

7 (37) 1937 Mad W N 574 (575) *Varadamma v Emperor*

(37) 24 AIR 1937 Pesh 20 (20) 33 Cri L Jour 387 *Vi Lalan v Emperor* (Examination under S 342 is obligatory only after the prosecution evidence is finished)

(38) 23 AIR 1936 Pesh 211 (212) 33 Cri L Jour 399 *Nassan v Emperor*

(35) 22 AIR 1935 Cal 605 (605) 36 Cri L Jour 1340 62 Cal 475 *Emperor v Ajahar Mandal*

(30) 31 Cri L Jour 613 (614) 124 Ind Cas 70 (Cal) *Moyraddin Mean v Emperor* (Summary trial)

(23) 10 AIR 1923 Cal 196 (197 198) 50 Cal 223 24 Cri L Jour 198 *Mosahur Ali v Emperor*
ddi

v Emperor

v Emperor

8 (37) 24 AIR 1937 Oudh 130 (131) 37 Cri L Jour 408 12 Luck 24 *Emperor v Drij Lal*

9 (36) 23 AIR 1936 Bom 154 (160) 37 Cri L Jour 688 60 Bom 148 *Shapurji Sorabji v Emperor* (Reason for this view is not clear from the judgment — Presumably the reason is that the imperative part of the duty of the Court under the section to examine the accused arises on the completion of the evidence for the prosecution and before he is called on to enter on his defence and thereafter this duty ceases to be imperative—See Note 9)

10 (36) 23 AIR 1936 Bom 154 (160) 37 Cri L Jour 688 60 Bom 148 *Shapurji Sorabji v Emperor* (Court may allow opportunity to accused to make statement to explain circumstances appearing in evidence led on behalf of co accused)

(81) 1894 All W N 81 (81) *Empress v Chatter Singh*

11 (36) 23 AIR 1936 Rang 350 (351) 37 Cri L Jour 920 *Nga Tlein Maung v Emperor*

(10) 11 Cri L Jour 403 (470) 7 Ind Cas 359 37 Cal 467 *Barindra Kumar v Emperor*

not exhaustive and do not limit the generality of s 21, Evidence Act, as to the relevancy of admissions. For a criticism of this view, see Note 2 on S 161 and Notes on S 533.

3. Applicability to summons cases and summary trials. — The High Court of Madras has held that this section does not apply to summons cases and that consequently it is not *obligatory* on the Court to examine the accused, though it may be desirable to do so¹. The ground, on which the decision proceeds, is that in summons cases there is no procedure for *calling upon the accused for his defence*, as in sessions cases and warrant cases (Ss 252, 256), but only for *hearing the accused* and that this section, which requires the Court to examine the accused *before the accused is called on for his defence*, has no application to such cases. A Full Bench of the High Court of Rangoon has also come to the same conclusion, on the additional ground that the words in S 245, namely "if he thinks fit" give a *discretion* to the Court to examine the accused or not and that such discretion is incompatible with the imperative provisions of this section². The general trend of opinion of all the other High Courts is, however, that this section applies equally to summons cases as well as to warrant-cases³ and that the words "if he thinks fit" in S 245 have reference to cases in which the Magistrate is prepared to acquit the accused, even on a consideration of the prosecution evidence as it stands, without calling on the accused for his defence and without hearing him⁴.

Note 3

- 1 (24) 11 A I R 1924 Mad 15 (17) 46 Mad 758 24 Cr L J 833 (F B), *Ponnusamy v Ramaswami*
2 (31) 18 A I R 1931 Rang 244 (246) 9 Rang 506 32 Cr L Jour 1190 (F B), *Emperor v Nga La Gyi*

The following cases are in view of the above Full Bench ruling, no longer good law
(194) 1 Cr L Jour 737 (737) 2 Low Bur Bul 239, *Emperor v Kyan Daw*

(97-01) 1 L pp Bur Bul 82 (82), *Queen-Empress v Nga Pyaung*

(23) 10 A I R 1928 Rang 135 (135) 25 Cr L Jour 684, *Mg Shue Kye v King Emperor*.

3 (40) 27 A I R 1940 Bom 314 (315) 42 Cr L Jour 71 191 Ind Cas 90, *Emperor v Kondiba Dalaj*
! in a warrant case

d, *Pae Darels*

- (28) 13 A I R 1926 Lah 667 (667) 27 Cr L Jour 1000, *Demello v Mrs Demello*
(26) 13 A I R 1926 Nag 300 (300) 22 Nag L R 65 27 Cr L Jour 632 *Dhagwan v Emperor*
(35) 22 A I R 1935 All 217 (218) 36 Cr L Jour 1290 57 All 666, *Sia Ram v Emperor*
(22) 9 A I R 1923 Bom 290 (291, 292) 46 Bom 441 23 Cr L Jour 45, *Gulabji v Emperor*
(26) 13 A I R 1926 Bom 67 (61) 50 Bom 34 27 Cr L Jour 165, *B N Gamadia v Emperor*
(31) 18 A I R 1931 Bom 195 (197) 32 Cr L Jour 719 (F B), *Emperor v Janardhan Kashinath*
(23) 10 A I R 1923 Cal 164 (164) 49 Cal 1075 24 Cr L Jour 3, *Gulzari Lal v Emperor* (Case under S 54A Calcutta Police Act)
(27) 14 A I R 1927 Cal 250 (253) 54 Cal 286 23 Cr L Jour 231, *Bethu Lal v Injured Lady*
(22) 9 A I R 1922 Lah 45 (46) 23 Cr L Jour 154, *Muhammad Balsh v Emperor*
(31) 18 A I R 1931 Lah 153 (154) 32 Cr L Jour 708, *Bhim Sen v Emperor*
(21) 8 A I R 1921 Pat 11 (12) 6 Pat L Jour 174 22 Cr L Jour 427 *Gulam Rasul v Emperor*
(26) 13 A I R 1926 Sind 1 (3) 20 Sind L R 34 26 Cr L Jour 1554 (1 L), *Emperor v Nabu*
(26) 13 A I R 1926 Sind 261 (282) 19 Sind L R 121 27 Cr L Jour 1290, *Emperor v Pario*

following AIR

Emperor (Provisions of S 342 are of general application and are applicable to all trials including sessions cases)

v Isamaddi
r (Not appi-

cable to summons-cases)

(27) 14 A I R 1927 Lah 435 (435) 24 Cr L Jour 472 *Shadi Khan v Gul Degari* (In maintenance cases evidence is recorded in the manner presented in s 335 Cr I C, for summons-cases section 342 is not applicable to summons-cases)

4 (21) 8 A I R 1921 Pat 374 (375) 45 Pat 587 22 Cr L Jour 1554 (1 L), *Emperor v Nabu*

As to whether this section applies also to summary trials see Note 6 on S 263.

4 Applicability to trials before Presidency Magistrates — Presidency Magistrates are not relieved from the obligation of questioning the accused generally under this section. The words 'if any' in S 370, clause (f), cannot be properly held as modifying the provisions of this section, as regards Presidency Magistrates¹. See also Section 370 Note 3.

5 Applicability to proceeding under Chapter VIII. — A person proceeded against under Chapter VIII of the Code (security proceedings) is not a person accused of any act or omission punishable by law and this section has no application to such cases¹.

6 Applicability to proceeding under section 363 of the Calcutta Municipal Act — A person proceeded against under S 363 of the Calcutta Municipal Act is not an accused person and this section has no application to such cases¹.

7 Applicability of section to proceeding under section 488 — A proceeding against a person under S 488 is of a civil nature and the person proceeded against is not an accused person. This section which applies to proceedings against accused persons cannot therefore, apply to proceedings under S 488¹.

8 Applicability to proceeding under section 476 — On the question as to whether proceedings in inquiries under S 476 of the Code are judicial proceedings and the persons against whom they are directed are in the position of accused persons and S 312 applies to such cases see S 476 Note 2.

9 When questions should be put — As seen in Note 2 the putting of questions under the first part of the section is discretionary and may be done at any stage of the inquiry or trial. The examination of the accused generally on the case under the second part of the section which is mandatory, must be after the close of the

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- (26) 13 AIR 1926 All 358 (358) 27 Cri L Jour 405 *Khacho Mal v Emperor*
 (68) 10 Suth W R Cr 2, (25-26) *Queen v Shama Shunker* (When the Magistrate thinks that the evidence for the prosecution does not disclose any proper subject of criminal charge against the prisoner, no examination should be made)
 (27) 14 AIR 1927 Cal 250 (257) 54 Cal 286 28 Cri L Jour 297, *Bechu Lal v Injured Lady*
 (21) 8 AIR 1921 Pat 11 (12) 22 Cri L Jour 427 6 Pat L Jour 174 *Ghulam Rasul v King Emperor*
v *Nabu*
habuala v Emperor

Note 4

- 1 (21) 8 AIR 1921 Bom 374 (375, 376) 45 Bom 672 22 Cri L Jour 17 *Fernandez v Emperor*

Note 5

- 1 (24) 11 AIR 1924 Cal 392 (393) 50 Cal 985 25 Cri L Jour 1085 *Binode Behari Nath v Emperor*
 (33) 20 AIR 1933 Sind 49 (53) 34 Cri L Jour 591 *Ibrahim v Emperor* (Per Mehta A J C)
 Also see S 117 Note 4

Note 6

- 1 (27) 14 AIR 1927 Cal 509 (510, 511) 54 Cal 532 28 Cri L Jour 407 *Krishen Doyal v Corporation of Calcutta*

Note 7

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Also see S 488, Note 2

[But see (26) 13 AIR 1926 Lah 667 (668) 27 Cri L Jour 1000 *Demello v Mrs Demello* (Section was held applicable to summons-case and therefore applicable to proceedings under S 488 — Whether person proceeded against was 'accused' was not adverted to)]

prosecution case and *before* the accused is called on for his defence¹ The examination

Note 9

- 1 (42) 29 AIR 1942 Pat 77 (78) 43 Cri L Jour 49 196 Ind Cas 582, *Munnar Pandey v Emperor*
 (40) 27 AIR 1940 Pat 295 (297) 41 Cri L Jour 267, *Feroze Kass v Emperor* (Accused is not bound to
 summon or produce his witnesses until he himself is examined)
 (38) 25 AIR 1938 Lah 543 (544, 545) 39 Cri L Jour 781 1 L R (1938) Lah 603 *Mohomed Nawaz v*
Emperor (Warrant case — Examination of accused after further cross examination of prosecution
 witnesses under S 346 but before defence is not illegal)
 (37) 24 AIR 1937 Pesh 20 (20) 38 Cri L Jour 387 *Mt Lalan v Emperor*
 (36) 23 AIR 1936 Pesh 211 (212) 38 Cri L Jour 399, *Hassan v Emperor*
 (04) 1 All L Jour 208n (208n) *In re Kollu*
 (27) 14 AIR 1927 All 475 (476) 49 All 531 28 Cri L Jour 399, *Sudaman v Emperor* (Accused should
 be questioned just before he enters on his defence)
 (28) 15 AIR 1928 All 222 (227) 30 Cri L Jour 530 *Emperor v Jhabbar Mal*
 (86) 1886 Rat 227 (228), *Queen Empress v Bava Chela*
 (91) " " " " " "
 (92) " " " " " "
 (94) " " " " " "
 (07) " " " " " " *v Savalya Atma*
 (08) 7 Cri L Jour 194 (195) 10 Bom L R 201 *Emperor v Harischandra*
 (15) 2 AIR 1915 Bom 221 (221) 16 Cri L Jour 765, *Rasappa Ningappa v Emperor*
 (24) 11 AIR 1934 Bom 334 (335) 25 Cri L Jour 1127, *Emperor v Narayana Sayanna* (It is incumbent
 on the Court to ask the accused generally whether he wishes to offer an explanation of any of the
 evidence which has been given against him and, if the Court does so that would be sufficient compliance
 with Section 342)
 (29) 16 AIR 1923 Bom 447 (448) 31 Cri L Jour 402 *Emperor v Genu Gopal*
 (81) 10 Cal L Rep 54 (55) *In the matter of Abdul Gufoor*
 (30) 31 Cri L Jour 613 (614) 124 Ind Cas 70 (Cal) *Moyzuddin Meean v Emperor*
 (19) 6 AIR 1919 Cal 696 (700) 46 Cal 411 20 Cri L Jour 24 *Ah Foong v Emperor*
 (21) 8 AIR 1921 Cal 269 (270) 23 Cri L Jour 41 *Gangadhar Goala v Reginald William Lemon Peed*
 (28) 10 AIR 1923 Cal 196 (197 198) 50 Cal 223 24 Cri L Jour 198 *Mazahur Ali v Emperor* (Pro
 visions of the section are mandatory)
 (23) 10 AIR 1923 Cal 470 (481 482) 50 Cal 518 24 Cri L Jour 218 *Promotha Vath v Emperor*
 (The accused should be examined after the re-examination of the prosecution witnesses — He cannot be
 examined before the close of the prosecution evidence or after the close of his defence evidence)
 (23) 10 AIR 1923 Cal 727 (709 730 732) 50 Cal 939 25 Cri L Jour 27 *Diba Kanta v Gour Gopal*
 (Examine in S 342 is to be taken in the ordinary English sense in which it covers all kinds of
 examination including cross-examination and re-examination and that the accused should have been
 examined again after all the witnesses for the prosecution have been examined and cross-examined)
 (25) 12 AIR 1905 Cal 361 (363 365 369) 52 Cal 522 26 Cri L Jour 631 *Emperor v Alimuddin*
Nasir
 (26) 13 AIR 1906 Cal 537 (538) 27 Cri L Jour 406, *Mahomed Rafique v Emperor*
 (28) 29 Cri L Jour 382 (383) 108 Ind Cas 381 (Lah) *Barkhan v Emperor*
 (18) 5 AIR 1918 Lah 348 (348) 1918 Pun Re No 1 Cr 19 Cri L Jour 260 *Ghulla v Emperor*
 (22) 9 AIR 1902 Lah 45 (46 47) 23 Cri L Jour 154 *Muhammad Baksh v Emperor*
 (25) 12 AIR 1925 Lah 288 (288) 27 Cri L Jour 87 *Ghaza Ali v Emperor*
 (26) 13 AIR 1926 Lah 551 (552) 7 Lah 364 27 Cri L Jour 1007 *Lachhman Singh v Emperor* (The
 provisions of S 342 (1) are mandatory)
 (26) 13 AIR 1906 Lah 684 (684 685) 27 Cri L Jour 1021, *Fazal Ahmed v Emperor* (Held, there
 was no proper compliance with provisions of S 342)
 (31) 18 AIR 1931 Lah 153 (154) 32 Cri L Jour 703, *Bham Sen v Emperor*
 (1900) 23 Mad 636 (637) 2 Weir 253 *Queen Empress v Pandara Tetan* (Examination of accused under

757, Nataraja Mudaliar v Detangations

Mudaliar (If a fresh witness for prosecution is called and examined the accused must again be
 questioned according to S 342 — Filing of written statement after the close of prosecution evidence
 is not tantamount to examination under S 342)

- (24) 11 AIR 1934 Nag 301 (304 305) 25 Cri L Jour 417, *Udhoo Patel v Emperor* (Court must
 communicate to the accused by appropriate questions everything that is alleged against him in the
 evidence for prosecution to its fullest extent — A general question is not sufficient)
 (34) 21 AIR 1934 Oudh 457 (458) 35 Cri L Jour 1417 10 Luck 235, *Onkar Singh v Emperor*

under the first part of the section does not dispense with the examination under the second part of the section² The reason is that the Code intends that the accused shall be given an opportunity of explaining any circumstances appearing in the evidence against him That must mean the *whole* of the evidence against him and any examination *before that evidence is closed, i e*, before all the prosecution witnesses have been examined, cross examined, and re examined, cannot possibly fulfil the conditions of the section,³ and is contrary to the law and unfair to the accused⁴

The word 'examination' includes cross examination and re examination and 'examined' means *completely* examined⁵ An examination of the accused, therefore, before the cross examination and re examination of the prosecution witnesses are over, is not a

- (20) 7 AIR 1920 Pat 471 (477, 478) 5 Pat L Jour 430 21 Cri L Jour 705, *Paighu Bhumiy v Emperor* (Section 342 is a general provision applicable to trial of all cases including sessions cases)
- (21) 8 AIR 1921 Pat 374 (375) 22 Cri L Jour 460, *Ramnath Rai v Emperor* (Defect due to non compliance of the provision condoned in the special circumstances of the case)
- (24) 11 AIR 1924 Pat 376 (376) 24 Cri L Jour 475, *Italdeo Dubey v Emperor*
- (25) 12 AIR 1925 Pat 723 (724, 725) 26 Cri L Jour 927, *Rameshar Singh v Emperor*
- (34) 21 AIR 1934 Pat 330 (334) 35 Cri L Jour 1322, *Shyama Charan v Emperor* (Section is mandatory but not exhaustive)
- (92 96) 1 Upp Bur Rul 144 (144, 145) *Queen Empress v Nga Tha Din*
- (04) 1 Cri L Jour 737 (737) 2 Low Bur Rul 239, *Emperor v Kyan Baw*
- (10) 11 Cri L Jour 746 (748) 8 Ind Cas 993 (Low Bur), *Emperor v Sit Ayein*
- (20) 12 AIR 1925 Rang 101 (101) 26 Cri L Jour 321, *Dana Roulter v Emperor*
- (27) 14 AIR 1927 Rang 19 (19) 4 Rang 361 27 Cri L Jour 1364 *Emperor v Nga Po Byu* (Trial without examination under S 942 is not proper even though the accused has been acquitted)
- (21) 8 AIR 1921 Sind 131 (131, 132) 16 Sind L R 201 25 Cri L Jour 191 *Dintu v Emperor* (Case exclusively triable by Sessions Court — Sessions Court examining accused under S 942 — Failure of committing Magistrate to do so is immaterial — It is however highly desirable that committing Magistrate should adhere to provisions of S 342)
- (25) 12 AIR 1925 Sind 127 (128, 129) 19 Sind L R 101 25 Cri L Jour 662, *Jhangli v Emperor* (If fresh prosecution evidence is taken accused must again be questioned generally under S 342)
- (27) 14 AIR 1927 Sind 175 (175, 176) 21 Sind L R 331 28 Cri L Jour 417, *Molan Khan v Emperor*
- (32) 19 AIR 1932 Sind 165 (166) 34 Cri L Jour 161 *Emperor v Pshan Dodo* (After examination of accused investigating officer examined — Accused should be further examined)
- [See (36) 23 AIR 1936 Pat 626 (627) 38 Cri L Jour 2 *Chandreshwar Prasad v Arunendra Mohan* (Examination under first part of section — Held in the circumstances Magistrate would have done well to examine accused before framing charge)]

Also see S 540 Note 16

- 2 (21) 8 AIR 1921 Pat 374 (375) 22 Cri L Jour 460, *Ramnath Rai v Emperor*
- 3 (25) 12 AIR 1925 Bom 170 (172) 50 Bom 42 26 Cri L Jour 690, *Emperor v Nathu Kashur-chand*
- (26) 13 AIR 1926 Lah 551 (552) 7 Lah 564 27 Cri L Jour 1007 *Lachman Singh v Emperor* (Examination in the course of prosecution evidence is insufficient)
- (20) 12 AIR 1925 Cal 574 (575) 24 Cri L Jour 943 *Hamid Ali v Sri Kissen Gosain*
- [See (26) 13 AIR 1926 Sind 1 (2) 20 Sind L R 34 26 Cri L Jour 1554 (FB) *Emperor v Nahu*]
- [See also (41) 28 AIR 1941 Lah 322 (323) 43 Cri L Jour 165 197 Ind Cas 413, *Ghaus Mohamud v Emperor* (Whole of prosecution evidence recorded before examining accused — Charges framed — Accused on being questioned by Magistrate stating that they did not wish to cross examine any of prosecut on witnesses — Accused held must be taken to have been examined at close of prosecution case — Since no prosecution witnesses were examined or cross-examined after framing of charges there was no point in examining accused again — Procedure held legal)]
- (23) 10 AIR 1923 Lah 539 (540) 25 Cri L Jour 426, *Barhali v Crown*
- 4 (14) 15 Cri L Jour 436 (438) 24 Ind Cas 172 (Ondh) *Ram Harakh v Emperor*

v Maria
i overruled

by this decision)

peror
n v Emperor

- (23) 10 AIR 1923 Cal 727 (731) 50 Cal 939 25 Cri L Jour 27, *Dibakanta Chatterjee v Gour Gopal*

sufficient compliance with the section⁶ There is a conflict of opinions as to whether an accused, who has been examined once before charge is framed, should be examined a second time, when the prosecution witnesses are *re called* under S 256 and cross examined a second time The High Courts of Calcutta⁷ Lahore⁸ and Madras⁹ and the Chief Court of Oudh¹⁰ have held that such second examination under this section is not necessary the High Court of Madras proceeding on the ground that cross examination after charge is really evidence for the *defence* and not for the *prosecution* The Allahabad High Court is also inclined to this view¹¹ The High Courts of Rangoon¹² and Patna¹³ and the Judicial Commissioners Courts of Nagpur¹⁴ and Peshawar¹⁵ have, on the other hand, held that a second examination, after the cross examination of the *re called* witnesses is necessary

When the accused *enters upon his defence*, the stage at which he must be examined passes It is no compliance with the section if the examination takes place at a later stage¹⁶ This section has therefore no application and no fresh examination of the accused is necessary where, for example, a prosecution witness is *re called* under S 257 (after the accused has entered on his defence) and cross examined¹⁷ or where additional evidence is

6 See cases cited in foot note (5)

7 (41) 45 Cal W N 328 (378), *Girulal Mondal v Emperor*

8 (38) 40 Pun L R 902 (903), *Jhandu v Emperor*

(36) 25 AIR 1938 Lab 543 (544 545) 89 Cri L Jour 781 I L R (1938) Lah 603 *Mahomed Nazam v Emperor* (Further cross examination of prosecution witnesses under S 256 is neither a part of the prosecution case nor that of the defence case)

(26) 13 AIR 1926 Lab 154 (155) 26 Cri L Jour 1418 *Fazal Karim v Emperor*

(29) 18 AIR 1929 Lab 371 (371 372) 30 Cri L Jour 625 *Emperor v Nadir*

(24) 11 AIR 1924 Lab 84 (88 89) 4 Lab 61 25 Cri L Jour 801, *P A Lyrne v Emperor*

[But see (26) 13 AIR 1926 Lab 51 (51 52) 26 Cri L Jour 1370 *Md Sadig v Emperor*]

9 (23) 10 AIR 1923 Mad 609 (609 610 611) 46 Mad 449 24 Cri L Jour 547 (FB) *Varian Routier v Emperor* (Overruling AIR 1922 Mad 512)

(23) 10 AIR 1923 Mad 694 (696) 25 Cri L Jour 7 *In re Thachroth Hydros* (Section 312 does not make it legally incumbent on Magistrate to further question the accused — It may be highly desirable that he should so question the accused if the evidence contains new matter of importance)

10 (25) 12 AIR 1925 Oudh 422 (422 423) 28 Oudh Cas 130 26 Cri L Jour 1301 *Emperor v Duj Behari* (AIR 1923 Mad 609 46 Mad 449 24 Cri L Jour 547 (FB) followed)

(30) 19 AIR 1932 Oudh 113 (113) 33 Cri L Jour 811 *Pitani v Emperor* (Relying on AIR 1925 Oudh 422 28 Oudh Cas 130 26 Cri L Jour 1301)

11 (36) 23 AIR 1936 All 319 (320) 37 Cri L Jour 710 *Md Rafiq Ahmad v Emperor* (Re-cross examination after charge forms part of defence — Even assuming that accused should be re-examined after re-cross examination of witnesses not so examining is mere irregularity)

12 (25) 12 AIR 1925 Rang 363 (364) 27 Cri L Jour 336 *Ah Khauing v Emperor*

(29) 16 AIR 1929 Rang 331 (332 333) 7 Rang 470 30 Cri L Jour 1164 *Subbaya Naidu v Emperor* [But see (25) 12 AIR 1925 Rang 258 (259 260 261) 3 Rang 139 26 Cri L Jour 1336 *Nga Hla L v Emperor*]

13 (24) 11 AIR 1924 Pat 791 (792) 25 Cri L Jour 711 *Bhokhari Singh v Emperor* (Held there was no sufficient compliance with the second part of S 342)

14 (25) 12 AIR 1925 Nag 44 (46 47) 20 Nag L R 174 26 Cri L Jour 971 (FB) *Local Government v Maria*

(24) 11 AIR 1924 Nag 51 (52) 25 Cri L Jour 713 *Krishnappa v Emperor*

(24) 11 AIR 1924 Nag 301 (304 305) 25 Cri L Jour 417, *Udho Patel v Emperor*

(28) 15 AIR 1928 Nag 162 (164) 29 Cri L Jour 475 *Mahammad Hayat Khan v Emperor*

(33) 20 AIR 1933 Nag 192 (193) 34 Cri L Jour 340 *Emperor v Anwar*

15 (36) 23 AIR 1936 Pesh 211 (212) 38 Cri L Jour 399 *Hassan v Emperor* (Examination of prosecution witnesses includes also further cross-examination after charge)

16 (40) 27 AIR 1940 Pat 295 (298) 41 Cri L Jour 267, *Feroze Kazi v Emperor* (Accused examined after the conclusion of arguments—Procedure seriously prejudices the accused and vitiates the trial)

(25) 12 AIR 1925 Cal 400 (400) 51 Cal 933 26 Cri L Jour 261, *Surendra Lal v Isamaddi*

Cas 488 Ram Charan v
d and one defence witness
thereby — Even if it be

irregularity it is curable under S 537)

17 (30) 17 AIR 1930 Cal 219 (219 - 0) 50 Cal 1137 31 Cri L Jour 406, *Oladar Pashman v Emperor*

taken or ordered to be taken by the appellate Court under S 423,¹³ or where a court witness is examined under S 540 (see S. 540, Note 16), or where witnesses are re-called under S 231 on an altered charge, after the accused has been called on for his defence,¹⁹ though in all such cases it may be *desirable* that the accused should be examined again.²⁰ See also the undermentioned case²¹

10. Examination after framing charge. — Provided the accused is examined after the prosecution evidence is completely closed, it makes no difference whether the examination takes place before or after the charge is framed.¹ Where witnesses are examined after charge, the accused must be questioned, under this section, after the close of such examination.²

11. "Evidence," meaning of. — The word "evidence" in this section means evidence *already given* at the inquiry or trial at the time of the examination.¹

12. Examination must be by the Court itself and not by others — The Court alone is authorized to examine the accused person and the counsel for the complainant or the prosecution should not be allowed to take part in the examination.¹ It is improper for a Magistrate to base his examination on detailed instructions given by the counsel for the prosecution.²

(33) 20 AIR 1833 Cal 594 (596) . 35 Cr L Jour 226, *Dharna Kanta v. Emperor*. (Arguments had commenced)

18 (40) 41 Cr L Jour 856 (359) . 1910 Nag L Jour 203 : 186 Ind Cas 660, *Nathu Singh v. Emperor*.

(28) 15 AIR 1928 Bom 200 (200) . 52 Bom 698 : 29 Cr L Jour 972, *Narayan Keshav v. Emperor*.

(35) 12 AIR 1925 Pat 414 (417, 420) . 4 Pat 488 : 26 Cr L Jour 811, *Mohiuddin v. Emperor*.

19 (22) 8 AIR 1822 Pat 393 (394) . 1 Pat 54 : 23 Cr L Jour 146, *Shamlal Kalwar v. Emperor*.

20 (36) 23 AIR 1936 Pat 438 (439) : 37 Cr L Jour 906, *Sri Krishna Prasad v. Emperor*. (When appellate Court orders additional evidence to be taken it will be quite proper to direct a further examination of the accused at the same time)

(33) 20 AIR 1833 Sind 49 (52) . 34 Cr L Jour 591, *Ibrahim v. Emperor*. (Per Ferrers, J. C)

[See also (37) 24 AIR 1887 Nag 285 (287) . 38 Cr L Jour 1058 : 1 L R (1937) Nag 541, *Shoaram Idan v. Emperor* (Where a prosecution witness is re-called and re-examined under S 540, accused should be re-examined, but when a fresh witness is called by the Court, re-examination is not necessary)]

21. (44) 81 AIR 1944 Pat 378 (381) . 23 Pat 457 : 46 Cr L Jour 438 . 218 Ind Cas 282 (DB), *Huntlay Hector Thomas v. Emperor* (Accused disclosing defence only in examination under S 342—Prosecution can be allowed to rebut defence)

Note 10

1 (40) 27 AIR 1940 Nag 283 (283) . 41 Cr L Jour 585, *Bhanwarsingh v. Sulhram Singh* (Examination before framing charge)

(3) (Observation of

1 aus Mohammad

[. v. Emperor. (Whole prosecution evidence recorded before examining accused — Charges framed subsequently — Accused on his own set out statement that)

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Note 11

1. (92) 14 All 242 (253) . 1892 All W N 83, *Queen Empress v. Hargobind Singh*

Note 12

1 (38) 25 AIR 1935 Nag 283 (285) . 40 Cr L Jour 197. ILR (1939) Nag 686, *Nana Sadoba v. Emperor*. (Where accused has not been adequately questioned the presence of his legal advisor cannot affect question of prejudice)

(30) 17 AIR 1930 Lah 166 (167) : 31 Cr L Jour 560, *Faqir Singh v. Emperor*

(86) 10 Mad 121 (123), *Queen-Empress v. Kamandu* (Complainant cannot examine accused — Per Parker, J)

2 (33) 20 AIR 1933 Nag 269 (269) . 34 Cr L Jour 1172, *Krishna Murarilal v. Emperor*.

13 De novo trial — Examination by successor — Where the Magistrate trying the case is transferred and his successor begins the trial once again, he should examine the accused once again under this section and cannot rest satisfied with the examination held by his predecessor¹ The High Court of Madras has held that a failure to examine the accused where no new matter has been introduced in the *de novo* trial does not vitiate the proceedings²

14 Nature of examination contemplated by the section — An accused person can be questioned under this section only for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him¹ The real object of the section is to enable the Judge to ascertain from the accused such explanation as he may desire to give regarding any statements made by the prosecution witnesses or to elicit from the accused how he proposes to meet such evidence as, in the opinion of the Court, implicates him² It follows that the section has no application where no evidence at all has been recorded on behalf of the prosecution³ or where no evidence implicating the accused

{ 34 } 21 AIR 1934 Nag 213 (214 215) 35 Cri L Jour 1457 31 Nag L R 49 *Hari Krishnaji v Emperor* (It can only be in exceptional circumstances that a Magistrate should find himself obliged to accept suggestions from the prosecuting counsel as to the questions to be put)

Note 13

1 (27) 14 AIR 1927 Lah 720 (720) 29 Cri L Jour 125 *Akhtar Mohammad v Emperor*
2 (35) 22 AIR 1935 Mad 22 (22) 58 Mad 427 36 Cri L Jour 307 *Marudamuthu Padayachi v Raghava Sastri*

Note 14

1 (44) 31 AIR 1944 Lah 25 (27) 1 L R (1943) Lah 477 211 Ind Cas 263 45 Cri L Jour 884 (FB), *Emperor v Dalip Singh* (In a case under S 75 1 P C as these facts do not appear in evidence before the charge is framed there is no legal warrant under S 342 for the Magistrate to question the accused with regard to them)

{ 34 } 1 L R (1943) Lah 477 211 Ind Cas 263 45 Cri L Jour 884 (FB), *Emperor v Dalip Singh* (In a case under S 75 1 P C as these facts do not appear in evidence before the charge is framed there is no legal warrant under S 342 for the Magistrate to question the accused with regard to them)

to warrant a conviction)
(02) 7 Cal W N 345 (351) *King Emperor v Bhut Nath Ghose*
(78) 1 Cal L Rep 436 (436, 437), *In the matter of Chimbash Ghose* (Court is not entitled to subject accused to severe cross-examination)

(86) 10 Mad 121 (123) *Queen Empress v Karandu*
2 (45) 82 AIR 1945 All 81 (85 86) 46 Cri L Jour 700 220 Ind Cas 437 1 L R (1945) All 508 *Mahlan v Emperor*
(42) 29 AIR 1942 Snd 102 (103) 1 L R (1942) Kar 112 43 Cri L Jour 799 202 Ind Cas 206, *Bhagwandas v Emperor*

{ 41 } 29 AIR 1941 Mad 296 (296) 40 Cri L Jour 402 193 Ind Cas 339 *In re K Krishnan* (Written statement prepared beforehand is not contemplated — What is contemplated is an explanation elicited by questions by Court)

{ 40 } 27 AIR 1940 Cal 250 (251) 41 Cri L Jour 563 *Tahsinuddin Ahmed v Emperor*
{ 80 } 6 Cal 96 (102 103) 6 Cal L Rep 501 *Hossein Buksh v Empress*
[See also (45) 32 AIR 1945 All 87 (89) 1 L R (1945) All 432 46 Cri L Jour 490 218 Ind Cas 372 *Pattan v Emperor* (It is of importance that the questions to the accused under S 342 should be put intelligently and not merely as a matter of form so that the object of the Legislature that the accused may have the opportunity of giving such explanations as he may desire may be fulfilled)]

3 (81) 13 All 345 (347 348) 1891 All W N 107 *Queen Empress v Hawthorne*
(84) 1884 All W N 106 (107) *Empress v Budha*
(83) 1883 All W N 238 (238) *Empress v Baljit*
(93) 1893 Rat 679 (680) *Queen Empress v Narayana*

{ 84 } 1884 All W N 106 (107) *Empress v Budha*
{ 83 } 1883 All W N 238 (238) *Empress v Baljit*
{ 93 } 1893 Rat 679 (680) *Queen Empress v Narayana*
(Examination at the stage of enquiry under S 20³ is bad)

{ 34 } 21 AIR 1934 Lah 96 (96) 15 Lah 60 30 Cri L Jour 1394 *Karam Din v Emperor* (Accused pleading guilty in summons-case — He can be convicted without taking prosecution evidence — In such cases this section does not apply)

{ 10 } 11 Cri L Jour 193 (193) 4 Ind Cas 1126 (Mad), *In re Salayyan*,
{ 82 } 1882 All W N 166 (166) *Empress v Kura* (The question was held to be a matter of discretion.)

has been given⁴ The reason is that no *explanation* from the accused is necessary in such cases The section has also no application where the *purpose* of the examination is something different from that specified in the section Thus an examination cannot be made of the accused for the purpose of getting from the accused the names of his witnesses, the nature of his evidence and the particulars of his defence⁵ The examination contemplated is not a *cross-examination* or an examination of inquisitorial nature⁶ for the purpose of entrapping the accused and of extracting from him damaging admissions, upon

- [See also (21) 8 AIR 1921 All 282 (283 284) 22 Cr L Jour 146 *Ganga Saran v Emperor* (In this case the complainant only had been examined but not cross-examined by the accused)]
- 4 (44) 31 AIR 1944 Pat 345 (346) 23 Pat 1 215 Ind Cas 268 46 Cr L Jour 86 (DB) *Kirti Narain Singh v Emperor* (Where in a prosecution under R 56 (4) of the Defence of India Rules there is no evidence whatever regarding the existence of a proper order under the rule with the contravention of which the accused is charged the Court would be going beyond its authority if it puts a question to the accused as to whether he contravened the provisions of R 56 of the Defence of India Rules by taking part in procession etc)
- (43) 30 AIR 1943 Mad 408 (409) 44 Cr L Jour 511 206 Ind Cas 604 *In re Grandhi Sarabhaiyya* (In such cases, the Court ought not to put any questions to accused under this section — Answers given to questions so improperly put cannot be used against accused)
- (23) 10 AIR 1903 Lah 225 (226) 4 Lah 55 24 Cr L Jour 633, *Devi Dial v Emperor*
- (16) 3 AIR 1916 Mad 407 (408) 16 Cr L Jour 693 39 Mad 770 (771) *In re Abubulla Ratullah*
- (41) 28 AIR 1941 Mad 1 (5) 42 Cr L Jour 677 195 Ind Cas 129 *Emperor v Kuppannal*
- (28) 16 AIR 1929 Nag 350 (352) 31 Cr L Jour 15 *Shamlal v Emperor*
- 5 (92) 14 All 249 (251 255) 1892 All W N 83 *Queen Empress v Hargobind Singh*
- (25) 12 AIR 1925 Nag 403 (404 405) 22 Nag L R 1 27 Cr L Jour 66 *Mahadeo Singh v Emperor*
- 6 (42) 29 AIR 1940 Sind 102 (103) 1 L R (1942) Kar 112 43 Cr L Jour 799 202 Ind Cas 200, *Bhagandas Jagannath v Emperor*
- (10) 17 AIR 1940 Cal 250 (251) 41 Cr L Jour 563 *Tahsinud Din Ahmed v Emperor*
- (40) 27 AIR 1940 Mad 379 (375) 112 (1040) Mad 514 41 Cr L Jour 858 190 Ind Cas 206 *In re Annamalai Mudali*
- Hind Khan
Hargobind Singh
v Emperor
- Jhannala v Emperor
of Dinnu Poy
- 7 (80) 6 Cal 96 (102 103) 6 Cal L Rep 521, *Hossein Dalah v Empress*
- (83) 10 Cal 140 (143) 13 Cal L Rep 358 *Hurry Churn Chuckerbutty v Empress*
- (78)
- (1863)
- (92)
- (25) *v Alimuddin Nashar*
- (10) 11 Cr L Jour 171 (174) 5 Ind Cas 602 (Lah) *Ahmad Yar Khan v Emperor* (Questions regarding the line of defence held not justified)
- (21) 8 AIR 1921 Lah 32 (33) 2 Lah 129 67 Ind Cas 340 (342) 23 Cr L Jour 388 *Uttar Din v Emperor*
- (30) 17 AIR 1930 Lah 166 (167) 31 Cr L Jour 560, *Faqir Singh v Emperor*
- (25) 12 AIR 1925 Nag 403 (404) 22 Nag L R 1 27 Cr L Jour 66 *Mahadeo Singh v Emperor*
- (22) 9 AIR 1902 Lah 456 (456) 23 Cr L Jour 431 *Nura v Emperor*
- (29) 16 AIR 1929 Lah 389 (384) 10 Lah 223 29 Cr L Jour 769 *Faqir Singh v Emperor*
- (10) 11 Cr L Jour 193 (193) 4 Ind Cas 1126 (Mad) *In re Sadayan*
- (03) 6 Oudh Cas 204 (210 211) *Sri Kishan v King Emperor* (Under the colour of an examination under S 342 an accused person should not be examined as if he were being examined as an approver)
- (04) 1 Cr L Jour 699 (700) 7 Oudh Cas 191 *Chedan v Emperor*
- (17) 4 AIR 1917 Low Bur 58 (59) 18 Cr L Jour 941 *Nga Chai Ye v Emperor*
- (16) 5 AIR 1918 Upp Bur 34 (39) 3 Upp Bur Bul 3 18 Cr L Jour 774 *Nga San Nyein v Emperor*
- (30) 17 AIR 1930 Rang 351 (353) 8 Rang 372 32 Cr L Jour 23 *U Ba Thein v Emperor*
- (25) 12 AIR 1905 Snd 116 (121) 25 Cr L Jour 761, *Topandas v Emperor*
- (30) 17 AIR 1930 Snd 225 (229 235) 31 Cr L Jour 1026 *Mohammad Yusuf v Emperor*
- (35) 22 AIR 1935 All 717 (719) 36 Cr L Jour 773 *Bhagwan Das v Emperor* (Sessions Judge should not cross examine accused to confront them with statements made to investigating officer)

which to build up the case⁷ or to supply a gap⁸ in the case for the prosecution. The Magistrate or Judge cannot thus ask the accused under this section about his previous convictions⁹. It must be noted that evidence as to previous convictions does not come on the record at this stage and so such convictions cannot form any circumstances appearing in evidence against the accused.

The section is designed to secure that the Court by the frame of its questions performs a double duty, viz —

- (a) communicates to the accused to the full extent that may be necessary in each particular case what is alleged against him in the prosecution evidence and

7 (84) 1884 All W N 106 (107) *Empress v Budha* (It is of great importance that the spirit as well as the letter of the provisions of law in this section should be appreciated)

(80) 8 Cal 96 (100) *Hossain v Empress*

(66) 3 Bom H C R Cr 51 (53) *Pej v J M Diaz*

(78) 1 Cal L Rep 436 (436 437) *In the matter of Chimbash Glase*

(1863) 1 Mad H C R 199 (200) 2 Weir 253 *Ex parte Virabuthra Coud*

(Questions to elicit

confessional statement not to be put)

(13) 14 Cr L Jour 199 (130) 18 Ind Cas 881 (Cal) *Haider Ali v Emperor*

(87) 10 Mad 29a (315) 2 Weir 361 *Queen Empress v Rang*

a (It is not fair to obtain admission of an accused

v Kissan Yess

rest

Vyasa v Mutulurpan Chetty

(Proceedings under S 476 — Accused can only be examined in accordance with provisions of S 342 — He cannot properly be asked questions merely to elicit a statement as a foundation for ordering his prosecution)

8 (41) 28 AIR 1911 Mad 1 (4) 42 Cr L Jour 677 195 Ind Cas 129 *Emperor v Kuppal*

(40) 27 AIR 1910 Cal 250 (251) 41 Cr L Jour 563 *Tahsinuddin Ahmed v Emperor*

(35) 25 AIR 1938 Mad 904 (905) 40 Cr L Jour 69 *Subba Rao v Venkatachalapa Aiyer* (The defect in the prosecution case cannot be sought to be cured by examining the accused under S 342)

(37) 24 AIR 1937 Mad 209 (210) 38 Cr L Jour 323 1LR (1937) Mad 358 *Seslapan Chetti v Emperor*

(35) 22 AIR 193, Rang 509 (210) 37 Cr L Jour 323 *Narayanan Chettyar v Emperor* (Magistrate is not entitled to question accused under S 342 so as to get admission of facts not proved in evidence — Nevertheless admission made without any intimation and with full understanding should be taken against him)

(99) 26 Cal 49 (51) *Hasan Kassar v Queen Empress*

(25) 12 AIR 192, Nag 403 (404) 23 Nag L R 1 27 Cr L Jour 66 *Maladeo Singh v Emperor*

(01) 28 Cal 689 (693) 5 Cal W N 670 *Hasan v Emperor*

(30) 17 AIR 1930 Pat 498 (499) 9 Pat 504 32 Cr L Jour 698 *Kalumanjhi v Emperor*

(04) 27 Mad 239 (240) 2 Weir 408 *Mahileen v Emperor*

(1900-01) 1 Low Pur Pul 292 (293) *Tha Zan v Crou*

(23) 10 AIR 1923 Lah 22, (226) 4 Lah 5, 24 Cr L Jour 693 *Devi Dial v Emperor*

(08) 8 Cr L Jour 67 (63) 4 Low Bur Pul 214 11 Bur L R 233 *Gaung Gyi v Emperor*

(30) 17 AIR 1930 Snd 22, (23) 31 Cr L Jour 1026 *Mid Yusuf v Emperor*

(20) 7 AIR 1920 All 274 (275) 42 All 522 22 Cr L Jour 84 *Mohan Singh v Emperor*

9 (43) 31 AIR 1914 Lah 22, (27 28) 1LR (1913) Lah 477 45 Cr L Jour 364 211 Ind Cas 223

(1B) *Emperor v Dalip Singh* (As facts relating to his previous convictions do not appear in evidence before the charge is framed there is no legal warrant under S 342 for the Magistrate to question the accused with regard to them)

(01) 28 Cal 689 (693) 5 Cal W N 670 *Hasan v Emperor*

(1900-01) 1 Low Bur Pul 8 (2) *Queen Empress v Aga Poth*

(02-03) 1 Upp Bur Pul Cr P Code 23 (23) *Aga Te v King Emperor*

(04) 1 Cr L Jour 227 (213) 24 Ind 129 5 Bom L R 603 *Emperor v Alloomiy Hussin*

(0) 2 Cr L Jour 227 (227) 11 Pat L R 31 *Aga Te v Emperor*

(b) ascertains from him what explanation or defence he wishes to put forward in respect thereof¹⁰

15 "Question him generally on the case" — As has been seen already in Note 2 it is imperative that the Court should question the accused *generally on the case* after the witnesses for the prosecution have been examined and before he is called on for his defence. There is a difference of opinion among the High Courts as to what is meant by questioning 'generally on the case'. According to one view, the word "generally" does not limit the nature of the questioning to one or more questions of a general nature relating to the case but means that the questions should *relate to the whole case* and should not be limited to particular part or parts of it, the law, therefore, intends that the *salient points* appearing in the evidence against the accused must be pointed out to him in a succinct form and he should be asked to explain them if he wishes to do so¹. It may be

10 (41) 1 Cri L Jour 854 (858) 17 C P L R 113 *Emperor v Katay Kisan*
(18) 5 AIR 1918 Nag 143 (145) 20 Cri L Jour 12, *Mt Tanu v Emperor*

Note 15

- 1 (45) 32 AIR 1945 All 87 (89) 1LR (1945) All 432 46 Cri L Jour 495 218 Ind Cas 372, *Fattan v Emperor*
- (40) 32 AIR 1945 All 81 (85) 46 Cri L Jour 750 1 LR (1945) All 508 220 Ind Cas 432 *Makkhan v Emperor*
- (42) 29 AIR 1942 Sind 102 (103) 1 LR (1942) Kar 112 43 Cri L Jour 799 202 Ind Cas 208, *Bhagandas v Emperor* (The words 'question him generally' in S 342 do not mean that the questions should be of a general nature. The questions should refer generally to the case but should relate to particular points in the case)
- (42) 29 AIR 1942 Sind 33 (37) 1 LR (1942) Kar 532 43 Cri L Jour 458 199 Ind Cas 78 (DB) *Emperor v Putiladho Shah Ibrahimshah* (Failure of Magistrate to call accused's attention to vital point and ask for explanation may vitiate conviction)
- (41) 28 AIR 1941 Oudh 517 (520) 42 Cri L Jour 758 195 1 C 630(DB) *Parmeshwar Din v Emperor*
- (83) 20 AIR 1933 P C 124 (130) 34 Cri L Jour 322 (PC) *Dwarkanath v Emperor*
- (40) 27 AIR 1940 Cal 878 (980) 41 Cri L Jour 783 *Emperor v Jit Lal*
- (37) 24 AIR 1937 Rang 83 (86) 38 Cri L Jour 524 14 Rang 668 (FB) *Emperor v U Damapala* (Murder case — Dying person denouncing accused as his assailant in presence of accused and other witnesses — Accused keeping silent — Omission of Court at trial of accused to question him as to his silence is irregularity)
- (87) 24 AIR 1937 Sind 221 (224) 38 Cri L Jour 995 31 Sind L R 470 *Khairo v Emperor* (Approver stating that deceased caused injuries to him during fight — Magistrate failing to ask explanation from accused about injuries on his body — Failure to ask explanation upon such vital point necessitates retrial of accused)
- (36) 23 AIR 1936 Nag 147 (148) *Ramseshan v Emperor* (The filing of a written statement does not abrogate the duty of the Court in this respect)
- (36) 23 AIR 1936 Oudh 405 (407) 37 Cri L Jour 955 12 Luck 261 *Mahomed Anis v Emperor* (Every piece of circumstantial evidence tending to incriminate accused should be pointedly brought to his notice)
- (25) 12 AIR 1925 Cal 361 (365 369 370) 52 Cal 522 26 Cri L Jour 631 *Emperor v Alimuddin Nasir* (Per Mukerji J. Newbould J. *contra*)
- (20) 12 AIR 1925 Cal 980 (980) 26 Cri L Jour 572 *Shamlal Singh v Emperor*
- (33) 20 AIR 1933 Oudh 305 (308) 34 Cri L Jour 568 (572) 9 Luck 1 *Sohan Lal v Emperor* (Relying upon AIR 1933 P C 124 34 Cri L Jour 322 (PC))
- (34) 21 AIR 1934 All 735 (738) 36 Cri L Jour 83, *Raghubar Dayal v Emperor*
- (12) 13 Cri L Jour 226 (233) : 14 Ind Cas 418 36 Mad 159 *In re Basrur Venkata Row* (Where a letter is to be used as genuine which is not proved the Court should ask the accused about it and put him questions respecting its significance otherwise it ought to be ignored or a favourable construction put upon it)
- (18) 5 AIR 1918 Nag 143 (145 146) 20 Cri L Jour 12 *Mt Tanu v Emperor*
- (24) 11 AIR 1924 Nag 301 (305) 25 Cri L Jour 417 *Udhao Patel v Emperor*

should be specifically asked as to what is their explanation of the doubtful passages in the more important documents)

that when a general question as to whether he wishes to say anything is asked, he will reply in the negative. If he does so, it will be no use asking further questions.² If on the other hand, it does not appear that he will refuse to answer questions, his attention must be drawn to the salient points and he should be questioned on these points.³ Merely questioning the accused generally, as to whether he has anything to say or anything to add to what he has said before the committing Magistrate is therefore, not a compliance with the section,⁴ especially in a complicated case.⁵ According to another view, a general question, "you have heard the evidence what is your defence or have you anything to say" is a sufficient compliance with the section.⁶ It was held in the undermentioned case⁷ that, according to the practice prevailing in the province of Madras putting specific questions was not necessary but a general question was enough. In *Kallam Narayana v. Emperor*.⁸ Mr Justice Reilly observed as follows:

'It is a very difficult duty and a duty which has to be performed with the greatest caution so that without the slightest flavour of cross examination without

- (30) 17 AIR 1930 Snd 225 (229) 31 Cr L Jour 1026 *Id Yusuf v Emperor* (Per Percival J C)
[See also (34) 21 AIR 1934 Oudh 151 (154) 9 Luck 546 35 Cr L Jour 915 149 Ind Cas 195 (DB), *Bhagwan Din v Emperor* (Accused not questioned as regards blood stains on his clothes — No value is to be attached to such evidence)]
- (33) 34 Cr L Jour 411 (412) 142 Ind Cas 785 (Nag) *Emperor v Daliram* (Court taking into consideration certain circumstances appearing in the prosecution evidence against the accused without drawing his attention to them in his examination under S 142 and calling upon him for an explanation — Held it was a serious error)]
- 2 (36) 23 AIR 1936 Nag 147 (148) *Rameshan v Emperor* (Accused refusing to answer beyond what was stated in written statement — Detailed examination on points against accused useless — There is no prejudice to accused if there be no detailed examination)
- 3 (25) 12 AIR 1925 Cal 361 (369) 52 Cal 522 26 Cr L Jour 631 *Emperor v Alimuddin Naskar* (Per Mukerji, J, Newbould J contra)
- 4 (45) 32 AIR 1945 All 81 (85) 1 L R (1945) All 559 46 Cr L Jour 750 220 Ind Cas 432 *Mahallan v Emperor*
- (46) 33 AIR 1946 Mad 179 (180) 1945 2 Mad L Jour 455 (456) (DD) *In re Duraiswami Koundan* (Giving a long précis of the whole prosecution evidence and asking the accused what he has to say with regard to it is an abuse of the provisions of S 342)
- (44) 31 AIR 1944 Mad 42 (43) 45 Cr L Jour 283 1 L R (1944) Mad 304 211 I C 7 (DB) *In re Shekur*
- (42) 29 AIR 1942 Sind 102 (103) 1 L R (1942) Har 112 43 Cr L Jour 799 902 Ind Cas 206 *Bhagwan das Jagannath v Emperor*
- (40) 27 AIR 1940 Mad 1 (4, 5) 41 Cr L Jour 369 *In re Kanakasabai Pillai* (Murder trial—Sessions Judge reading out to the accused précis of the evidence in one breath and asking him whether he wants to say anything — Held no sufficient compliance with the section)
- (36) 23 AIR 1936 Mad 715 (716) 33 Cr L Jour 45 59 Mad 622 *In re Sangama Naicher*
- (36) 23 AIR 1936 Mad 678 (629) 37 Cr L Jour 1107 59 Mad 629: *Chinnu v Emperor*
- (24) 11 AIR 1924 Nag 301 (305) 25 Cr L Jour 417 *Udhao Patel v Emperor*
- (25) 12 AIR 1925 Cal 980 (980) 26 Cr L Jour 572 *Shamlal Singh v Emperor*
- (31) 18 AIR 1931 Lah 153 (154) 32 Cr L Jour 708 *Bham Sen v Emperor*
- (18) 5 AIR 1918 Nag 143 (146) 20 Cr L Jour 12 *Mi Tanu v Emperor*
- (24) 11 AIR 1924 Pat 791 (792) 25 Cr L Jour 711 *Bholhari Singh v Emperor*
- (25) 12 AIR 1925 Pat 342 (345) 26 Cr L Jour 716 *Durga Ram v Emperor*
- (24) 11 AIR 1924 Rang 172 (173) 1 Rang 689 25 Cr L Jour 497, *Mig Hman v Emperor*
- (24) 11 AIR 1924 Oudh 111 (112) 24 Cr L Jour 661 *Nageswar Prasad v Emperor* (Accused stating in answer to general questions: My evidence in cross-case is correct. I have no more to say — Examination held improper)
- 5 (38) 25 AIR 1933 Nag 233 (285) 40 Cr L Jour 197 ILR (1933) Nag 696, *Nana Sadoba v Emperor*
- (30) 17 AIR 1930 Rang 114 (118) 7 Rang 621 31 Cr L Jour 337, *Maung Ba Chit v Emperor*
- 6 (26) 13 AIR 1926 Cal 424 (424) 26 Cr L Jour 1510 *Reza Muhammad v Emperor*
- (27) 14 AIR 1927 Nag 71 (71, 72) 27 Cr L Jour 181 *Wasudeo v Emperor* (Newbould J, in AIR 1925 Cal 361 52 Cal 522 26 Cr L Jour 631 followed)
- (23) 10 AIR 1923 Pat 91 (93 94) 23 Cr L Jour 333, *Panchu Choudhary v Emperor* (When accused is defended by legal practitioner lengthy examination ought not to be held)
- (25) 12 AIR 1925 Pat 339 (339) 26 Cr L Jour 632 *Ramamali Kumar v Emperor*
- 7 (27) 14 AIR 1927 Mad 613 (613 614) 28 Cr L Jour 333, *Ramaswami v Emperor*
- 8 (33) 20 AIR 1933 Mad 233 (233) 55 Mad 231 31 Cr L Jour 491

(b) ascertains from him what explanation or defence he wishes to put forward in respect thereof¹⁰

15 "Question him generally on the case" — As has been seen already in Note 2 it is imperative that the Court should question the accused *generally on the case* after the witnesses for the prosecution have been examined and before he is called on for his defence. There is a difference of opinion among the High Courts as to what is meant by questioning 'generally on the case'. According to one view, the word 'generally' does not limit the nature of the questioning to one or more questions of a general nature relating to the case but means that the questions should *relate to the whole case* and should not be limited to particular part or parts of it, the law, therefore, intends that the *salient points* appearing in the evidence against the accused must be pointed out to him in a succinct form and he should be asked to explain them if he wishes to do so¹. It may be

10 (44) 1 Cr L Jour 854 (858) 17 C P L R 113 *Emperor v Katay Kisan*

(18) 5 AIR 1918 Nag 143 (145) 20 Cr L Jour 12 *Mt Tanu v Emperor*

Note 15

1 (45) 32 AIR 1915 All 87 (89) ILR (1915) All 432 46 Cr L Jour 495 218 Ind Cas 372 *Fattan v Emperor*

(45) 32 AIR 1915 All 81 (85) 46 Cr L Jour 750 I L R (1915) All 558 220 Ind Cas 432 *Makhan v Emperor*

(49) 29 AIR 1912 Sind 102 (103) I L R (1912) Kar 112 43 Cr L Jour 799 202 Ind Cas 206, *Bhagwandas v Emperor* (The words question him generally in S 342 do not mean that the questions should be of a general nature. The questions should refer generally to the case, but should relate to particular points in the case.)

(42) 29 AIR 1912 Sind 33 (37) I L R (1911) Kar 532 43 Cr L Jour 458 199 Ind Cas 78 (D B) *Emperor v Pimladho Shah Ibrahimshah* (Failure of Magistrate to call accused's attention to vital point and ask for explanation may vitiate conviction.)

(41) 28 AIR 1911 Oudh 517 (520) 42 Cr L Jour 758 195 I C 630 (DB) *Parmeshwar Din v Emperor*

(83) 20 AIR 1938 P C 124 (130) 34 Cr L Jour 322 (PC) *Dwarkanath v Emperor*

(40) 27 AIR 1940 Cal 378 (380) 41 Cr L Jour 783 *Emperor v Jit Lal*

(87) 24 AIR 1937 Rang 83 (86) 38 Cr L Jour 524 14 Rang 666 (FB) *Emperor v U Damapala* (Murder case — Dying person denouncing accused as his assailant in presence of accused and other witnesses — Accused keeping silent — Omission of Court at trial of accused to question him as to his silence is irregularity.)

(97) 24 AIR 1937 Sind 221 (224) 38 Cr L Jour 995 31 Sind L R 470, *Khairo v Emperor* (Approver stating that deceased caused injuries to him during fight — Magistrate failing to ask explanation from accused about injuries on his body — Failure to ask explanation upon such vital point necessitates retrial of accused.)

(36) 23 AIR 1936 Nag 147 (148) *Ramseshan v Emperor* (The filing of a written statement does not abrogate the duty of the Court in this respect.)

(36) 23 AIR 1936 Oudh 405 (407) 37 Cr L Jour 955 12 Luck 261 *Mahomed Anis v Emperor* (Every piece of circumstantial evidence tending to incriminate accused should be pointedly brought to his notice.)

(25) 12 AIR 1925 Cal 361 (365 369 370) 52 Cal 522 26 Cr L Jour 631, *Emperor v Alimuddin Nasir* (Per Mukerji J Newbould J *contra*.)

(25) 12 AIR 1925 Cal 980 (980) 26 Cr L Jour 572 *Shamlal Singh v Emperor*

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letter is to be used as genuine which is not proved the Court should ask the accused about it and put him questions respecting its significance otherwise it ought to be ignored or a favourable construction put upon it.)

(18) 5 AIR 1918 Nag 143 (145 146) 20 Cr L Jour 12 *Mt Tanu v Emperor*

(24) 11 AIR 1924 Nag 301 (305) 25 Cr L Jour 417 *Udhas Patel v Emperor*

(18) 5 AIR 1918 Upp Bar 34 (39) 3 Upp Bar Rol 3 18 Cr L Jour 774, *Nga San Nyein v Emperor*

(24) 11 AIR 1924 Rang 172 (173) 1 Rang 689 25 Cr L Jour 487, *Maung Hman v Emperor*

(30) 17 AIR 1930 Rang 114 (118 119) 7 Rang 821 31 Cr L Jour 387 *Maung Ba Chit v Emperor* (Prosecution mainly based on contents of documents capable of more than one explanation — Accused should be specifically asked as to what is their explanation of the doubtful passages in the more important documents.)

that when a general question, as to whether he wishes to say anything is asked, he will reply in the negative. If he does so, it will be no use asking further questions². If on the other hand, it does not appear that he will refuse to answer questions, his attention must be drawn to the salient points and he should be questioned on these points³. Merely questioning the accused generally, as to whether he has anything to say or anything to add to what he has said before the committing Magistrate is, therefore, not a compliance with the section⁴ especially in a complicated case⁵. According to another view, a general question, 'you have heard the evidence what is your defence, or 'have you anything to say' is a sufficient compliance with the section⁶. It was held in the undermentioned case⁷ that, according to the practice prevailing in the province of Madras putting specific questions was not necessary but a general question was enough. In *Kallam Narayana v Emperor*⁸ Mr Justice Reilly observed as follows

'It is a very difficult duty and a duty which has to be performed with the greatest caution so that without the slightest flavour of cross examination without

- (30) 17 AIR 1930 Sind 225 (229) 31 Cr L Jour 1026 *Md Yusuf v Emperor* (Per Percival J C)
[See also (34) 21 AIR 1934 Oudh 151 (154) 9 Luck 546 35 Cr L Jour 915 149 Ind Cas 195 (DB),
Bhagwan Din v Emperor (Accused not questioned as regards blood stains on his clothes — No value is to be attached to such evidence)
(83) 34 Cr L Jour 411 (412) 142 Ind Cas 785 (Bag) *Emperor v Baliram* (Court taking into consideration certain circumstances appearing in the prosecution evidence against the accused without drawing his attention to them in his examination under S 142 and calling upon him for an explanation — Held it was a serious error)]
2 (36) 23 AIR 1936 Nag 147 (148) *Rameshan v Emperor* (Accused refusing to answer beyond what was stated in written statement — Detailed examination on points against accused useless — There is no prejudice to accused if there be no detailed examination)
3 (25) 12 AIR 1925 Cal 361 (369) 52 Cal 522 26 Cr L Jour 631 *Emperor v Alimuddin Naskar* (Per Mukerji J, Newbould J contra)
4 (45) 32 AIR 1945 All 61 (65) 1 L R (1945) All 558 46 Cr L Jour 700 220 Ind Cas 432 *Makhhan v Emperor*

das Jagannath v Emperor

- (40) 27 AIR 1940 Mad 1 (4 5) 41 Cr L Jour 369 *In re Kanakasabai Pillai* (Murder trial—Sessions Judge reading out to the accused précis of the evidence in one breath and asking him whether he wants to say anything — Held no sufficient compliance with the section)
(36) 23 AIR 1936 Mad 715 (716) 38 Cr L Jour 45 59 Mad 622 *In re Sangama Nascher*
(36) 23 AIR 1936 Mad 628 (629) 37 Cr L Jour 1107 59 Mad 629a *Chinnu v Emperor*
(24) 11 AIR 1924 Nag 301 (305) 25 Cr L Jour 417 *Udhao Patel v Emperor*
(25) 12 AIR 1925 Cal 980 (980) 26 Cr L Jour 572 *Shamlal Singh v Emperor*
(31) 18 AIR 1931 Lah 153 (154) 32 Cr L Jour 708 *Bhim Sen v Emperor*
(18) 5 AIR 1918 Nag 143 (146) 20 Cr L Jour 12 *Mt Tanu v Emperor*
(24) 11 AIR 1924 Pat 791 (792) 25 Cr L Jour 711 *Bholhari Singh v Emperor*
(25) 12 AIR 1925 Pat 342 (345) 26 Cr L Jour 716 *Durga Ram v Emperor*
(24) 11 AIR 1924 Rang 172 (173) 1 Rang 689 25 Cr L Jour 497, *Mg Hman v Emperor*
(24) 11 AIR 1924 Oudh 111 (112) 24 Cr L Jour 661 *Ageshwar Prasad v Emperor* (Accused stating in answer to general question 'My evidence in cross-case is correct I have no more to say' — Examination held improper)
5 (38) 25 AIR 1939 Nag 283 (285) 40 Cr L Jour 197 11 R (1939) Nag 686, *Nana Sadoba v Emperor*.
(30) 17 AIR 1930 Rang 114 (116) 7 Rang 821 31 Cr L Jour 337, *Maung Ba Chit v Emperor*
6 (26) 13 AIR 1926 Cal 424 (424) 26 Cr L Jour 1510 *Rez Muhammad v Emperor*
(27) 14 AIR 1927 Nag 71 (71 72) 27 Cr L Jour 181 *Wasudeo v Emperor* (Newbould J, in AIR 1925 Cal 361 52 Cal 522 26 Cr L Jour 631 followed)
(23) 10 AIR 1923 Pat 91 (93 94) 23 Cr L Jour 233, *Panchu Choudhry v Emperor* (When accused is defended by legal practitioner, lengthy examination ought not to be held)
(25) 12 AIR 1925 Pat 389 (389) 25 Cr L Jour 632 *Ramamali Kumar v Emperor*
7 (27) 14 AIR 1927 Mad 613 (613, 614) 23 Cr L Jour 333 *Ramaswami v Emperor*
8 (33) 20 AIR 1933 Mad 233 (233) 56 Mad 331 - 31 Cr L Jour 441

asking anything which may lead the accused to incriminate himself, the important points against him may be brought to his notice and he may have an opportunity of explaining them. The task is such a difficult one that, when the accused is represented by counsel, it is often in his interest that the Judge should *formally* comply with the section by asking a general question and then leave the accused's counsel to offer explanations on his behalf in the way most favourable and least dangerous to him."

According to a third view, the question as to what must be the nature of the questions to be put depends upon the circumstances of each case, it would however be a sufficient compliance with the section if the accused is given an *opportunity* of explaining the circumstances appearing against him, it is neither necessary nor desirable to examine the accused in detail so as to enable the prosecution to take advantage thereof⁹

In *Dwarkanath Varma v Emperor*,¹⁰ Lord Atkin observed as follows

"The other question is a general question whether there was anything else he desired to say about the charges or the evidence. The learned Chief Justice told the jury that the absence of blood in the body cavity was a vital point. If so, it is plain that under s 342 of the Code, it was the duty of the examining Judge to call the accused's attention to this point and ask for an explanation."

The first of the three views set out above must, in the light of the Privy Council decision, be accepted as correct. After the above Privy Council decision, the Madras High Court adopted this view in the cases cited below¹¹. But in the undermentioned decision¹² of the same High Court the Privy Council decision was distinguished and it was held that where the accused has shown by his replies that he has understood all the points against him and has attempted to explain them, the failure of the Judge to put to him all the items of evidence leading to the inference of his guilt is not material.

A long composite question should not be asked, but separate questions on the various points should be put and the explanation of the accused asked¹³. The High Court of Madras has, in the undermentioned case,¹⁴ deprecated the habit, cultivated by the Courts since the Privy Council decision, of summarising the whole evidence and asking the accused what he has to say with regard to it.

16 "Without previously warning the accused" — The section does not require, as in the case of statements taken under s 164, that the accused shall be *warned* of the consequences of the statements he makes¹. It has however, been held in the

9 (40) 27 AIR 1940 Mad 372 (375) 1 L R (1940) Mad 514 41 Cr L Jour 853 190 Ind Cas 206 *In re Annamalai Mudali* (When it is clear that the accused has understood all the points against him and has tried to explain them, the failure to put to the accused all the items of evidence leading to the inference of his guilt is immaterial)

(25) 12 AIR 1925 Pat 713 (716) 4 Pat 459 26 Cr L Jour 951 *Mid Nasiruddin v Emperor*

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(25) 12 AIR 1925 Pat 713 (716) 4 Pat 459 26 Cr L Jour 951 *Mid Nasiruddin v Emperor*

12 (40) 27 AIR 1940 Mad 372 (375) 1 L R (1940) Mad 514 41 Cr L Jour 853 190 Ind Cas 206. *In re Annamalai Mudali*

13 *In re Annamalai Mudali*

14 *In re Annamalai Mudali*

15 *In re Annamalai Mudali*

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17 *In re Annamalai Mudali*

18 *In re Annamalai Mudali*

19 *In re Annamalai Mudali*

20 *In re Annamalai Mudali*

21 *In re Annamalai Mudali*

22 *In re Annamalai Mudali*

undermentioned case* that it is extremely desirable that the Magistrate should follow the practice in England and warn the accused that they are not obliged to answer unless they desire to do so

17 Examination of pleader of accused — There is a conflict of opinions as to whether this section enables the Court to examine the pleader of the accused in cases where the personal attendance of the accused has been dispensed with under S 205. According to the High Courts of Allahabad,¹ Calcutta² and Madras³ the examination must be of the accused *in person* who should be directed under sub s (2) of S 205 to be present for the purpose. The High Courts of Bombay⁴ and Rangoon⁵ and the Judicial Commissioner's Court of Sind⁶ have, on the other hand held that the Magistrate is not bound to examine the accused personally in such cases

18 Written statement of accused, if sufficient — Under the Code of 1861 where the examination of the accused was in the *discretion* of the Court it was held that where a written defence was given it was not necessary for the Magistrate to examine the accused orally.¹ The latter part of the present section is however as has been seen already mandatory and the accused is not entitled as of right to put in a written statement in lieu of answers which he may give to questions put to him under this section.² It has been generally held that this section contemplates an *oral* examination³ that a written statement of defence cannot be allowed to take the place of the examination which this section imperatively orders the Court to make⁴ and that the practice of taking such

2 (76) 13 AIR 1926 Mad 570 (572-573) 27 Cri L Jour 311 *In re Kannammal*

Note 17

1 (34) 21 AIR 1934 All 693 (694) 35 Cri L Jour 879 *Ishwar Das v Bhagat Das*

2 (45) 32 AIR 1945 Cal 482 (482-483) (DB) *Adeluddin v Emperor*

(26) 18 AIR 1926 Cal 430 (431) 26 Cri L Jour 1032 *Messer Depari v Emperor*

3 (21) 8 AIR 1921 Mad 679 (680) 23 Cri L Jour 697 *In re Nasnamalai Konan*

4 (26) 13 A I R 1926 Bom 218 (220) 27 Cri L Jour 440 50 Bom 210 *Dorabshah Domanji v Emperor*

(34) 21 AIR 1934 Bom 212 (212) 35 Cri L Jour 1035 *Emperor v Jaffar Cassim* (Section 342 must be read subject to provisions of S 205—Magistrate permitting accused to appear by pleader under S 205—He is not bound to question accused personally)

5 (27) 14 AIR 1927 Rang 73 (73) 4 Rang 506 29 Cri L Jour 226 *Maung Po Nyem v Haka Singh* (Personal attendance of accused under S 205 dispensed with—Personal attendance should not be insisted on for examination under S 342)

6 (13) 14 Cri L Jour 272 (272) 19 Ind Cas 544 6 Sind L R 206 *Emperor v Mt Jamal Khatun* (Do)

Note 18

1 (71) 16 Suth W R Cr 53 (53) *Dula Mundul v Kally Shaha*

2 (29) 16 AIR 1929 Bom 296 (300) 53 Bom 479 31 Cri L Jour 61 *Emperor v C E Ping*

(17) 4 AIR 1917 Cal 697 (697) 17 Cri L Jour 9, *Deputy Legal Remembrancer Belar & Orissa v Matuk diars Singh*

(16) 3 AIR 1916 Cal 633 (641) 16 Cri L Jour 721 *Emperor v D Vyendra Chandra* (Putting in of a written statement instead of answering questions is particularly to be deplored)

3 (31) 18 A I R 1931 Mad 241 (242) 32 Cri L Jour 757, *Nataraja Mudaliar v Delasigamona Mudaliar*

4 (42) 29 A I R 1912 Sind 102 (103) 1 L R (1912) Kar 112 43 Cri L Jour 799 202 Ind Cas 206 *Bhagchandras v Emperor* (The practice of filing a written statement should not be encouraged as it tends to defeat the object of the section)

(41) 29 A I R 1941 Mad 296 (297) 191 Ind Cas 339 42 Cri L Jour 402 *In re K Krishnan* (Such written statement does not come within S 297, as it cannot be said to be a document containing the examination of the accused duly recorded by or before the committing Magistrate and therefore it cannot be tendered in evidence)

(16) 23 AIR 1936 Nag 147 (148) *Rameshan v Emperor* (The filing of written statement does not abrogate the duty of the Court to put to the accused various points against him)

(33) 1903 All W N 1 (1) *Emperor v Anusuya*

(33) 20 AIR 1933 All 690 (695) 31 Cri L Jour 967 55 All 1010 *Jahabala v Emperor*

(25) 12 AIR 1925 Pat 378 (380-381) 4 Pat 231 26 Cri L Jour 232 *Plagvat Singh v Emperor* (But when the accused refuses to answer a question, the Magistrate is not bound to go on asking questions especially when a written statement is put in at the time meeting the points of the prosecution.)

statements is pernicious⁵ and entirely irresponsible.⁶ A written statement drafted by the accused's legal adviser, for instance, can never have the same value as answers coming directly from the accused's mouth.⁷ In the undermentioned cases,⁸ however, it was held that the filing of a written statement of defence dispensed with the necessity to examine the accused orally under this section. It is submitted that this view is not correct and is against the general trend of opinion.

The immunity under sub s (9) of the section does not extend to a written statement filed by the accused. See also Note 12 on Section 256.

19 Examination by committing Magistrate — A committing Magistrate is bound before commitment to examine the accused, as required by this section. The words 'and he has (if necessary) examined the accused' in S 209 of the Code cannot be taken as giving a discretion to the Magistrate who intends to commit, to examine the accused.¹ The Calcutta High Court, however, has in the undermentioned case,² held that the mandatory provisions of this section apply only to the Sessions Court in such cases, as it is in that Court that the accused is called on for his defence. A similar view has also been taken by the Judicial Commissioner's Court of Sind.³ See also Section 287 and Notes thereon.

- (21) 6 AIR 1921 Pat 674 (375) 22 Cr L Jour 460 *Ramnath Rao v Emperor*
 (21) 6 AIR 1921 Pat 415 (416) 22 Cr L Jour 442, *Moinuddin v Emperor*
 (22) 9 AIR 1922 Pat 5 (6) 23 Cr L Jour 114 *Balkesar Singh v Emperor*.
 (34) 91 AIR 1934 Nag 213 (214 215) 35 Cr L Jour 1457 31 Nag L R 49 *Hari Krishnaji v Emperor*.
 (24) 11 AIR 1924 Nag 301 (306) 25 Cr L Jour 417 *Udhao Patel v Emperor*
 (16) 8 AIR 1916 Cal 189 (214) 4^o Cal 957 16 Cr L Jour 497, *Amritlal Hazra v Emperor*
 (20) 7 AIR 1920 Pat 471 (479) 5 Pat L Jour 430 21 Cr L Jour 705, *Raghu Bhumsj v Emperor*
 (21) 22 Cr L Jour 276 (279) 60 Ind Cas 676 (679) (Lab) *Harnama Singh v Emperor*
 (21) 6 AIR 1921 Mad 679 (680) 23 Cr L Jour 697 *In re Nainamalai Xonan*
 [See (26) 13 AIR 1926 Pat 566 (567 568) 27 Cr L Jour 1041, *Emperor v Zakir Haider* (There is no provision in law for the accused filing a written statement in a sessions trial)]
 5 (36) 23 AIR 1936 Oudh 405 (407) 37 Cr L Jour 955 12 Luck 261 *Mahomed Anis v Emperor*
 (Practice of taking written statements instead of examining the accused condemned.)
 (16) 6 AIR 1916 Cal 633 (641) 16 Cr L Jour 724 *Emperor v Dwijendra Chandra*
 6 (17) 4 AIR 1917 Cal 687 (690) 17 Cr L Jour 9 *Deputy Legal Remembrancer Behar and Orissa v Matukdhari Singh*
 7 (36) 23 AIR 1936 Oudh 405 (407) 37 Cr L Jour 955 12 Luck 261 *Mahomed Anis v Emperor*
 (Written statements filed on behalf of accused persons are evolved out of the brains of the counsel for the accused helped by the parroters and friends of the accused and seldom represent the ideas of the accused or the facts as known to the accused.)
 (36) 23 AIR 1936 Pat 626 (627) 38 Cr L Jour 2 *Chandreshwar Prasad v Arunendra Mohan*
 (16) 3 AIR 1916 Cal 633 (641) 16 Cr L Jour 724 *Emperor v Dwijendra Chandra*
 8 (44) 31 A 1 R 1944 Pat 67 (72) 22 Pat 681 45 Cr L Jour 624 212 Ind Cas 298 (DB), *Satyamurayan v Emperor*
 (30) 31 Cr L Jour 171 (172) 120 Ind Cas 753 (Pat) *Gurdial Singh v Biola Halwai*
 (25) 12 AIR 1925 Pat 414 (417) 4 Pat 488 26 Cr L Jour 811 *Satyad Mohuddin v Emperor*
 (22) 9 A 1 R 1920 Pat 388 (389) 23 Cr L Jour 703 1 Pat 31, *Mr Tilaian v Emperor* (Filing of written statement showed that accused was not prejudiced.)
 [See also (37) 24 AIR 1937 Nag 67 (68) 38 Cr L Jour 354 1 L R (1937) Nag 228 *Budhulal v Emperor* (Accused under S 342 can only be examined if he is willing to answer questions put by Court—Accused declining to make statement but preferring to file written statement controverting all the points in prosecution evidence—There is no violation of S 342)]

Note 19

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20. Examination of accused in sessions trials — The section is a general provision applicable to trials in all cases including sessions cases, and even where the accused has been examined generally by the committing Magistrate, the Sessions Judge is bound to examine the accused in the trial.¹ It makes a considerable difference to listeners, like the jury, whether a statement before the Magistrate is read out in Court, or whether an accused person is carefully examined in the presence of the jury and his answers and demeanour noted by the jury.² A contrary view has, however, been taken in the under-mentioned case,³ based upon the interpretation of the words, 'if any' used in s 289 of the Code. It is submitted that this view is not correct. The words 'if any' in s 289 should not be construed as conflicting with this section. Section 259 must be taken to contemplate the case in which there are no circumstances for the accused to explain.⁴ See also Section 289, Note 3.

21. Refusal to answer — Sub-section (2) — An accused person is entitled to refuse to answer questions put to him under this section,¹ and when he does so the Court is not bound to go on questioning him.² Nor should the Court hold inquisitorial proceedings against him in such a case.³

Where an accused declines to answer questions put to him under this section, the fact should be noted on the record.⁴

Although an accused is entitled to refuse to answer, such refusal may often be attended with great risk to him, inasmuch as the Court and the jury, if any, may draw such inference against him from such refusal as it thinks just.⁵ An innocent man cannot well injure himself by a truthful explanation of the circumstances appearing against him.⁶

Note 20

- 1 (20) 7 AIR 1920 Pat 471 (177 478) 5 Pat L Jour 430 21 Cri L Jour 705, *Raghu Bhumsj v Emperor*
- (26) 13 AIR 1926 Oudh 57 (59) 26 Cri L Jour 1576 *Emperor v Mahammad Shafi*
- (03-04) 2 Low Bur Rul 115 (116, 117), *Nga Thet U v King Emperor*
- (27) 14 AIR 1927 Rang 19 (19) 4 Rang 361 27 Cri L Jour 1364 *Emperor v Nga Po Byu*
- (07) 6 Cri L Jour 74 (75) 9 Bom L R 730, *Emperor v Raju Ahilaji* (It has however been observed that the proposition was open to serious doubt)
- 2 (26) 13 AIR 1926 Oudh 57 (58) 26 Cri L Jour 1576 *Emperor v Mahammad Shafi*
- 3 (09) 10 Cri L Jour 325 (339) 3 Ind Cas 625 (Cal), *Khudiram Bose v Emperor*
- 4 (03-04) 2 Low Bur Rul 115 (116), *Nga Thet U v King Emperor*

Note 21

- 1 (31) 18 AIR 1931 Lah 178 (181 182) 32 Cri L Jour 634, *Sher Jang v Emperor*
[See also (06) 3 Cri L Jour 134 (135) (Lah), *Mr A v Emperor* (A counsel may legally advise the accused not to answer)]
- 2 (44) 31 AIR 1944 Nag 192 (195) 11LR (1944) Nag 589 46 Cri L Jour 80 215 Ind Cas 265 (DB), *Provincial Government C P & Berar v Gomaji Badri* (Accused making no answer except that he would file written statement—No violation of requirements of S 342)
- (44) 31 AIR 1944 1st 67 (72) 22 Pat 681 45 Cri L Jour 624 212 Ind Cas 298 (DB) *Satyanarayan v Emperor* (If the accused having heard the prosecution evidence and on being questioned by the Court under S 342 in general terms indicates his intention of leaving his defence to his legal adviser by filing a written statement the Court is neither bound nor entitled to question him further)
- (37) 24 AIR 1937 Nag 67 (67 68) 38 Cri L Jour 354 11LR (1937) Nag 222, *Budhulal v Emperor* (Accused declining to answer questions and preferring to put in written statement — No examination under S 342 is possible)
- (36) 23 AIR 1936 Nag 147 (148), *Rameshan v Emperor*.
- (25) 12 AIR 1925 Pat 378 (381) 4 Pat 231 26 Cri L Jour 932, *Bhagrat Singh v Emperor* (Especially where a written statement has been put in)
- 3 (50) 17 AIR 1930 Cal 209 (212) 57 Cal 1074 31 Cri L Jour 903, *Prafula Kumar v Emperor*
- 4 (71) 15 S. & W. R Cr 16 (17) *In re Gopal Hajjam*
- 5 (40) 27 AIR 1940 Cal 250 (251) 41 Cri L Jour 563, *Talvauddeen Ahmad v Emperor*
- (16) 3 AIR 1916 Cal 633 (641) 16 Cri L Jour 724, *Emperor v Dajendra Chandra*.
- (31) 18 AIR 1931 Lah 178 (181, 182) 32 Cri L Jour 634 *Sher Jang v Emperor* (He cannot defeat the ends of justice by refusing to answer)
- 6 (16) 3 AIR 1916 Cal 524 (525) 16 Cri L Jour 576, *Emperor v Nagerdra Nath*.

An accused person does not render himself liable to punishment by refusing to answer questions put to him⁷

As to whether an accused person can refuse to sign the record of his examination under S 364 and the effect of such refusal, see S 364, Note 10

The fact that the accused declines to make a statement will not necessarily indicate that he would not like to answer specific questions⁸

22 Giving false answers—Sub-section (2) — An accused person does not, by giving false answers to the questions put to him under this section, render himself liable to punishment. The resort to a false defence will, however, affect the credit to be attached to the case of the accused and raise an inference against him, though this will not relieve the Court from the task of attempting to arrive at a sound conclusion from the whole evidence, inasmuch as notwithstanding his false defence, the accused may be innocent of the offence charged¹

23 Answers given to be taken into consideration — Where facts are put forward on behalf of the prosecution, which unless explained, justify an inference of guilt being drawn against the accused, it is both lawful and proper for the Court to consider the explanation of those facts, which the accused puts forward in his defence¹. In cases of circumstantial evidence the Court should always take the explanation of the accused into consideration². The burden of proving an exception under the Penal Code is on the accused³

7 (99) 1 Bom L R 435 (436), *Queen Empress v Jayappa Nagappa* (Same rule applies to his examination by a police patrol)

8 (80) 17 AIR 1930 Cal 209 (212) 57 Cal 1074 31 Cri L Jour 903 *Pranfulla Kumar v Emperor*

Note 22

1 See (68) 1868 Pun Re No 22 Cr p 52 (65) *Jehangir Khan v Crown*

(90) 1890 Pun Re No 21 Cr p 47 (49), *Empress v Harjao Rai*

[See also (21) 8 AIR 1921 Lah 89 (90) 22 Cri L Jour 595 *Harj Ram v Emperor* (No inference as to guilt of accused can be necessarily drawn from an erroneous or a false statement made by him)]

Note 23

1 (16) 3 AIR 1916 All 63 (64) 17 Cri L Jour 23 *Abdul Aziz v Emperor*

(20) 7 AIR 1920 All 72 (73 74) 21 Cri L Jour 410 *Jagdeo Pershad v Emperor*

[See (43) 80 AIR 1943 Mad 408 (409) 44 Cri L Jour 541 206 Ind Cas 604 *Sarabhaiyya v Emperor* (If a question is properly put to an accused person and he chooses to make a statement which inculpates himself there is no reason why his answer should not be taken into account because that answer is not strictly necessary for the explaining away of the circumstances appearing against him. His admission would be evidence against him)]

(13) 5 AIR 1918 Cal 314 (315) 19 Cri L Jour 81, *Asiraf Ali v Emperor*]

2 (26) 13 AIR 1926 Bom 71 (72) 49 Bom 878 27 Cri L Jour 114 *Emperor v Abdul Gani*

3. (44) 31 AIR 1944 Lah 97 (101) 45 Cri L Jour 634 212 Ind Cas 440 (DB) *Emperor v Musaffar Husain* (Right of self defence)

(37) 1937 Mad W N 557 (561) (FB) *Public Prosecutor v Subramania Odayar* (Evidence establishing accused's guilt—Accused not attempting to prove exceptions—Acquittal is wrong)

(14) 1 AIR 1914 Cal 532 (533) 15 Cri L Jour 276 *Ram Nevas v Emperor*

(27) 14 AIR 1927 Cal 324 (326) 28 Cri L Jour 334 *Adam Ali v Emperor* (Onus to establish circumstances justifying exercise of right of private defence is on the accused)

369 *Muhammad Gul v Tasley Karim*

ngress

r Klan v Emperor (Grave and sudden

provocation)

(24) 11 AIR 1924 Lah 733 (734) 25 Cri L Jour 1005 *Kalar Singh v Emperor* (Do)

(25) 12 AIR 1925 Lah 399 (400) 6 Lah 171 27 Cri L Jour 433 *Rajha v Emperor* (Do)

(27) 14 AIR 1927 Lah 786 (787) 28 Cri L Jour 838 *Hazura Singh v Emperor* (Right of private defence)

(15) 2 AIR 1915 Mad 250 (250) 15 Cri L Jour 447, *In re Nariss Peddi* (Do)

(12) 13 Cri L Jour 470 (471) 15 Ind Cas 310 (Mad) *Veerana Nandan v Emperor*

(33) 34 Cri L Jour 401 (406) 142 Ind Cas 741 (Nag) *Sileman v Emperor*

(29) 15 AIR 1925 Nag 59 (62) 28 Cri L Jour 996 *Surajmal v Ramnat*

and in such cases, the circumstances, with his statement, may be sufficient to establish the exception in his favour⁴

The proof of a case against the accused must depend, not on the absence of an explanation on his part, but upon the positive affirmative evidence of his guilt given by the prosecution⁵ Where, however, the prosecution evidence *prima facie* establishes his guilt or involves him in considerable suspicion, his absence of explanation may give rise to an inference against him⁶ But when the prosecution evidence is entirely untrustworthy it is not open to the Court to rely upon the admissions of the accused made in a statement under this section and to base a conviction thereon⁷ But the Chief Court of Sind has held that if the statement of the accused amounts to a confession and it is true and voluntary, it is sufficient for a conviction even though the prosecution evidence as to his guilt is totally disbelieved⁸

The answers given can only be 'taken into consideration' in the inquiry or trial in which they are given They cannot be allowed to fill up a gap in the prosecution evidence the prosecution must make out its case by evidence⁹ Thus, where in a prosecution for defamation, no evidence was let in to prove publication it was held that the admission of publication, made by the accused in his statement under this section was not sufficient to fill up the gap in the prosecution evidence¹⁰ Similarly, in a prosecution for murder, where

(33) 20 AIR 1933 Rang 142 (143) 34 Cri L Jour 783 *Nga Ba Shin v Emperor*

(29) 16 AIR 1929 Sind 90 (92) 23 Sind L R 216 30 Cri L Jour 543 *Allahbuz Khan v Emperor*

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Emperor]

Also see S 271 Note 9

4 (27) 14 AIR 1927 All 119 (119) 27 Cri L Jour 139 *Mangalia v Emperor*

5 (24) 11 AIR 1924 Cal 257 (253) 25 Cri L Jour 817 (FB) *Emperor v Barendra Kumar*

6 (18) 5 AIR 1918 Mad 111 (115) 19 Cri L Jour 189 *E D Smith v Emperor* (Where the only alternative theory to guilt of accused is a remote possibility, which if correct he is in a position to explain the absence of any explanation must be considered in determining whether the possibility may be disregarded or taken into account)

(19) 6 AIR 1919 Oudh 160 (174) 20 Cri L Jour 465 *Sushil Chand a v Emperor*

(14) 1 AIR 1914 Sind 111 (112) 7 Sind L R 109 15 Cri L Jour 497 *Iskhaning Sawansing v Emperor* (Force of suspicious circumstances is augmented in absence of explanation)

[See (24) 11 AIR 1924 Cal 257 (283) 25 Cri L Jour 817 (FB) *Emperor v Darendra Kumar*]

7 (42) 29 AIR 1942 Oudh 321 (322) 17 Luck 616 43 Cri L Jour 657 901 I C 391 *Phillips v Emperor*

(37) 1937 Mad W N 569 (570) *Krishnayya v Emperor*

8

(44) 31 AIR 1944 Sind 137 (140 141) 11R (1914) Kar 114 46 Cri L Jour 19 215 Ind Cas 172 (DB) *Parand v Emperor* (The words taken into consideration in S 342 (3) are very wide Whatever the effect may be under S 30 Evidence Act with regard to accused persons other than the maker of

(16) 3 AIR 1916 Mad 851 (853) 39 Mad 449 16 Cri L Jour 294 *Annari Mutlirajan v Emperor*

10 (34) 25 AIR 1938 Mad 904 (905) 40 Cri L Jour 63, *Subba Rao v Venkateswaraiah Aiyar*

(23) 10 AIR 1923 Lah 225 (226) 4 Lah 55 24 Cri L Jour 693, *Devi Dasi v Emperor*

(04) 1 Cri L Jour 566 (568) 2 Weir 403 27 Mal 233 (10) *Mohddeen Abdul Kadir v Emperor*

(11) 12 Cri L Jour 555 (587) 12 Ind Cas 961 36 Mad 457 G G Jeyamath v F S Vas

[But see (35) 22 AIR 1933 Lard 509 (510 511) 37 Cri L Jour 324 *Narasimha Chetti ar v Emperor* (Accused admitted in his examination of publication of defamatory letter — Adm + on not

the prosecution evidence is not sufficient to connect the accused with the murder, the gap cannot be filled up by an admission made by the accused in his examination under this section¹¹ The Lahore High Court has in the undermentioned case¹² expressed a doubt whether the same principle would apply to a written statement lodged by the accused of his own accord

Where the answers given satisfactorily explain the prosecution evidence there can be no conviction if they do not rebut the prosecution evidence the Court will convict, but in any case the Court cannot supplement the prosecution evidence by selecting only the passages which might corroborate the prosecution evidence, rejecting passages exonerating the accused the *entire statement* should be considered¹³

Under the Code of 1872 the statement of an accused person could be used only as *against* him Under the corresponding section of the Code of 1892, as well as under the present section it can be used *for or against* him¹⁴ in the same case or in a subsequent trial for a different offence¹⁵ It cannot however, be used against any person *other* than the one who made it¹⁶

a result of intimidation and found to be true because defence was solely based upon it — Held such admission could be taken into consideration against the accused even though there was no evidence of publication]]

11 (41) 28 AIR 1941 Mad 1 (4) 42 Cr L Jour 677 195 Ind Cas 129, *Emperor v Kuppammal*. (Following AIR 1816 Mad 407)

12 (86) 23 AIR 1936 Lab 23 (20) 37 Cr L Jour 428 *Hasham v Emperor* (On the facts of the case it was held that the statement could be taken into consideration when the prosecution had without such statement proved its case)

13 (37) 24 AIR 1937 Lah 243 (945) 33 Cr L Jour 843 *Ahman Shah Ud v Emperor* (Court cannot take into consideration merely the inculpatory part of an accused's statement to the exclusion of the exculpatory part)

(29) 16 AIR 1929 All 1 (5) 51 All 813 30 Cr L Jour 101 *Bhola Nath v Emperor*

ment and take the inculpatory statement of the accused into account and that it should be considered as a whole can only apply to cases where there is no other evidence or reliable evidence on the record in order to establish the accused's guilt NOTE — It is not clear how the existence or other wise of evidence establishing a *prima facie* case against the accused makes any difference for the application of the proposition that the accused's statement should be considered as a whole)

(31) 18 AIR 1931 All 1 (2) 32 Cr L Jour 362 52 All 1011 (TB) *Bal Mahund v Emperor* (Confession must be taken as a whole)

(33) 20 AIR 1933 All 401 (402) 34 Cr L Jour 765 *Man Singh v Emperor* (Held that admissions of the accused were to be taken as a whole)

(32) 33 Cr L Jour 570 (571) 138 Ind Cas 217 (Lab), *Faqir Mahomed v Emperor* (Admissions must be taken as a whole)]

14 (40) 27 AIR 1940 Cal 250 (951) 41 Cr L Jour 563 *Tahsinuddin Ahmad v Emperor* (In some cases the Court may draw even an inference against the accused from his answer or refusal to answer)

(1) 8 AIR 1921 Pat 122 (122) 6 Pat L Jour 241 22 Cr L Jour 433 *Baldeo Koori v Emperor*

[See (67) 7 Subb W R Cr 59 (60) *Queen v Kallychurn* (Accused convicted of adultery on his own admission on coupled with the evidence)]

(23) 10 AIR 1923 All 90 (91) 45 All 166 24 Cr L Jour 6 *Deo Datt v Emperor* (Contradictory statements of accused taken into consideration against him)]

15 (42) 29 AIR 1912 Cal 277 (979) 43 Cr L Jour 693 900 Ind Cas 328 *Ayub Ali v Emperor* (Where the line of defence taken in the previous trial is a relevant fact in a subsequent trial against the accused the statement recorded under S 342 in the previous trial can be admitted in evidence)

(21) 8 AIR 1921 Pat 129 (129) 6 Pat L Jour 241 22 Cr L Jour 433 *Baldeo Koori v Emperor*

16 (40) 27 AIR 1940 Cal 250 (951) 41 Cr L Jour 563 *Tahsinuddin Ahmed v Emperor* (Statement of accused under S 342 cannot be used against his co-accused)

As to the meaning of the words 'taken into consideration' in S 30 of the Evidence Act see the underment one cases¹⁷

24 Irrelevant answers — In giving his answers, the accused must confine himself to relevant answers. The Judge can refuse to record irrelevant answers and may even prevent the making of such answers¹

25 Answers making defamatory statements.—It has been held by the High Courts of Allahabad² and Madras³ that a defamatory statement made in answer to questions put by the Court under this section, will not render the accused liable to punishment. The High Court of Bombay has, on the other hand, held that he will render himself liable⁴

26 Answers amounting to contempt of Court — A statement, which amounts to contempt of Court will render the accused liable to punishment¹

27 Answers by one accused, if can be considered against co accused — It has already been seen that the answers given by the accused can be used only for or against him and not against others. There is no indication in the language of this section that the answers given by one accused under this section could be considered against his co accused. On the question whether statements made under this section can be taken into consideration under S 30 of the Evidence Act against a co accused, there is a divergence of judicial opinion. The Bombay High Court has held that for the purposes of S 30, there is no distinction between a confession made by an accused before the trial and one made by him in the course of the trial and hence a confession made by one accused in the course of his statement under this section can be taken into consideration against his co accused under S 30 of the Evidence Act¹. The Lahore High Court agrees with this view². But the

(70) 2 N W P H C R 336 (337) *Queen v Hurgobind*

(94) 21 Cal 935 (976) *Wafadar Khan v Empress*

(69) 1869 Pun Re No 27 Cr p 54 (54-55) *Crown v Hossainee*

(78) 1979 Pun Re No 13 Cr, p 34 (30) *Crown v Jhanda*

17 (90) 15 Bom 66 (68) *Queen-Empress v Khandia* (Accused jointly tried with other accused — Confessions of other accused can only be taken into consideration along with evidence — They cannot by themselves form basis of conviction)

as the evidence of an accomplice taken on oath and tested by cross-examination)

(66) 5 Satb W R Cr 1 (3) *Queen v Sunetchur* (Statement of a prisoner whether taken as a confession or on examination may be received as evidence)

Note 24

1 (33) 90 AIR 1933 All 690 (693) 55 All 1040 31 Cr L Jour 967 *Jhawala v Emperor*

Note 25

1. (27) 14 AIR 1927 All 707 (708) 50 All 169 29 Cr L Jour 262 *Murla Pathal v Emperor*

2 (09) 9 Cr L Jour 276 (277) 1 Ind Cas 218 (Mad) *In re Payini Chellaya* (Statements held privileged)

(12) 13 Cr L Jour 275 (278, 282) 14 Ind Cas 659 36 Mad 216 (FB) *Potaraju v Emperor*

3 (26) 13 AIR 1926 Bom 141 (143) 50 Bom 162 27 Cr L Jour 423 (TB), *Santa v Umrao*

Note 26

1 (22) 9 AIR 1902 Bom 261 (264) 46 Bom 973 23 Cr L Jour 305 *Emperor v Venkatrao* (Imputation of prejudice to presiding Judge made in accused's statement amounts to contempt)

Note 27

1 (30) 17 A I R 1930 Bom 354 (355-356) 51 Bom 531 31 Cr L Jour 1137 *William Cooper v Emperor*

2 (36) 23 AIR 1936 Lah 337 (338) 37 Cr L Jour 508 16 Lah 651 *Dial Singh v Emperor* (Value of confession as against co-accused depends on facts and circumstances of case)

Allahabad³ Madras⁴ Calcutta⁵ and Nagpur⁶ High Courts have taken a contrary view on the ground that s 30 of the Evidence Act refers only to a confession made before the trial and not in the course of the trial. It is submitted that the latter view is correct. The reason is this s 30 of the Evidence Act requires that the confession must be proved before the Court. Under s 3 of the Evidence Act a fact is said to be proved when on considering the matters before it the Court *believes* such fact to exist or considers its existence so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it exists. When a confession is made before a Court in the course of a trial, the Court perceives with his own senses the fact of the confession and *knows* such fact. The Court does not *believe* it or consider it to be probable. See also s 255 Note 8 and s 271, Note 15.

28 Several accused—Each to be examined separately.—Where there are several accused in a case, it is incumbent on the Magistrate to examine each of them separately. A joint statement of all the accused in a single paragraph is not authorized by the section¹. Where after the Judge took an explanation from one of the accused persons as regards the nature of his defence and subsequently took another statement from a co accused under this section it was held that he was entitled to do so².

Where there are several accused the case of each of them should be individually considered and each of them should be questioned with reference to the particular position brought out by the evidence against him³.

29 Accused's defence in general—The nature of the defence should be ascertained not only from the statement of the accused but from the trend of the cross examination of the prosecution witnesses and from the arguments of the accused's pleader at the close of the trial¹.

An accused person is entitled to put forward any defence open to him technical or otherwise and to have the Court's judgment on it². Nor is there anything in law to prevent

- 3 (23) 10 AIR 1923 All 322 (393) 25 Cri L Jour 305 45 All 323 *Mahadeo v Emperor*
 4 (31) 18 AIR 1931 Mad 820 (821) 32 Cri L Jour 1099 54 Mad 788 *In re Marudamuthu*
 (29) 16 AIR 1929 Mad 285 (285) 30 Cri L Jour 932 *In re Govinda Naydu* (Section 30 does not refer to statements made at the trial but the statements before and proved at the trial)
 [But see (14) 1 AIR 1914 Mad 45 (46) 15 Cri L Jour 13 39 Mad 302 *In re Vempalli Balu Reddi*]
 5 (40) 27 AIR 1940 Cal 250 (251) 41 Cri L Jour 563 *Tahasinuddin Ahmad v Emperor* (The Court is not entitled to draw any inference against a co accused from the answer of one accused given in response to questions put to him under the provisions of S 342 Cr P C)
 [See also (81) 7 Cal 65 (68 69) 8 Cal L Rep 359 *Empress v Chandranath* (Each accused in absence of other—Convict on an statement of co accused cannot be supported)]
 6 (40) 27 AIR 1940 Nag 287 (290 291) 41 Cr L Jour 886 190 Ind Cas 273 *Sumitra v Emperor*
 (Distinct on between confession before trial and one made when examined under S 342 pointed out)
 v *Emperor* (Statement not taken

Nag L R 163 *Ganpat v Emperor*

Note 28

- 1 (37) 24 AIR 1937 S od 304 (394) 39 Cri L Jour 59 32 Sind L R 30 *Emperor v Shitalamal*
 (Section contemplates individual statements of accused and not joint statement)
 (31) 18 AIR 1931 Bom 132 (135) 55 Bom 356 32 Cri L Jour 572 *Balkrishna Anant v Emperor*
 (14) 1 AIR 1914 Lah 42 (43 44) 1913 Pun Re No 20 Cr 15 Cri L Jour 11 *Emperor v Nanak Chand*
 (29) 29 Cri L Jour 469 (469) 109 Ind Cas 117 (Lah) *Girdhari Lal v Emperor*
 [But see (25) 12 AIR 1905 Nag 403 (403 404) 29 Nag L R 1 27 Cri L Jour 66 *Mahadeo Singh v Emperor* (Co accused not debarred from giving concerted statement)]
 2 (28) 15 AIR 1928 Cal 675 (677) 65 Cal 858 29 Cri L Jour 1029 *Satya Narain v Emperor*
 3 (38) 25 AIR 1939 Nag 283 (285) 40 Cri L Jour 197 1 L R (1939) Nag 686 *Nana Sadoba v Emperor* (Where a complicated question is put to each accused without reference to the particular position of each as brought out by the evidence against him it is not a sufficient compliance with the section)

Note 29

- 1 (30) 17 AIR 1930 Cal 419 (442 443) 31 Cri L Jour 1203 *Kullu v Emperor*
 2 (14) 1 AIR 1914 Cal 456 (459) 41 Cal 350 15 Cri L Jour 383 *Ramesh Chandra v Emperor*

him from setting up alternative and inconsistent defences,³ though such defence may ordinarily weaken his case.⁴ It is open to an accused person to plead the right of private defence either specifically, or in the alternative.⁵

It is not the affair of the defence to explain or to supply gaps in the prosecution evidence.⁶ Nor can the Court call upon the accused to frame a theory, particularly in a case of difficulty in which the theory of the prosecution is itself not clear.⁷ Where however, a *prima facie* case is made out by the prosecution, it is the duty of the defence to rebut the presumption arising therefrom by some tangible evidence.⁸

An accused can make admissions of facts at his trial, which may relieve the prosecution from bringing evidence to prove such admitted facts. A plea of guilty is an extreme instance of such an admission and a decision may be based thereon.⁹

30 Court, if can ask accused to give thumb impressions — Section 73 of the Evidence Act provides that the Court may direct any person present in Court to write any words or figures or to give his thumb impressions. Section 5 of the Identification of Prisoners Act 33 (XXXIII) of 190, also enables the Court to direct the measurements (which include thumb impressions) of any person to be taken for the purpose of any

3 (18) 5 AIR 1918 All 169 (100) 40 All 281 19 Cri L Jour 371, *Yusuf Hussain v Emperor* (Alternative defence)

(19) 8 AIR 1919 Cal 439 (411) 20 Cri L Jour 661 *Afiruddi Chakkar v Emperor* (Do)

(15) 2 AIR 1915 Cal 786 (787) 16 Cri L Jour 76 (78) *Kali Prasad v Emperor*

(27) 14 AIR 1917 Lah 710 (712) 29 Cri L Jour 117, *Santa Singh v Emperor* (Inconsistent pleas)

(20) 7 AIR 1920 Pat 843 (813 844) 21 Cri L Jour 799 5 Pat L Jour 64 *Kauri Keot v Emperor* (Alternative defence)

(28) 15 AIR 1918 Rang 167 (167) 30 Cri L Jour 239 *Abdul Aziz v Fasal Rahman* (Even where accused deny having made statements alleged to be defamatory, they are entitled to prove that the allegations, if made by them would bring them within one of the exceptions to S 500, Penal Code)

Also see S 256 Note 10 and S 290 Note 1

4 (23) 10 AIR 1923 Cal 717 (718) 25 Cri L Jour 100 *Nagendra Chandra v King Emperor*

(27) 14 AIR 1927 Lah 710 (712) 29 Cri L Jour 117 *Santa Singh v Emperor*

5 (20) 7 AIR 1920 Pat 843 (843, 844) 21 Cri L Jour 799 (800) 5 Pat L Jour 64 *Fandi Keot v Emperor*

6 (14) 1 AIR 1914 Cal 456 (466) 41 Cal 350 15 Cri L Jour 383 *Ramesh Chandra Banerjee v Emperor*

7 (18) 5 AIR 1918 All 160 (166) 19 Cri L Jour 935 *Surendra Nath v Emperor*

(30) 1930 Mad WN 1211 (1215) *Pichamma Naidu v Emperor* (Accused charged with murder is under no obligation to suggest any other way in which the deceased might have met his death — Failure to do so should not occasion adverse comment)

(94) 1894 Rat 686 (686) *Queen Empress v Jehmal Narayan*

8 (28) 15 AIR 1918 Cal 27 (39) 29 Cri L Jour 49 *Hari Narayan Chandra v Emperor* (Per Sahrawardy J)

(14) 1 AIR 1914 Sind 111 (112) 7 Sind LR 109 15 Cri L Jour 497 (498 499) *Isarung Sauansing v Emperor*

(33) 20 AIR 1933 Cal 593 (600) 34 Cri L Jour 1015 *Irman Ulla v Jamulla* (Once the elements of an offence under S 215 Penal Code have been established by evidence the onus of proving that the accused is entitled to the benefit of the except on mentioned in S 215 is on the defence)

(28) 15 AIR 1918 Pat 100 (101) 6 Pat 627 29 Cri L Jour 239, *Ghanshyam Singh v Emperor* (Merely relying on discrepancies in prosecution evidence is not sufficient)

(31) 18 AIR 1931 Pat 394 (386) 10 Pat 590 33 Od L Jour 111, *Leda Bhagat v Emperor* (Facts and citing only one reasonable inference — Accused to escape consequences of that inference must offer alternative inference equally probable)

(27) 14 AIR 1917 Sind 85 (97) 27 Cri L Jour 1265 *Bukhan v Emperor* (Force of suspicious circumstances is augmented when no explanation of facts is offered)

Also see S 257, Note 1 and S 290 Note 5

9 (06) 4 Cri L Jour 471 (475) 3 Low Bur Rat 208 (TB) *Ibbas Ali v Emperor*

[See also (34) 21 AIR 1934 Cal 221 (229 230) 35 Cri L Jour 334 147 Ind Cas 82 (SB) *Emperor v Surrya Kumar Sen* (If a person voluntarily elects to put on record a statement of his criminal activities and thereafter neither repudiates that statement nor offers a reasonable explanation of it he has no grievance whatever if the Court regards that statement as conclusive against him. In such circumstances there is no burden placed on the Crown of establishing the truth of the admissions of guilt abunde)]

proceeding under the Code It was held in the undermentioned cases¹ that the taking of thumb impressions of accused persons is in the nature of questioning the accused for the purpose of eliciting incriminating statements from them, and that it is, therefore, prohibited by this section These decisions have not been followed by later decisions of the same Courts on the ground that s 342 applies only to oral statements and has no application to the taking of thumb impressions and signatures²

Where the accused refused to give his handwriting in a forgery case against him, it was held that an adverse inference can be drawn against him by reason of such refusal³

31 "No oath shall be administered to the accused"—Sub-section (4).—Under the Indian law, a person cannot be administered an oath in any case, in which he is an accused person¹ In *Emperor v Kazi Darood*,² the High Court of Bombay observed :

Note 30

- 1 (17) 4 AIR 1917 Low Bur 137 (139) 17 Cri L Jour 316, *Maung Po Nyun v Mutu Kurpen Chetty*.
 (22) 9 AIR 1922 Pat 73 (74, 75) 1 Pat 242 23 Cri L Jour 638, *Dazari Hajam v King Emperor*.
 (Identification of Prisoners' Act not referred to)
 2 (28) 15 AIR 1926 Pat 103 (101) 6 Pat 623 28 Cri L Jour 1028 *Zahuri Sahu v Emperor* (Court can direct accused to give his thumb impression in Court)
 (28) 15 AIR 1928 Pat 129 (131, 132) 6 Pat 305 28 Cri L Jour 650, *Dasgri Singh v Emperor*
 (24) 11 AIR 1924 Rang 115 (116, 117) 1 Rang 759 26 Cri L Jour 103 (FD), *King Emperor v Nga Tun Hlaing*
 [See also (26) 13 AIR 1926 Cal 531 (533) 27 Cri L Jour 409, *Emperor v Kiran Bala Das*
 (23) 10 AIR 1923 Mad 178 (179) 23 Cri L Jour 694 46 Mad 715, *Public Prosecutor v Vram Mal*]
 3 (32) 19 AIR 1932 Bom 406 (409) 56 Bom 304 33 Cri L Jour 666, *Emperor v Ramrao Mangesh*

Note 31

- person in the position of accused is bad)
 (31) 16 AIR 1931 Lah 476 (478) 12 Lah 635 32 Cri L Jour 913, *In the matter of Khawrahram*
 (Accused can in no case be examined as a witness)
 (06) 3 Cri L Jour 225 (226) 28 All 831 3 All L Jour 98 1906 All WN 42 *Bindera Singh v Emperor* (No one can be prosecuted in respect of false statements made in affidavit sworn by him in a case in which he is an accused)
 (86) 5 Cal L Rep 574 (575) *In the matter of A David* (Two prisoners tried together for different offences committed in the same transaction — It is improper and illegal to examine one as a witness against the other)
 (19) 6 AIR 1919 Cal 1021 (1022) 45 Cal 720 19 Cri L Jour 663, *Akhoy Kumar v Emperor* (Accused person actually under trial cannot be sworn as witness)
 (82) 5 C P L R Cr 1 (2) *Empress v Shakur* (Unless an accused person is convicted or acquitted, he should not except in the case where he is made Queen a witness be examined as witness touching the matter of which he is accused)
 (29) 16 AIR 1929 Pat 145 (148) 30 Cri L Jour 646 (FD), *Indra Chandra Narang v Emperor* (It is most unfortunate that Indian Law of Evidence does not permit an accused to give evidence in support of his defence)
 (1900 02) 1 Low Bur Rul 59 (60) *Queen Empress v Nga Sau* (Making some of the accused persons

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Ind Cas 914 *Mallan v Emperor* (Accused cannot be convicted under S 182 Penal Code for statement made by him during his examination on oath by a

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It is repugnant to all principles of criminal law as administered in this country to compel a person to give evidence in the very matter in which he is accused, or liable to be accused and then to base the charge on such evidence, and at the trial of the accused to use such evidence given on oath as a statement tending to prove the guilt of the accused.

Accused means the accused *then under trial* and under examination by the Court.³ In other words he must be an accused in the enquiry or trial in which he is presented as a witness.⁴ It cannot include an accused over whom the Court is exercising jurisdiction in *another* inquiry or trial.⁵ Thus, A, against whom an enquiry or trial is

- [See also (04) 7 Cri L Jour 131 (131) 3 Mad L Tim 138 *Anthony v. Emperor* (Conviction based on the deposition of the accused taken on solemn affirmation is bad)]
 [But see (26) 13 AIR 1926 Bom 151 (152) 30 Bom 111 27 Cri L Jour 400 *Emperor v. Ramnath Jyoti* (Statement of accused on oath at Coroner's inquest is admissible at his trial either under S 26 or under ss 18 and 21 Evidence Act)]
 3 (35) 25 AIR 1938 Bom 481 (482-483) 40 Cri L Jour 118 11 L R (1939) Bom 49 *Emperor v. Karamali Gulamali*
 (24) 23 Bom 213 (219) *Empress v. Durant*
 (02) 15 C P L R 112 (114) *Emperor v. Vinayak Jageshwar*
 (16) 3 AIR 1916 Bom 229 (231, 232) 17 Cri L Jour 236 *Gowind Dittant v. Emperor*
 (19) 6 AIR 1919 Cal 1021 (1022) 43 Cal 720 19 Cri L Jour 663, *Akhoy Kumar Mukherjee v. Emperor*
 (20) 7 AIR 1920 Nag 255 (256) 16 Nag L R 9 21 Cri L Jour 769, *Gowinda Sambhuji v. Emperor*
 (25) 12 AIR 1925 Oudh 227 (227) 25 Cri L Jour 1194 *Mahdum v. Emperor* (Accused in case before Sub Magistrate making false statements in application before District Magistrate not protected)
 (25) 12 AIR 1925 Rang 122 (123) 3 Rang 11 26 Cri L Jour 492 *A V Joseph v. King Emperor* (Accused tried separately is a competent witness for or against the other)
 (92) 16 Bom 661 (668) *Queen-Empress v. Mona Puna* (Accused means a person over whom the Magistrate or other Court is exercising jurisdiction)
 (96) 23 Cal 493 (494), *Jhaja Singh v. Queen Empress* (Do)
 (01) 28 Cal 709 (714) 5 Cal W N 749 *Lalit Mohan Moutra v. Surja Kanta Acharjee*
 (99) 21 All 107 (109) 1898 All W N 185 *Empress v. Mutasaddi Lal*
 (34) 92 AIR 1938 Bom 186 (189) 59 Bom 35, 36 Cri L Jour 937, *Keshav Vasudeo v. Emperor* (Persons not sent up for trial—Mere inclusion of their names in police charge-sheet does not make them accused)
 4 (40) 27 AIR 1910 No. 410 (413) 41 Cri L Jour 697 188 Ind Cis 895 (893) *Sheeshanil ar Dhondhaji v. Emperor*
 (37) 24 AIR 1937 Nag 17 (22, 23) 38 Cri L Jour 237 and 251 11 L R (1937) Nag 315 (FB), *Andhujan Guljar v. Emperor* (The word 'inquiry' in the section does not include an investigation)
 (20) 7 AIR 1920 No. 255 (256) 16 Nag L R 9 21 Cri L Jour 769 *Gowinda Sambhuji v. Emperor*
 (87) 1887 Pun Re No 38 Cr p 85 (90) *Mal Singh v. Empress*
 5 (38) 25 AIR 1938 Bom 481 (482) 40 Cri L Jour 118 11 L R (1939) Bom 49 *Emperor v. Karamali Gulamali*
 (37) 24 AIR 1937 Nag 17 (22) 38 Cri L Jour 237 and 251 11 L R (1937) Nag 315 (FB) *Andhujan Guljar v. Emperor* (Inquiry in S 342 does not include investigation and 'accused' means one over whom the Magistrate is exercising jurisdiction)
 (93) 20 All 426 (427) 1898 All W N 102, *Queen Empress v. Tirben Sahas*
 (03) 7 Cri L Jour 95 (102) 35 Cal 161 7 Cal L Jour 63, *Deputy Chandra Pal v. Emperor*
 (19) 6 AIR 1919 Cal 1021 (1022, 1023) 43 Cal 720 19 Cri L Jour 663, *Akhoy Kumar Mukherjee v. Emperor* (When two persons, though accused of complicity in the same offence are tried separately each is a competent witness at the trial of the other)
 (28) 15 AIR 1928 Cal 557 (559) 56 Cal 400 30 Cri L Jour 818, *Superintendent and Remembrancer of Legal Affairs Bengal v. Murray*
 (31) 18 AIR 1931 Cal 341 (342) 59 Cal 1214 32 Cri L Jour 667, *Muhammad Yusuf v. Emperor*
 (87) 1887 Pun Re No 38 Cr p 85 (90) *Mal Singh v. Empress*
 [See also (95) 1895 Rat 776 (777) *Queen Empress v. Ramchandra Sawaram*]

trate¹⁶ does not cease to be an accused person. A pardon granted by the Government to an accused after the commencement of the trial is not one under s 337 and he does not cease to be an accused person. His evidence is therefore not admissible against himself as co-accused¹⁷.

Where an accused person is *contacted* he ceases to be an accused person¹⁸. Where therefore one of several co-accused is convicted on his plea of guilty, he becomes a competent witness against others who were originally jointly put up for trial with him¹⁹. It was also held in the undermentioned case²⁰ that where an accused person *pleads guilty*, his incompetency of being a witness is removed though he is convicted on such plea some time later. Where a prosecution is well drawn against one of several accused under s 474, he ceases to be an accused person and is a competent witness to whom an oath can be administered in further proceedings against others²¹.

A criminal appeal is a *continuation* of the criminal case and the appellant has the privilege of the accused and cannot be administered an oath²².

A Magistrate should not put persons on oath unless he is satisfied of his authority to do so. Where he examines persons against whom a complaint is laid before issue of process, the procedure is irregular and illegal²³.

Section 10 of the Bombay Gambling Act 1887 empowers the Magistrate to examine as witnesses any of the persons arrested and brought before him in accordance with s 6(b).

- (77) 1 Bom 610 (618) *Reg v Hanmantia*
 (20) 7 AIR 19 Q Lah 215 (216) 1 Lah 10 21 Cr L Jour 599 *Mal and v Emperor* (Mere promise of immunity to accomplice does not amount to discharge so as to make him competent witness against his co-accused)
 (06) 4 Cr L Jour 44 (45 46) 10 Cal W N 817 *Pada Singh v Emperor* (Conditional pardon invalid—Not a competent witness)
 16 (89) 1889 Rat 461 (461) *Queen Empress v Lilladur*
 17 (00) 4 Cr L Jour 982 (983) 1906 Ind Re No 9 Cr 1144 *Madad v Emperor*
 (09) 1909 Pun Re No 12 Cr p 33 (36) 1909 Pun L R No 100 *Nabi Bakhsh v Emperor*
 (79) 2 All 260 (969) *Empress of India v Asghar Ali*
 [See also (36) 23 AIR 1936 Lah 353 (356) 37 Cr L Jour 515 16 Lah 594 *Fahir Singh v Emperor*]
 18 (01) 3 Bom L R 437 (438) *King Emperor v Anya* (Per Candy J *Fulton J contra*)
 (31) 18 AIR 1931 Cal 341 (343 344) 38 Cal 1214 39 Cr L Jour 667 *Muhammad Yusuf v Emperor*
 (78) 1878 Pun Re No 23 Cr p 60 (61 69) *Muhammad Ali v Crown*
 [See also (75) 24 Suth W R Cr 8 (9) *Queen v Ram Rullo & Moolerji*]
 19 (01) 3 Bom L R 437 (438) *King Emperor v Anya* (Per Candy J *Fulton J contra*)
 [See (92) 2 We r 520 (520 521) *In re Marudanuttu* (Such evidence stands on a different footing from that of an approver or unconvicted accomplice—The Judge is justified in saying that the jury may look to the evidence of such person for confirmation of the story told by an approver)]
 20 (1900) 10 Mad L Jour 147 (158 159 160) (FB) *N A Subramaniam Aiyar v Queen Empress*
 21 (10) 11 Cr L Jour 21 (21 29) 5 Ind Cas 21 (All) *Muhammad Nur v Emperor*
 (1900) 25 Bom 422 (424 428) 2 Bom L R 1095 *Queen Empress v Hossein Haji Abba*
 (16) 8 AIR 1916 Bom 229 (231 234 235) 17 Cr L Jour 256 *Gowid Bahant v Emperor*
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Emperor
 (33) 20 AIR 1933 Cal 149 (149) 34 Cr L Jour 675 *Sudam Chandra v Emperor*
 (24) 11 AIR 1924 Lah 235 (235) 24 Cr L Jour 696 *Chhaprolia v Emperor*
 (26) 13 AIR 1926 Nag 426 (427 428) 27 Cr L Jour 807 *Maladeo v Emperor*
 (06) 4 Cr L Jour 14 (149) 33 Cal 1353 10 Cal W N 967 *Ba 10 Singh v Emperor*
 Also see S 340 Note 8
 [But see (35) 22 AIR 1935 Cal 473 (475) 36 Cr L Jour 1248 157 Ind Cas 840 (DB) *Abdul Majid v Emperor*]

thereof. This procedure is a special procedure which overrides the general law enacted in this section.²⁴ A contrary view was, however, expressed in the undermentioned case.²⁵

In the undermentioned case²⁶ it was held that a proceeding for the forfeiture of recognizances is in the nature of a civil proceeding and that the person proceeded against can give evidence on oath on his own behalf.

See also S 539A Note 5

32 Examination of accused in cross case as a witness — Where there is a case and a counter or cross case both pending it was held in the undermentioned cases¹ that the examination of the accused in the one case as witness in the other constituted a grave irregularity as it was impossible to assume in such a case that the evidence so given could be impartial. This view it is submitted cannot be accepted as correct if it means that such examination is not authorized by the law. The said view has not been followed in later cases.² In any case if the accused is not prejudiced by the course adopted it will not vitiate the trial.³ See also the undermentioned cases.⁴

32a Applicability of section to proceedings under section 14 of the Legal Practitioners Act — The High Court of Madras has held that a pleader against whom proceedings are taken under S 14 of the Legal Practitioners Act is an *accused* person and he cannot be solemnly affirmed.¹ The High Court of Calcutta has in the undermentioned case² taken a contrary view.

32b Applicability to proceedings under section 145 — None of the parties litigating under S 145 can be called an accused person and therefore they can be examined as witnesses in the case.¹

33 Examination of accused — How recorded — See Section 364

34 Destruction of record — Proof of examination — Where the records have been destroyed and in his explanation the Magistrate states that the accused was examined under this section his statement must be accepted.¹

35 Non compliance with the section — Effect of — There is a conflict of opinions as to the effect of a non compliance with the provisions of the section. One set

24 (14) 1 AIR 1914 Snd 45 (46, 47) 8 Snd L R 309 16 Cri L Jour 417 *Laladhar Umersa v Emperor*

25 (10) 2 AIR 1915 Bcn 123 (103, 104) 17 Cri L Jour 9 *Babulal Dalait v Emperor*

26 (71) 15 Suth W R Cr 87 (88) *In re Jelani Bulsh* (Per Allsop J)

Note 32

1 (86) 14 Cal 358 (359, 360) *Bachu Mullah v Sia Ram Singh*

(80) 6 Cal 96 (97, 98, 101) 6 Cal I Rep 571 *Hossain Bulsh v Emperor*

(83) 13 Cal I Rep 275 (278, 279) *Chahor vs Lall v Moti Kurmi*

2 (04) 1 Cri L Jour 199 (201, 203, 204) 8 Cal W N 311 *Sahadev Alur v Emperor*

(91) 20 Cal 537 (548, 549) *Queen Empress v Chandra Bhuiya*

(98) 15 AIR 1918 Cal 557 (559) 56 Cal 400 30 Cri L Jour 818 *Superintendent and Remembrancer of Legal Affairs Bengal v Murray* (Case under Factor's Act)

3 (87) 14 Cal 308 (360) *Bachu Mullah v Sia Ram Singh*

(04) 1 Cri L Jour 199 (203, 204) 8 Cal W N 311 *Sahadev Alur v Emperor*

(98) 15 AIR 1918 Cal 557 (559) 56 Cal 400 30 Cri L Jour 818 *Superintendent and Remembrancer of Legal Affairs Bengal v Murray*

4 (25) 12 AIR 1910 Cal 1060 (1261, 1262) 26 Cri L Jour 1615 *Makhan v Moondra*

(16) 9 AIR 1916 Lo Bur 20 (20) 17 Cri L Jour 203 *I am Sarup v Emperor*

Note 32a

1 (83) 6 Mad 207 (203) 1 Weir 116 *Kotla Subba Chetty v Queen*

2 (2) 9 AIR 1911 Cal 515 (519, 521) 49 Cal 73 21 Cri L Jour 33 (SD) *Emperor v Pajani Kantia* (Proceedings under this section are quasi-criminal proceedings)

Note 32b

1 (95) 12 AIR 1910 Oudh 286 (286) 26 Cri L Jour 70 *Mohammad Ayab v Sarfaraz*

Note 34

1 (99) 16 AIR 1919 Cal 406 (406) 56 Cal 1067 30 Cri L Jour 506 *Sadagar Chaudhuri v Emperor*

of cases holding that such a non compliance vitiates the trial¹ This view is based upon

Note 35

- 1 (19) 25 AIR 1934 Lah 513 (513) 39 Cri L Jour 781 I L R (1939) Lah 607, *Mahomed Nawaz v. Emperor*
 (37) 23 AIR 1937 Oudh 16 (17-18) 36 Cri L Jour 1303 11 Luck 461, *Emperor v. Karuna Shankar* (Prejudice may be presumed—Failure to examine he'll vitiated trial)
 [See also (44) 31 AIR 1914 Nag 192 (195) ILR (1914) Nag 589 46 Cri L Jour 80 - 215 Ind Cas 265, *Provincial Government C P & Berar v. Gomaji Bidi* (It is best that Courts should literally comply with the requirements of S 312, in view of the controversy as to whether an incurable illegality results when the provisions of that section are not complied with)]
No examination made after close of prosecution evidence
 (35) 1937 Mad W N 574 (575) *Varahalamma v. Emperor* (Provision is mandatory—Accused not examined after prosecution evidence—Conviction must be set aside)
 (15) 2 AIR 1915 Bom 221 (221) 16 Cri L Jour 765, *Dasappa Ningappa v. Emperor*.
 (33) 20 AIR 1913 Cal 317 (318) 31 Cri L Jour 519, *Hoogly Chinsura Municipality v. Keshab Chandra*
 (26) 13 AIR 1926 Lah 667 (668) 27 Cri L Jour 1000, *Mr. Demello v. Mrs. Demello*
 (07) 5 Cri L Jour 332 (333) 9 Bom L R 356, *Emperor v. Satalya Alma* (Non-compliance of this mandatory provision raises a presumption of prejudice)
 (2-) 15 AIR 1929 Lah 392 (396) 30 Cri L Jour 18, *Iritchard v. Emperor*.
 (31) 18 AIR 1931 Mad 211 (211) 32 Cri L Jour 757, *Nataraja Mudaliar v. Devasigamani Mudliar* (Provision is mandatory—Examination of prosecution witness after examination of accused—Latter must again be examined)
 (21) 6 AIR 1921 Bom 370 (371) 23 Cri L Jour 21, *Emperor v. Rustomji Manchergji* (Non examination in summons-case)
 (21) 8 AIR 1921 Bom 374 (376, 377) 15 Bom 672 - 22 Cri L Jour 17, *Fernandes v. Emperor*
 (22) 9 AIR 1922 Bom 290 (291) 46 Bom 441 23 Cri L Jour 45, *Gulabjap v. Emperor*
 (14) 1 AIR 1914 Cal 663 (663) : 41 Cal 743 (745-746) 15 Cri L Jour 190, *Mohammad Hussain v. Emperor*
 (23) 10 A I B 1923 Mad 609 (610) - 48 Mad 419 - 24 Cri L Jour 547 (F B) *Varisan Routhier v. Emperor*
 (25) 12 AIR 1923 Bom 170 (172-173) 50 Bom 42 - 26 Cri L Jour 690, *Emperor v. Nathu* (Accused examined before the close of prosecution evidence but not after)
 (26) 13 A I R 1926 Bom 57 (58) 50 Bom 31 27 Cri L Jour 165, *D N Gamadia v. Emperor*. (Non-compliance constitutes illegality—Consent of accused does not affect)
 (23) 15 AIR 1928 Bom 140 (141) - 29 Cri L Jour 535, *Emperor v. Bhau Dharma* (Examination of witnesses after examination of accused—Accused not further examined subsequently)
 (21) 8 AIR 1921 Cal 605 (606) 25 Cri L Jour 521 *Kashi v. Damu*. (Proper course is to remit the case for re trial)
 (23) 10 AIR 1923 Cal 470 (482) 50 Cal 516 24 Cri L Jour 248 *Promotha Nath v. Emperor*
 (24) 11 AIR 1924 Cal 975 (976) 51 Cal 024 26 Cri L Jour 15 *Remembrancer of Legal Affairs, Bengal v. Satish Chandra*
 (24) 11 AIR 1924 Cal 153 (153) 25 Cri L Jour 460, *Saulendra Chandra v. Emperor* (Re trial should be ordered)
 (25) 12 AIR 1925 Cal 574 (575) 24 Cri L Jour 913, *Hamid Ali v. Sri Kissen Gosain*
 (25) 29 Cri L Jour 392 (393) 108 Ind Cas 331 (Lah), *Bas Khan v. Emperor*

stitutes a re trial)

- (27) 9 AIR 1923 Lah 45 (47) 23 Cri L Jour 154, *Haji Muhammad Baksh v. Emperor*
 (24) 11 AIR 1924 Lah 734 (736, 737) 25 Cri L Jour 1020 *Nawal Chand v. Emperor*
 (25) 12 AIR 1925 Lah 299 (288) 27 Cri L Jour 87, *Ghaza Ali v. King Emperor* (Questioning accused is mandatory)
 (26) 13 AIR 1926 Lah 51 (53) 26 Cri L Jour 1370, *Muhammad Sadiq v. Emperor*
 (26) 13 AIR 1926 Lah 551 (552) 7 Lah 551 27 Cri L Jour 1007, *Lachman Singh v. Emperor*
 (26) 13 AIR 1926 Lah 683 (683) 27 Cri L Jour 1023, *Ismail v. Emperor*
 (26) 13 A I R 1926 Lah 684 (684-685) 27 Cri L Jour 1021, *Iasal Ahmad v. Emperor* (Note by Magistrate that accused does not wish to add to his previous statement is not proper compliance with Section 312)

- (27) 14 AIR 1927 Lah 720 (720) 29 Cri L Jour 125 *Akhlar Mohammad v Emperor* (Magistrate trying case transferred — Successor beginning trial *de novo* but not again examining accused under S 342 — Held proceedings were vitiated)
- (28) 15 AIR 1928 Lah 230 (231) 29 Cri L Jour 905 *Emperor v Gian Singh*
- (34) 21 AIR 1934 Lah 96 (96) 15 Lah 60 35 Cri L Jour 1394 *Karam Din v Emperor*
- (34) 21 AIR 1934 Lah 415 (415) 35 Cri L Jour 1447, *Amir v Emperor*
- (34) 21 AIR 1934 Lah 631 (632) 36 Cri L Jour 401 *Anand Prakash v Emperor*
- (34) 21 AIR 1934 Nag 213 (215) 31 Nag L R 49 35 Cri L Jour 1457, *Hari Krishnaji v Emperor* (Magistrate not examining accused when written statement filed)
- (21) 22 Cri L Jour 593 (593) 62 Ind Cas 870 (870) (Pat) *Tilak Gope v Bhayaram*
- (20) 7 AIR 1920 Pat 471 (475 479) 21 Cri L Jour 705 5 Pat L Jour 430 *Raghu Bhumaj v Emperor*. (Written statement cannot take place of examination under S 342)
- (20) 7 AIR 1920 Pat 729 (729 730) 21 Cri L Jour 793 *Suraj Pandey v Emperor*
- (21) 8 AIR 1921 Pat 11 (12) 22 Cri L Jour 427 6 Pat L Jour 174 *Gulam Rasul v Emperor*
- (21) 8 AIR 1921 Pat 109 (114) 22 Cri L Jour 417 6 Pat L Jour 147, *Fatu Santal v Emperor*
- (22) 9 AIR 1922 Pat 5 (6) 23 Cri L Jour 114 *Balkesar Singh v King Emperor*
- (22) 9 AIR 1922 Pat 212 (213) *Ram Nandan Singh v Emperor*
- (22) 9 AIR 1922 Pat 296 (297) 23 Cri L Jour 440 *Parmeshwar Lal Mitter v Emperor*
- (22) 9 AIR 1922 Pat 299 (299) 22 Cri L Jour 239 *Rameshwar Singh v Emperor* (Accused examined before evidence for prosecution closed)
- (23) v King Emperor
- (25) jh v Emperor
- (26) gh v Emperor
- (34) 21 AIR 1934 Pesh 75 (7a) 35 Cri L Jour 1361 *Anar Gul v Emperor*
- (15) 5 AIR 1918 Upp Bnr 43 (44) 4 Upp Bur Rul 18 18 Cri L Jour 944 *Emperor v Nga Po Mya*
- (23) 10 AIR 1923 Rang 132 (133) 4 Upp Bur Rul 127 25 Cri L Jour 819 *King Emperor v Nga Sein* (Particulars of offence not explained)
- (27) 14 AIR 1927 Rang 19 (19) 4 Rang 361 27 Cri L Jour 1364 *King Emperor v Nga Po Byu* (Accused not examined under S 342 — Re trial ordered even though accused had been acquitted)
- (26) 13 AIR 1926 Sind 1 (3) 20 Sind L R 34 26 Cri L Jour 1554 (FB) *Emperor v Nabu*
- (26) AIR 1926 Sind 281 (289) 19 Sind L R 121 27 Cri L Jour 1290, *Emperor v Pario*
- (92) 1892 Rat 625 (625) *Queen Empress v Manchi*
- (22) 9 AIR 1922 Pat 299 (299) 22 Cri L Jour 239 *Rameshwar Singh v Emperor*

— v Kyan Baw

hi (Not a mere error of form — But where no

prejudice High Court will not interfere))

Examination after prosecution witnesses were examined and before their cross examination

- (23) 10 AIR 1923 Cal 196 (197, 198) 50 Cal 223 24 Cri L Jour 198 *Mosakur Ali v Emperor*
- (24) 11 AIR 1924 Nag 51 (59) 25 Cri L Jour 713 *Krishnappa v Emperor*
- (28) 15 AIR 1928 Nag 162 (164) 29 Cri L Jour 475 *Mahammad Hayat Khan v Emperor* (Failure to examine after second cross-examination of re-called witnesses — Held, that the illegality only affected such portion of the trial as was subsequent to the stage at which it occurred)
- (33) 20 AIR 1933 Nag 192 (193) 34 Cri L Jour 340 *Emperor v Amirbi* (Omission to examine accused after second cross-examination of re-called witnesses)
- (29) 16 AIR 1929 Bom 447 (448 450 451) 31 Cri L Jour 402 *Emperor v Genu Gopal*
- (31) 32 Cri L Jour 623 (623) 130 Ind Cas 845 (Cal) *Moharrum Muhammad v Emperor* (Statement after examination and before cross examination of prosecution witnesses)
- (25) 12 AIR 1925 Nag 44 (47) 20 Nag L R 174 26 Cri L Jour 971 (FB) *Local Government v Maria*
- (23) 10 AIR 1923 Cal 164 (164) 49 Cal 1075 24 Cri L Jour 3 *Gulzar Lal v Emperor* (Accused examined after the examination in-chief of some of the prosecution witnesses but not examined again after another witness for the prosecution had been examined after the cross examination of the previous witnesses)
- (23) 10 AIR 1923 Cal 668 (668) 50 Cal 308 25 Cri L Jour 709 *Jummon Ghristian v Emperor* (Examination of accused after examination in-chief of the prosecution witnesses is not sufficient — He must be examined after their cross-examination and re-examination)
- (24) 11 AIR 1924 Cal 182 (182 183) 25 Cri L Jour 269 *Haro Nath Malo v Ala Bux* (Examination before cross-examination of prosecution witnesses)
- (34) 21 AIR 1934 Lah 648 (648) 36 Cri L Jour 468 *Kundan Lal v Emperor* (Failure to examine after second cross-examination)
- (34) 21 AIR 1934 Oudh 457 (458, 459) 35 Cri L Jour 1417 10 Luck 235 *Onkar v Emperor*
- (22) 9 AIR 1922 Pat 158 (159 160) 22 Cri L Jour 697 6 Pat L Jour 644 *Mistarjit Singh v King Emperor* (Examined includes cross-examination and re-examination)

the observations of their Lordships of the Privy Council in *Subramania Ayyar v King-Emperor** to the following effect

Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase, as irregularity, is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment.

In the undermentioned cases³ a contrary view has been expressed, namely, that a non compliance with the section does not vitiate the trial unless the accused has been

(27) 12 AIR 1925 Lang 363 (361) 27 Cri L Jour 330 *Ah Khaung v King Emperor* (No examination after further cross-examination of prosecution witnesses)

(27) 14 AIR 1927 Sind 175 (175 176) 21 Sind L R 331 23 Cri L Jour 417, *Motanihan v Emperor*. Asking general questions

(42) 29 AIR 1912 Sind 33 (37) ILR (1911) Kar 532 199 Ind Cas 78 43 Cri L Jour 459 (DB) *Emperor v Pinaladhoshah Ibrahimshah*

(38) 25 AIR 1938 Sind 97 (98 99) 39 Cri L Jour 618 32 Sind L R 709 *Raban Lalu v Emperor* (Confes on forming integral part of prosecution case — Failure to examine accused about it is not covered by S 537 — Retrial should be ordered)

(23) 12 AIR 1925 Pat 342 (341) 26 Cri L Jour 716 *Durga Ram v Emperor* (AIR 1922 Pat 398 1 Pat 375 dissented from — Court must ask specific questions — General questioning is not enough)

(21) 8 AIR 1921 Mad 679 (680 681) 23 Cri L Jour 697, *In re Nannamalai Konan* (Accused not

Taking joint statement from several accused

(37) 21 AIR 1937 Sind 304 (301) 39 Cri L Jour 59 32 Sind L R 20 *Emperor v Shivalomal*

(31) 18 AIR 1931 Bom 132 (135) 55 Bom 306 32 Cri L Jour 572, *Balkrishna v Emperor*

(98) 29 Cri L Jour 469 (469) 109 Ind Cas 117 (Lah) *Girdhari Lal v Emperor*

(26) 13 AIR 1906 Lah 155 (155) 27 Cri L Jour 408 6 Lah 554 *Mt Ghasiti v Emperor*

Examination after the defence began

(23) 12 AIR 1925 Cal 490 (490) 51 Cal 933 26 Cri L Jour 261, *Surendra v Ismaddi*

Miscellaneous

3 Failure to examine at all

(40) 27 AIR 1940 Bom 314 (314) 42 Cri L Jour 71 191 Ind Cas 90, *Emperor v Kondiba Balaji*, (When statement of accused is not taken at all *prima facie* he is prejudiced)

(37) 24 AIR 1937 Oudh 130 (131) 37 Cri L Jour 403 12 Luck 24 *Emperor v Braylat* (Failure to examine raises presumption of prejudice but it can be rebutted)

(26) 27 Cri L Jour 719 (720) 94 Ind Cas 911 (912) (All) *Rammur v Emperor* (Examination after some only of the prosecution witnesses were examined—No further examination after all the witnesses were examined)

(24) 11 AIR 1924 All 763 (763 764) 26 Cri L Jour 132 *Ganga Sahai v Emperor* (Held accused was not prejudiced by irregularity)

(35) 22 AIR 1935 All 217 (219) 36 Cri L Jour 1290 57 All 666 *Sia Ram v Emperor* (Summary trial — Mere fact that statement of accused has not been recorded is not fatal)

(24) 11 AIR 1924 Oudh 111 (112) 24 Cri L Jour 661, *Nageshar Prasad v Emperor* (Court reading out accused's statement in cross-exam and getting it admitted by him — Held that S 342 was not properly complied with and procedure followed amounted to grave irregularity — However accused was not prejudiced)

(25) 12 AIR 1925 Oudh 491 (491) 26 Cri L Jour 655 *Emperor v Sheopal* (Accused held prejudiced)

(26) 13 AIR 1926 Oudh 421 (424 425) 27 Cri L Jour 859 *Girdhari Lal v Emperor* (Onus on to

show when not prejudicing the accused

prejudiced)

Shivan v Emperor (Accused not to interfere as accused were not

- (25) 12 AIR 1925 Pat 414 (417 418 419) 4 Pat 488 26 Cri L Jour 811, *Sayid Mohiuddin v Emperor*
- (29) 16 AIR 1909 Pat 64 (64) 29 Cri L Jour 771, *Sheodutt Roy v Emperor*
- (30) 19 AIR 1932 Rang 190 (191, 199) 10 Rang 511 34 Cri L Jour 121 (FB), *Emperor v Njo Po Min*
- (34) 21 AIR 1934 All 389 (390) 33 Cri L Jour 781 *Hakmat Ali v Emperor* (Where there is prejudice it will vitiate trial)
- (36) 13 AIR 1926 Bom 231 (232) 50 Bom 174 27 Cri L Jour 1335, *Emperor v Harjuman Valji* (Accused putting in written statement on questioning by Magistrate—Omission to orally examine is not illegality) [See (35) 22 AIR 1933 Cal 603 (606) 36 Cri L Jour 1340 62 Cal 475 *Emperor v Ajahar Mandal* (Sessions trial—Omission to examine the accused in the committing Magistrate's Court does not vitiate trial)]
- [See also (21) 8 AIR 1921 Cal 269 (270) 23 Cri L Jour 41, *Gangadhar v Reed*
- (85) 2 Weir 405 (405) *In the matter of Gaudi Talaya* (Assumed)
- (19) 6 AIR 1919 Cal 696 (700) 46 Cal 411 20 Cri L Jour 24, *Ah Foong v Emperor*]
- Examination before the close of prosecution evidence**
- (42) 29 AIR 1943 Oudh 342 (343) 43 Cri L Jour 503 200 Ind Cas 90 *Ram Udit v Jagannath* (Failure to re-examine accused after cross-examination of prosecution witnesses after charge—No prejudice caused—Conviction not illegal)
- (38) 39 Cri L Jour 841 (842) 177 Ind Cas 56 (Oudh) *Kandhi v Municipal Board Rae Darli* (Failure to re-examine accused after a court witness is examined—Held accused not prejudiced)
- (36) 23 AIR 1936 All 319 (320) 37 Cri L Jour 710 *Hafiz Mahomed v Emperor* (Accused examined before framing of charge but not after second cross-examination—Irregularity is cured if no injustice is caused)
- (88) 23 AIR 1936 Oudh 311 (319) 37 Cri L Jour 616 12 Luck 268 *Bachchu Lal v Emperor* (Failure to re-examine accused after the close of prosecution evidence when he has been examined at length before will not vitiate the trial unless it is shown to have caused prejudice)
- (36) 23 AIR 1936 Pesh 211 (213) 38 Cri L Jour 399 *Hassan v Emperor* (Failure to examine after the second cross-examination will not vitiate trial unless prejudice is caused)
- (28) 10 AIR 1923 All 81 (82 83) 45 All 124 21 Cri L Jour 67 *Bechu Chauda v Emperor* (Examination of prosecution witness after recording statement)
- (28) 13 AIR 1926 All 558 (353 359) 27 Cri L Jour 405 *Khachho Mal v Emperor*
- (27) 14 AIR 1927 All 475 (476) 49 All 551 28 Cri L Jour 399 *Sudaman v Emperor*
- (28) 15 AIR 1928 All 227 (227 228) 30 Cri L Jour 530 *Emperor v Jhabbar Mal*
- (24) 11 AIR 1924 Lah 84 (88 89) 4 Lah 61 25 Cri L Jour 801 *P A Bjrns v Emperor* (Fresh examination of accused after examination of prosecution witnesses recalled by accused is not necessary)
- (25) 12 AIR 1925 Oudh 422 (422 423) 28 Oudh Cas 130 28 Cri L Jour 1301 *Emperor v Brij Behari* (Non-examination after second cross-examination)
- (25) 12 AIR 1925 Oudh 803 (604) 26 Cri L Jour 1374 *Khusian Singh v Emperor* (Do)
- (30) 81 Cri L Jour 171 (172) 120 Ind Cas 753 (Pat) *Gurdial Singh v Bholanath Halwai*
- (25) 12 AIR 1925 Rang 238 (260 261) 3 Rang 139 26 Cri L Jour 1336 *Nga Hia U v Emperor*
- (29) 16 AIR 1929 Rang 331 (332 333) 7 Rang 470 30 Cri L Jour 1164 *Subdayya v Emperor*
- (29) 16 AIR 1929 Sind 5 (5 6) 23 Sind L R 1 29 Cri L Jour 932 *Allah Dito v Emperor* (Additional evidence not disclosing fresh facts)
- (30) 19 AIR 1932 Sind 163 (166) 34 Cri L Jour 161 *Emperor v Rihan Dodo* (No fresh examination after additional prosecution evidence—Held there was great probability of accused having been prejudiced)
- (34) 21 AIR 1934 Sind 67 (67 68) 28 Sind L R 106 35 Cri L Jour 1175 *Hidayatullah v Emperor* (No fresh examination after additional prosecution evidence)
- Examination after the defence was over**
- (27) 14 AIR 1927 Cal 330 (331) 28 Cri L Jour 347 *Tameskhan v Rajjabali* (Obiter)
- (26) 13 AIR 1926 Pat 393 (394) 27 Cri L Jour 1017 *Balagobind Thakur v Emperor* (Technical failure to comply is not fatal in the absence of prejudice—AIR 1925 Pat 414 4 Pat 488 26 Cri L Jour 811 followed)
- Failure to question specifically**
- (43) 32 AIR 1945 All 81 (86) 1 L R (1915) All 558 46 Cri L Jour 750 220 Ind Cas 432 *Mahliha v Emperor*
- (49) 29 AIR 1942 Sind 102 (103) 1 L R (1919) Kar 112 43 Cri L Jour 799 207 Ind Cas 206 *Bhagwan*
liabilities
(justice)
- () J Davis
- ()
- pala (See observations of Roberts C J)

replicated by the procedure adopted in *Abdul Rahman v King Emperor*,⁴ which was a case arising under S 300 of the Code, their Lordships of the Privy Council distinguished *Sulramania Iyyar*'s case on the ground that in that case the procedure adopted was one which the Code positively prohibited and held that an omission or irregularity in the case of other provisions of the Code unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned is not enough to warrant the quashing of a conviction. It is submitted that unless the provisions of this section are construed as conveying a positive prohibition the cases holding that a non-compliance *ipso facto* vitiates conviction require reconsideration.

Where the non-compliance with the section is held to vitiate the trial whether by reason of prejudice to the accused or independently of any prejudice, ordinarily, the proper course is to order a re-trial from the stage at which the provisions of this section were not complied with.⁵ In other words the matter should be set right by again questioning the

(36) 19 6 Oudh W N 364 (365, 366) *Shafaat v Emperor* (Accused charged with offence under S 147 Penal Code, with other charges — No question in respect of not having been committed or in respect of its common object put to the accused — Held accused was prejudiced by omission and the trial vitiated)

(38) 25 AIR 1939 Nag 281 (285) 40 Cr L Jour 197 I L R (1939) Nag 636 *Nana Sadoba v Emperor*
(30) 17 AIR 1930 Rang 114 (118) 7 Rang 621 31 Cr L Jour 337 *Maung Da Chit v Emperor* (In complicated cases merely asking general questions is not sufficient)

Questions in the nature of cross examination

(30) 17 AIR 1930 Rang 351 (353, 354) 8 Rang 572 32 Cr L Jour 23 *U Da Thin v Emperor*
(Conviction should not be set aside unless failure of justice has been occasioned)

Miscellaneous

(42) 29 AIR 1942 Sind 122 (126) I L R (1912) Kar 252 44 Cr L Jour 367 20 Ind Cas 809 *Emperor v Rasul Bux* (Three accused — Written statement filed by one dittoed by others — Statement with drawn and replaced by another which merely omitted objectionable matter — Second statement signed by one accused only — Omission to examine again under S 342 held not prejudicial to accused)

(35) 22 AIR 1933 All 217 (219) 36 Cr L Jour 1290 (1291) 57 All 666, *Sia Ram v Emperor* (Particulars of examination if any had taken place, not recorded — Held, accused was not prejudiced)

(86) 23 AIR 1936 Oudh 16 (17, 18) 36 Cr L Jour 1303 (1304) 11 Luck 481, *Emperor v Karima Shankar* (Prejudice may be presumed in circumstances of a case)

(95) 1899 Rat 735 (735) *Queen Empress v Posha Hars* (Held that as the accused had a valiant pleader they had probably suffered no prejudice by the Sessions Judge having ignored the provisions of this section)

[See (40) 27 AIR 1940 Pat 295 (298) 41 Cr L Jour 267 *Feroze Kasi v Emperor* (Accused examined after close of arguments — Such procedure even if amounts to irregularity is such that it seriously prejudices the accused and the trial is vitiated — Obiter)]

4 (27) 14 AIR 1927 P C 44 (48, 49) 5 Rang 53 54 Ind App 96 28 Cr L Jour 259 (FC)

5 (40) 27 AIR 1940 Dom 314 (316) 42 Cr L Jour 71 191 Ind Cas 90 *Emperor v Kondiba Dalaji*

(38) 25 AIR 1938 Nag 283 (285) 40 Cr L Jour 197 I L R (1939) Nag 686 *Nana Sadoba v Emperor*
(Non-compliance — Trial vitiated by prejudice to accused — Retrial ordered from point at which defect occurred)

(37) 24 AIR 1937 Sind 291 (224) 38 Cr L Jour 995 31 Sind L R 470 *Khawro v Emperor* (Failure of Magistrate to ask explanation from accused on a vital point necessitates a retrial — Question of illegality or irregularity of such non-compliance was not adverted to)

(33) 20 AIR 1933 Lah 1002 (1003) 35 Cr L Jour 104 *Tej Ram v Emperor* (Except where the case is a petty one)

(28) 15 AIR 1928 Lah 230 (231) 29 Cr L Jour 905 *Emperor v Gian Singh* (Appellate Court may

under the special circumstances of the case)

(24) 11 AIR 1924 Pat 376 (376) 24 Cr L Jour 475 *Baldeo Dubey v Emperor*

(26) 13 AIR 1926 Pat 29 (29) 26 Cr L Jour 1289 *Ram Charan Singh v Emperor*

accused as required by this section and then by calling on him to enter on his defence⁶ The Court remanding the case should not keep the case on its own file and simply call for a re submission after taking the necessary examination, it should remand the whole case to be tried on the merits as if it were before the Court for the first time⁷ But where the case is a petty one⁸ or the offence is merely technical⁹ it has been held that it is not in the interest of justice that the case should be tried *de novo* and that the accused should be acquitted

Where questions are put in contravention of the section such as questions in the nature of cross examination,¹⁰ or where further evidence is taken after the examination of the accused and the latter is not examined again under this section,¹¹ the answers given in the one case and the further evidence taken in the other should be rejected and not taken into account It will not be proper for the Judge to take into consideration circumstances appearing in the prosecution evidence against the accused if he had not drawn his attention to them in his examination and called for an explanation¹² In cases where the evidence against the accused is entirely circumstantial unless the Magistrate has elicited from the accused any explanation he has to give in respect of the facts appearing in evidence against him the trial will be vitiated and conviction based on such evidence cannot be sustained¹³

An objection on the ground of the failure to comply with the provisions of this section raises a point of law and can be taken at the hearing of an application for revision.

(2a) 12 AIR 1925 Sind 127 (129) 19 Sind L R 104 25 Cri L Jour 662 *Jhangli v Emperor* (Unless the appellate Court on going into merits of the case holds that there is no case against the appellant — Retrial not ordered under special circumstances of the case)

[See (49) 29 AIR 1942 Sind 102 (103) 1 L R (1942) Kar 112 43 Cri L Jour 799 202 Ind Cas 206 *Bhagwandas Jagannath v Emperor* (Charge under S 420 Penal Code — Misrepresentations and manner of beating not set out with precision in charge — Retrial held should start from before framing of charge)]

(42) 29 AIR 1942 Sind 33 (37) 1 L R (1941) Kar 532 43 Cri L Jour 459 189 Ind Cas 76 (DB), *Emperor v Pimladhoshah Ibrahimshah* (Retrial of entire case ordered so as to enable prosecution to place its case in proper and legal manner)]

[See also (21) 29 Cri L Jour 598 (599) 62 Ind Cas 870 (871) (Pat) *Talak Gope v Bhaia Ram*]]

6 (25) 12 AIR 1925 Nag 433 (433) 26 Cri L Jour 1425 *Wasideo v Emperor*

7 (2a) 12 AIR 1925 Cal 172 (172) 26 Cri L Jour 318 *Abdus Samad v Emperor*

8 (37) 1937 Mad W N 74 (575) *Varahamma v Emperor* (Case under Ss 293 and 114 Penal Code)

(88) 23 AIR 1936 Oudh 16 (16) 36 Cri L Jour 1303 11 Lne 461 *Emperor v Karuna Shankar* (Accused charged under S 4 Gambling Act not examined in accordance with S 312 — Trial held vitiated but retrial held not necessary)

(34) 21 AIR 1934 Lah 415 (415 416) 35 Cri L Jour 1447 *Amur v Emperor*

(33) 20 AIR 1933 Lah 1002 (1003) 35 Cri L Jour 104 *Tej Ram v Emperor*

Emperor

(08) 8 Cri L Jour 62 (64) 4 Low Bur Rul 244 *Gaung Gyn v Emperor* (Questions about confession inadmissible — Therefore answers to such questions are inadmissible)

(09) 10 Cri L Jour 325 (339 340) 3 Ind Cas 695 (Cal) *Khudiram Bose v Emperor* (Some questions proper and others in the nature of cross examination — Answers to former may be considered)

(16) 3 AIR 1916 Mad 407 (408) 39 Mad 770 16 Cri L Jour 623 *In re Abibullah Rowthan* (Questions put when no evidence implicating the accused had been taken — Answers held not admissible in evidence)

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although it was not urged in the Courts below and is not set forth in the application¹⁴ But in revision proceedings the High Court is not bound to interfere even if the non-compliance with S 342 is held to be illegal¹⁵

Where a Magistrate examines an accused person before any evidence has been recorded it has been held that such statements cannot be rejected as inadmissible on account of the irregularity in procedure and that they may be evidence as being admissions under S 21 of the Evidence Act¹⁶

343.* Except as provided in sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge

1 Scope of the section — Section 163 is an analogous provision applicable where an investigation is proceeding under Chap XIV This section applies to accused persons and during the stage of inquiries and trials¹ The words accused person have the same meaning as the word accused in S 312² and unless influence is used to a person who is an accused within the meaning of that section this section does not apply³ Thus it does not apply where an inducement is offered to a witness and not to an accused person then under bail⁴ See Note 31 on S 31⁵ as to the meaning of accused person

2 "Except as provided in sections 337 and 338" — Sections 337 and 338 provide for the grant of pardon to accused persons Except under those sections no inducement can be offered to an accused person to make any disclosures Thus a conditional pardon cannot be tendered by any authority save as provided by ss 337 and 338¹

* 1882 S 343 1872; S 344 1861 S 203

14 (21) 8 AIR 1921 Pat 415 (416) 22 Cr L Jour 442 *Moinuddin v Emperor*
15 (42) 29 AIR 1942 Oudh 34² (343) 43 Cr L Jour 503 200 Ind Cas 90 *Ram Udai v Jagannath*
(Prosecution witnesses cross-examined — Accused not asked whether he wished to make further statement — High Court will not interfere in revision unless prejudice is shown)

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16 (93) 1893 Bat 679 (680) *Queen Empress v Narayan*

Section 343 — Note 1

1 (37) 24 AIR 1937 Nag 17 (21) 38 Cr L Jour 237 & 251 I L R (1937) Nag 315 (FB) *Amdamayan Guljar v Emperor*

2 (37) 24 AIR 1937 Nag 17 (21) 38 Cr L Jour 237 & 251 I L R (1937) Nag 315 (FB) *Amdamayan Guljar v Emperor* (The expression "accused person" in this section means one who is in the array of the accused persons under inquiry or trial)

v Emperor

(Person though could be tried with accused under S 239 not so tried — Such person is competent witness — Overruled by AIR 1937 Nag 17 I L R (1937) Nag 315 38 Cr L Jour 237 & 251 (FB) on another point)

Note 2

1 (66) 4 Cr L Jour 44 (45) 10 Cal W N 817 *Paban Singh v Emperor* (The evidence of accused taken under conditional pardon is wholly inadmissible)

[See also (36) 23 AIR 1936 Lah 353 (355) 16 Lah 591 37 Cr L Jour 515 *Faqir Singh v Emperor* (Assuming that S 343 is a bar to a pardon being tendered to an accused person during the course of trial otherwise than in accordance with S 337 or S 338 it would only make the evidence of such approver inadmissible)]

accused as required by this section and then by calling on him to enter on his defence⁶ The Court remanding the case should not keep the case on its own file and simply call for a re submission, after taking the necessary examination, it should remand the whole case to be tried on the merits, as if it were before the Court for the first time⁷ But where the case is a petty one,⁸ or the offence is merely technical,⁹ it has been held that it is not in the interest of justice that the case should be tried *de novo* and that the accused should be acquitted

Where questions are put in contravention of the section, such as questions in the nature of cross examination,¹⁰ or where further evidence is taken after the examination of the accused, and the latter is not examined again under this section,¹¹ the answers given in the one case and the further evidence taken in the other should be rejected and not taken into account It will not be proper for the Judge to take into consideration circumstances appearing in the prosecution evidence against the accused, if he had not drawn his attention to them in his examination and called for an explanation¹² In cases where the evidence against the accused is entirely circumstantial, unless the Magistrate has elicited from the accused any explanation he has to give in respect of the facts appearing in evidence against him, the trial will be vitiated and conviction based on such evidence cannot be sustained¹³

An objection on the ground of the failure to comply with the provisions of this section, raises a point of law and can be taken at the hearing of an application for revision,

(23) 12 AIR 1925 Sind 127 (129) 19 Sind L R 101 25 Cri L Jour 662, *Jhangli v Emperor* (Unless the appellate Court on going into merits of the case, holds that there is no case against the appellant

Cri L Jour 799 202 Ind Cas 206,
Penal Code — Misrepresentations and
retrial held should start from before

Kae 532 43 Cri L Jour 458 199 Ind Cas 78 (DB),
retrial of entire case ordered so as to enable prosecution to

place its case in proper and legal manner}}

[See also (21) 22 Cri L Jour 598 (599) 62 Ind Cas 870 (871) (Pat) *Tilak Gope v Bhaya Ram*]]

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(Accused charged under S 4, Gambling Act, not examined in accordance with S 343 — Trial held vitiated but retrial held not necessary)

(34) 21 AIR 1934 Lah 415 (415 416) 35 Cri L Jour 1447, *Amir v Emperor*.

Emperor

(08) 8 Cri L Jour 62 (64) 4 Low Bur Rul 244, *Gaung Gyi v Emperor* (Questions about confession inadmissible — Therefore answers to such questions are inadmissible)

(09) 10 Cri L Jour 325 (339 340) 3 Ind Cas 625 (Cal) *Khudiram Bose v Emperor* (Some questions proper and others in the nature of cross examination — Answers to former may be considered)

(16) 3 AIR 1916 Mad 407 (408) 39 Mad 770 16 Cri L Jour 623, *In re Abibullah Routhan* (Questions put when no evidence implicating the accused had been taken—Answers held not admissible in evidence)

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although it was not urged in the Courts below and is not set forth in the application¹⁴ But in revision proceedings the High Court is not bound to interfere even if the non-compliance with S 312 is held to be illegal.¹⁵

Where a Magistrate examines an accused person before any evidence has been recorded it has been held that such statements cannot be rejected as inadmissible on account of the irregularity in procedure and that they may be evidence as being admissions under S 21 of the Evidence Act.¹⁶

343.* Except as provided in sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge

No influences to be used to induce disclosures

1 Scope of the section — Section 163 is an analogous provision applicable where an investigation is proceeding under Chap XIV. This section applies to accused persons and during the stage of inquiries and trials¹ The words accused person have the same meaning as the word accused in S 312² and unless influence is used to a person who is an accused within the meaning of that section this section does not apply³ Thus it does not apply where an inducement is offered to a witness and not to an accused person then under bail⁴ See Note 31 on S 312 as to the meaning of accused person

2 "Except as provided in sections 337 and 338" — Sections 337 and 338 provide for the grant of pardon to accused persons Except under those sections no inducement can be offered to an accused person to make any disclosures Thus a conditional pardon cannot be tendered by any authority save as provided by ss 337 and 338⁵

* 1882 S 343 1872 S 344 1851 S 203

- 14 (21) 8 AIR 1901 Pat 415 (418) 2^o Cri L Jour 442 *Moinuddin v Emperor*
 15 (42) 29 AIR 194^o Oudh 342 (343) 43 Cri L Jour 503 200 Ind Cas 90 *Ram Udit v Jagannath*
 (Prosecut on witnesses cross examined — Accused not asked whether he wished to make further statement — High Court will not interfere in revision unless prejudice is shown)
 (38) 25 AIR 1939 Lah 832 (837) 40 Cri L Jour 186 *Gurdas Singh v Emperor* (High Court will order retrial only when prejudice is caused to the accused due to non-compliance with the section)
 (28) 15 AIR 1928 Lah 230 (231) 29 Cri L Jour 90 *Emperor v Giani Singh*
 (26) 13 AIR 1906 Lah 553 (554) 27 Cri L Jour 727 *Hazara Singh v Emperor*
 (32) 19 AIR 1932 Oudh 113 (113 114) 33 Cri L Jour 811 *Pitram v Emperor*
 (21) 8 AIR 1921 Pat 374 (375) 22 Cri L Jour 460 *Ramnath Rai v Emperor*
 (08) 7 Cri L Jour 4^o2 (42^o 4^o3) 4 Low Bar Rul 143 *Emperor v Ba Pe*
 16 (93) 1893 Rat 679 (680) *Queen Empress v Narayan*

Section 343 — Note 1

- 1 (37) 24 AIR 1937 Nag 17 (21) 38 Cri L Jour 237 & 2^o1 I L R (1937) Nag 315 (FB) *Amdumayan Guljar v Emperor*

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witness — Overruled by AIR 1937 Nag 17 I L R (1937) Nag 315 33 Cri L Jour 237 & 2^o1 (FB) on another point) *v Emperor*
 — is competent

Note 2

Where the pardon tendered turns out to be illegal under S 337, it would be unlawful to examine the accused as a witness and his statement would be irrelevant and inadmissible in evidence²

3 No influence, etc. — An accused person is neither bound nor is under an obligation to make any admission injurious to his own interests. No judicial officer should attempt to compel him to make any such admission¹. Where however, the accused wishes to make a statement of his own accord, it is not necessary that the Magistrate should give him any caution before taking his statement². The eliciting of an admission by putting words into the mouth of the accused is unfair³.

An accused person is not bound to produce his co accused who are absconding and the Court cannot exercise any pressure upon him for the purpose of producing them⁴.

An assurance of amnesty given to a witness is not within the mischief of the section and does not affect the competency of the witness, though it may affect his credibility⁵.

4 Evidentiary value of statements — See also Note 6 on S 163. This section does not declare what the consequences would be if an accused person did make a statement under inducement¹. It seems to be however, clear that the statements so made would be inadmissible in evidence.

344. (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone Power to postpone or adjourn proceedings the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody.

Provided that no Magistrate shall remand an accused person to Remand custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation — If sufficient evidence has been obtained to raise a Reasonable cause suspicion that the accused may have committed an offence, for remand and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

* 1882 S 344 1872 Ss 194, 208, 219, 264, 1861 Ss 224, 269, 253, 377

2 (02) 1902 Pun L R No 52 Cr p 191 (192 193) *Durga v Emperor*

(02) 1902 Pun Re No 12 Cr p 33 (36) 1902 Pun L R No 100 *Nabi Baksh v Emperor*

Note 3

1 (97) 19 All 291 (292, 293) 1897 All W N 52, *In the matter of Gudar Singh*

(1864) 1 Soth V R Cr 24 (24) *Queen v Ramdhun Sing* (Honorary Magistrate holding out promises to prisoners as inducement to them to confess)

Synopsis

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| <p>1 Legislative changes</p> <p>2 Scope and applicability of the section</p> <p>3 Postponement and adjournment</p> <p>4 Postponement of case sine die</p> <p>5 Inquiry or trial See Sect on 4 (1) clause (k)</p> <p>5a Adjournment by public proclamation</p> <p>6 May if it thinks fit</p> <p>7 Reasonable cause for adjournment</p> <p>8 Stating the reasons therefor</p> <p>9 Adjournment to and trial on holiday</p> <p>10 Advancement of hearing</p> <p>11 Stay of criminal proceedings</p> <p>12 Adjournment of one of two cross cases</p> <p>13 Power of High Court to set aside order of adjournment</p> | <p>14 Power of Sessions Judge or District Magistrate to stay criminal proceedings pending before subordinate Magistrate See Note 11</p> <p>15 On such terms as it thinks fit — Costs</p> <p>15a Adjournment for cross examination of prosecution witnesses in trials of warrant cases — Power to impose terms on accused</p> <p>16 Remand</p> <p>17 Distinction between detention under S 167 and under S 344</p> <p>18 Grounds of remand</p> <p>19 Remand in absence of accused</p> <p>20 Period of detention</p> <p>21 By a warrant</p> <p>22 Magistrate's liability for unreasonable detention</p> |
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NOTE to the Synopsis See the Notes indicated for the following topics

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| <p>Adjournment of appeal — Costs See Note 15</p> <p>Costs against absent accused See Note 15</p> <p>Detention — Period of See Note 16</p> <p>Detention — Whether intended to be penal See Note 18</p> <p>Grounds held insufficient for adjournment See Note 7</p> <p>Protraction of trial — Improperly of See Note 2</p> | <p>Remand for getting a confession — Remand when objectionable See Note 18</p> <p>Remand in bailable cases See S 496</p> <p>Remand to police custody See Note 16</p> <p>Revison See Note 13</p> <p>Second remand See Note 16</p> <p>Who can be ordered to pay costs See Note 15</p> |
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1 Legislative changes — There was no separate chapter in the Codes of 1861 and 1872 dealing with the general provisions applicable to all kinds of trials. Hence a provision of adjournment was made under each chapter relating to different proceedings such as preliminary inquiry by Magistrates trial of warrant cases of summons cases and sessions trials. When the 1882 Code was passed recasting in many respects the two former Codes some of the general provisions applicable to all kinds of trials were clubbed together in chap XXIV and the Court's power to adjourn and remand was provided for in S 344. The section as re-enacted provided also for the postponement of the commencement of an inquiry or trial for which there was no provision in the Codes of 1861 and 1872. In the present Code the words *if it thinks fit* in sub s (1) were inserted between the words *the Court may* and *by order in writing* etc.

2 Scope and applicability of the section — This section provides for the postponement of the commencement or the adjournment of any inquiry or trial and also for remand of the accused where such postponement or adjournment is made. Thus after a Magistrate has taken cognizance of an offence his powers of postponement and adjournment are regulated by this section ¹

The policy of law is that criminal cases should be disposed of with the least possible delay ²

Section 344 — Note 2

3 Ind Cas 260 (DB)

3 Ind Cas 269 (DB)

Emperor v Abdul Wahid

- (41) 28 AIR 1941 Snd 166 (187) ILR (1941) Kar 359 43 Cri L Jour 68 196 Ind Cas 751 *Agha Nasar Ali Sulian v Emperor*
- (29) 16 AIR 1929 Nag 40 (43) 29 Cri L Jour 1099 *Raoimal v Sampat* (Intention of Code is that criminal trial should be continued from day to day until termination)
- (25) 12 AIR 1925 Cal 1017 (1019) 27 Cri L Jour 129 *Thomas James Henry Arnup v Kedar Nath Ghose* (Whether considered from the point of view of the complainant or of the accused delay is inexcusable)

The object is to avoid hardship to the parties and witnesses³ If the accused is in custody, frequent adjournments will be a harassment to him and, from the point of view of the prosecution, time will efface recollection of facts The longer the period allowed to elapse from the time of the arrest to the time the witnesses give evidence, the greater is the probability of confusion and of the truth being obscured⁴ The section consequently provides that a postponement or adjournment can be given only in two cases —

- (1) where witnesses are absent or
- (2) for any other reasonable cause⁵

It is not expedient for a sessions trial to be adjourned When once begun such trial should be continued *de die in diem* — from day to day — until it is finished⁶ The section applies only to proceedings in *inquiries* and *trials* It does not apply to *appeals*,⁷ or to proceedings in revision⁸

As to other provisions relating to adjournment, see Sections 229, 508 and 526

3 Postponement and adjournment — The section empowers the Court not only to *adjourn* an enquiry or trial, but to postpone its *commencement* Thus, a Magistrate receiving a complaint may postpone the issue of a process under S 204, and is not bound to

(26) 13 AIR 1926 Cal 102 (104) 26 Cri L Jour 1050 *Rash Behary v Corporation of Calcutta* (Frequent adjournments at the instance of the prosecution condemned)

(17) 4 AIR 1917 Sind 73 (76) 18 Cri L Jour 54 (57) 10 Sind L R 148 *Jehangir Perosshah v Ganga ram Naumal* (Do—Sind Courts Criminal Circulars Ch 5 R 22)

(23) 10 AIR 1923 Cal 725 (727) 25 Cri L Jour 492, *Shermull v Corporation of Calcutta* (Long adjournment for three years condemned)

ahomed Ibrahim v Emperor (Protracted

trial (Constant unnecessary adjournment is

(17) 4 AIR 1917 Sind 46 (47) 18 Cri L Jour 834 11 Sind L R 27, *F W Soler v Emperor* (Protracted trial by lengthy cross examination)

(32) 19 AIR 1932 Pat 276 (278) 34 Cri L Jour 263, *Birdhi Chand v Darbari Jayaswal* (Numerous adjournments in petty cases)

(30) 17 AIR 1930 Pat 241 (243) 9 Pat 113 31 Cri L Jour 769 *Narayan v Emperor* (Do)

(68) 9 Sath W R Cr C r 5 (6)

(99) 2 Bom L R 322 (323) *Queen-Empress v Mahadu Tukaram*

(29) 16 AIR 1929 Cal 776 (776) 31 Cri L Jour 614 *Strajuddin Kasi v Sergeant H Jenner* (The case of an accident to a motor due to the negligent and reckless driving of another motor car ought to be tried within a week)

(25) 12 AIR 1925 Oudh 501 (501) 27 Oudh Cas 327 26 Cri L Jour 530 *Bahadur v Emperor* (A delay of over four and half months in hearing an appeal would amount to denial of justice in a majority of cases)

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3 (1865) 4 Sath W R Cr Cir No 12 p 1

(See also (24) 11 AIR 1924 Cal 18 (44) 25 Cri L Jour 1313 *P E Billingham v Emperor*]

4 (25) 12 AIR 1925 Cal 1017 (1020) 27 Cri L Jour 129 *Thomas James Henry Arnup v Kedar Nath Ohose* (Simple assault case which could have been disposed of within a few days took a period of more than a year)

5 (36) 23 AIR 1936 Sind 235 (236) 38 Cri L Jour 119 30 S L R 357 *Jethanand v Tahulram*

6 (19) 13 Cri L Jour 861 (862) 35 AIR 63 17 Ind Cas 797, *Badri Prasad v Emperor* (Evidence case remaining

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stpone trial to

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8 (36) 23 AIR 1936 Sind 235 (236) 38 Cri L Jour 119 30 S L R 357, *Jethanand v Tahulram*

pass any order under S 202 S 203 or S 204 immediately after examining the complainant¹

In the unmentioned case² the Bombay High Court pointed out the desirability of having a fixed time each day for the purpose of appointing new dates for cases which cannot be reached on that day

4 Postponement of case sine die — A postponement or adjournment of a case *sine die* is not in accordance with this or any other provision of the Code¹ The postponement or adjournment under this section can only be from time to time and for such time as the Court considers reasonable i.e. for *fixed and definite periods*² See also Note 11

5 Inquiry or trial — See Section 4 (1) clause (b)

5a Adjournment by public proclamation — An adjournment must under this section be by *an order in writing* It is irregular and objectionable to adjourn a trial by public proclamation¹

6 "May, if it thinks fit." — These words show that the question of postponement or adjournment of an enquiry or trial is a matter of the Court's *discretion* The discretion is however not an *arbitrary* one but should be exercised judiciously and only in cases which come within the terms of this section¹

A Court is not obliged to pay attention to a telegram from a pleader of one of the parties asking for adjournment*

Note 3

- 1 (25) 12 AIR 1925 Pat 619 (620 621) 26 Cr L Jour 1179 *Ram Saran Singh v Nihalad Narain Singh* (Complainant examined and case postponed till disposal of counter case)
 (29) 16 AIR 1929 Cal 281 (282) 31 Cr L Jour 262 *Ram Golam Singh v Sarat Chandra* (Even apart from S 344 the Magistrate under inherent jurisdiction has jurisdiction to postpone commencement of proceedings)
 2 (34) 21 AIR 1934 Bom 130 (133) 35 Cr L Jour 1139 *In re Jamnabai Meghji*

Note 4

- 1 (42) 29 AIR 1942 Cal 219 (221) ILR (1941) 2 Cal 281 43 Cr L Jour 539 199 Ind Cas 269 (DB) *Emperor v Md Ebrahim*
 (47) 29 AIR 1942 Lab 256 (257) ILR (1943) Lab 726 43 Cr L Jour 865 202 Ind Cas 609 *Kehr Singh v Kirpal Kaur* (Process issued—Magistrate must in warrant case proceed in accordance with Chap XXI—Order directing investigation on under S 156 (3) and adjournment hearing *sine die* is illegal)
 (41) 28 AIR 1941 Sind 186 (187) ILR (1941) Kar 350 43 Cr L Jour 68 196 Ind Cas 751 (DB) *Agha Nayarali Sultan v Emperor*
 (41) 45 Cal W N 819 (822) (DB) *Emperor v Rajamatali* (Prosecuting Inspector applying for adjournment for definite period to enable him to obtain orders of Government regarding prosecution—Magistrate adjourning case *sine die* as he did not feel sure as to when the prosecution would be ready to go on with the case—Order illegal)
 (09) 9 Cr L Jour 35 (36) 13 Cal W N 104 8 Cal L Jour 561 *Abdur Rauf Mia v Rahamuddin* (Adjournment *sine die* of proceedings under S 145)
 (32) 19 AIR 1932 Sind 214 (215) 27 Sind L R 17 34 Cr L Jour 139 *Tarachand v Emperor* (Dismissal of 11 Cr L Jour 7—Adjournment *sine die* pending disposal of another case)
 (33) 20 AIR 1933 Sind 358 (359) 27 Sind L R 219 35 Cr L Jour 517 *Emperor v Dinalshah Rajanshah* (Criminal case for theft—Civil suit by accused for declaration of title to property removed—Held criminal case should not remain undisposed till decision of civil suit)
 [But see (10) 11 Cr L Jour 7 (8) 4 Ind Cas 537 (Cal) *Guru Das Hasara v Weatherall*]
 2 (26) 13 AIR 1926 All 421 (422) 27 Cr L Jour 560 *Kewal Ram v Emperor*

Note 5a

- 1 (1870 71) 6 Mad H C R App xxix (xxx)

Note 6

- 1 (70) 17 Suth W R Cr 55 (57) 9 Beng L R 354 *Mulhoora Nath v Heera Lal* (Absence of reasonable cause for adjourning enquiry—High Court under S 15 of Charter Act set aside order of Magistrate adjourning enquiry)
 2 (40) 27 AIR 1940 Nag 293 (283) 41 Cr L Jour 585 *Bhanwar Singh v Sukhram Singh* (Especially where the telegram does not arrive until after the proceedings are over)

7. Reasonable cause for adjournment. — An adjournment can be granted only on the ground of the *absence of a witness*¹ or for any other *reasonable cause*² As a general rule Magistrates should refrain from granting adjournments save in cases where they are clearly necessitated for the purposes of justice³

The following have been held to be good grounds for adjournment :

- (1) To enable the accused to secure the attendance of his witnesses⁴
- (2) To enable an accused to examine such of his witnesses as he has produced⁵
- (3) To enable an accused to engage the services of a pleader to properly defend himself in complicated cases⁶
- (4) Where the accused's advocate is absent at another place to fulfill a long standing engagement⁷
- (5) Where a large number of witnesses have been examined for the prosecution and the accused wants two days' time to consider what evidence he should produce⁸
- (6) Where the counsel for the accused in a capital case wants to cross examine the witnesses on the following day as he was not prepared to cross examine on that day⁹
- (7) Where a party is asked to cross examine a witness at 6.30 P. M., and he asks for time on the ground that the pleader is not then available¹⁰
- (8) Where the accused is tried for separate offences and an appeal is pending against the conviction in respect of one of such offences.¹¹
- (9) Where a new witness is produced in the Sessions Court who was not examined before the committing Magistrate and the accused wants time on the ground that it is a surprise to him¹²

Note 7.

1 witness is reported

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Magistrate's duty to
being proceeded with

3 (30) 17 AIR 1930 Pat 241 (243) 9 Pat 113 31 Cri L Jour 789, *Narayan v Emperor* (Petty criminal case—Parties should appear at first hearing for completion of entire trial — Adjournment should be deprecated in such case)

4 (14) 1 AIR 1914 Lah 84 (84) 15 Cri L Jour 521, *Lal Singh v Emperor*

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7. (11) 12 Cri L Jour 474 (476) 12 Ind Cas 82 (LB) *E. J. Esteves v Emperor*

8 (20) 7 AIR 1920 Pat 25 (28) 21 Cri L Jour 321, *Rameshwar v Emperor*.

9. (14) 1 AIR 1914 Cal 831 (835) 41 Cal 299. 15 Cri L Jour 596, *Sadasiv v Emperor*.

Also see S 286, Note 10.

(10) For producing material documents filed in a civil case¹³

(11) Where in a sessions trial it is found that a witness is absent and therefore his deposition before the committing Magistrate could not be received and the witness has consequently to be summoned¹⁴

The following have been held not to be sufficient grounds for granting an adjournment

(1) To enable the accused to get a ruling from the High Court on a point of law¹⁵

(2) The absence of a co accused and desirability of a joint trial¹⁶

(3) To enable the complainant to examine witnesses whom he had not cared to have in attendance.¹⁷

(4) To enable a party to summon witnesses where sufficient time has already been allowed for the purpose¹⁸

(5) To enable the prosecution to find out evidence the existence of which is entirely problematical¹⁹ The High Court of Lahore has however, held that an adjournment may be granted to give opportunity to the complainant to collect evidence though for such purpose it should be sparingly granted²⁰

(6) To enable the prosecution to examine witnesses not named in the *chalan*²¹

(7) To enable the pleader of one of the parties in a petty case to be present where the pleader of the opposite party was present and the date had been announced beforehand²²

(8) The absence of the counsel of one of the accused in a sessions case in which a number of witnesses had been summoned²³

A Full Bench of the High Court of Lahore has held that this Code is not applicable to contempt proceedings and that even if S 344 be held applicable to such proceedings where the Court is scandalised and an attempt is made by a scurrilous publication to undermine and impair the authority of the Court, immediate action is necessary to vindicate the authority of the Court and the proceedings will not be adjourned merely

13 (21) 22 Cri L Jour 335 (336) 61 Ind Cas 63 (Cal) *Biswambhar Roy v Aminuddin* (Order refusing adjournment for purpose of procuring necessary documents is an arbitrary order constituting denial of justice)

14 (74) 21 Suth W R Cr 56 (57) *Queen v Lakhun Santlal*

[See also (87) 12 Cal L Rep 120 (121) *Empress v Sagambar* (Depositions before committing Magistrate taken in the absence of accused — Prosecution failing to lay down any basis for such reception of evidence—Adjournment for summoning material witnesses is necessary)]

Also see S 512 Note 19

15 (07) 7 Cri L Jour 400 (401) 12 Cal W N 604 (604) *Mohesh Sonar v Emperor* (Postponement granted for obtaining ruling of High Court on the point whether certain coins were king's coins or not)

(33) 20 AIR 1933 S ud 17 (20) 26 Sind L R 255 33 Cri L Jour 908 *Abdullah v Emperor*

16 (01) 1 Low Bur Rul 60 (61) *Queen Empress v Nga Tun Hla*

(29) 9 AIR 1922 Cal 334 (335) 49 Cal 182 29 Cri L Jour 465 *Billinghurst v Meek* (Principal accused absent)

17 (25) 12 AIR 1925 S ud 815 (316) 26 Cri L Jour 953 *Ali Sher v Mir Mahomed*

Also see S. 256 Note 9

18 (74) 23 Suth W R Cr 9 (11) *Chalun Tewari v Sukedad Khan*

(23) 10 AIR 1923 Mad 185 (186) 46 Mad 253 24 Cri L Jour 84 *In re Derwish Hussain* (Where accused did not ask for fresh process after the witness failed to attend though served)

19 (30) 17 AIR 1930 Rang 76 (77) 7 Rang 592 31 Cri L Jour 296 *Ali Phone v Emperor* (At a stage when case is ready for hearing)

20 (42) 29 AIR 1942 Lah 256 (257) ILR (1943) Lah 726 43 Cri L Jour 865 202 Ind Cas 609 (DB), *Kehr Singh v Kirpal Kaur*

21 (19) 19 AIR 1924 Cal 334 (335) 49 Cal 182 29 Cri L Jour 465 *Billinghurst v Meek* (Principal accused absent)

22 (19) 19 AIR 1924 Cal 334 (335) 49 Cal 182 29 Cri L Jour 465 *Billinghurst v Meek* (Principal accused absent)

23 (37) 21 AIR 1937 All 171 (174) 38 Cri L Jour 416 *Salag Ram v Emperor*

ramsingh. (Telegram

8. "Stating the reasons therefor" -- The reasons for the adjournment should be clearly expressed on record. It is not enough that a reasonable cause *exists*. Such cause should be stated in the order as the prisoner is entitled to know what such cause is, and an appellate Court cannot form an opinion of its reasonableness unless it is stated on record¹.

10 Advancement of hearing — This section does not stand in the way of the Court advancing the hearing of a case to an earlier date, provided due notice thereof is given to the parties¹ An acceleration of the date of hearing against the wishes of the accused or his pleader is not proper.

24 (42) 29 AIR 1042 Lah 105 (107) 1LR (1942) Lah 411 43 Cri L Jour 599 200 Ind Cas 182 (FB).
In re K L Gauba Lahore

Note 8

Note:

1 appears necessary

Note 9

Also see § 340 Note 4 and § 537, Note 25.

Note 10

2 (98) 1898 Pnn Re No 14 Cr p 32 (33) *Karamidin v Queen*

Note 11

(24) 11 AIR 1924 Mad 888 (889) *In re Periaswamy Muthurayan* (Stay of criminal proceeding until disposal of civil litigation between parties respecting same subject matter should be ordered where the

Excommunication by Roman Catholic priest — Criminal proceeding stayed until complainant established the illegality of priest's acts in a civil Court]]

S. 561A of the Code.² The High Court had also independent of S. 561A power under S. 107 of the Government of India Act 1915 to stay proceedings in subordinate Courts in the exercise of its powers of superintendence over inferior Courts.³ But under S. 221 of the Government of India Act 1935 which corresponds to S. 107 of the Act of 1915 the High Court has now no power to interfere with the judicial orders of the lower Courts see subs (2) of S. 221 and the undermentioned cases.⁴

Questions very often arise as to whether a criminal proceeding should be stayed during the pendency of a civil proceeding in respect of the same or substantially the same subject matter. There is now a consensus of judicial opinion that there is no *invariable rule* that a criminal proceeding should be stayed pending the issue of a civil suit⁵ but that

[But see (29) 16 AIR 1929 Snd 115 (116) 93 Sind L R 295 30 Cri L Jour 399 *Ramchand v Emperor* (No power except under S. 344 to adjourn from time to time — The question of inherent power was not adverted to)]

(27) 14 AIR 1917 Mad 851 (851) 28 Cri L Jour 819 *Murugan v Gatha Ram* (Do)

(33) 20 AIR 1933 Sind 308 (309) 97 Sind L R 219 35 Cri L Jour 517 *Emperor v Dinalshah Raja : shah* (Following A I R 1919 Snd 115 23 Sind L R 29, 30 Cri L Jour 399 and AIR 1932 Sind 214 27 Snd L R 17 34 Cri L Jour 139 — Criminal case for theft — Civil suit by accused for declaration of title to property removed — Held criminal case should not remain undisturbed till decision of civil suit)]

2 (28) 29 Cri L Jour 1053 (1055) 112 Ind Cas 477 (Bom) *Jehangir v Framji Rustumji Wadia* (Criminal proceeding need not be stayed where accused is not likely to be prejudiced by criminal proceeding being allowed to proceed)

(26) 13 AIR 1926 All 30 (33) 48 All 60 26 Cri L Jour 1485 *Kanhaya Lal v Bhagvandas* (Proceedings in both Civil and Criminal Courts regarding same dispute)

3 (23) 10 AIR 1923 Mad 50, (50a) 25 Cri L Jour 290 *Nambia v Sudalaimuthu*

(96) 23 Cal 610 (614 616) *Rajkumari v Bama Sundari* (Rampal J contra)

(31) 18 AIR 1931 Pat 411 (414) 33 Cri L Jour 147 *Jagannath v Rajagopalachari*

(08) 8 Cri L Jour 390 (391) 31 Mad 510 4 Mad L T 186 *Itire Jotiah*

(07) 6 Cri L Jour 131 (132) 30 Mad 226 *Anna Aiyar v Emperor*

[See (21) 8 AIR 1921 All 365 (366) 43 All 180 22 Cri L Jour 236 *Rajkumwar Singh v Emperor*]

[See also (24) 11 AIR 1921 Mad 235 (236) 24 Cri L Jour 640 *Inkamma v Adribholli*]

(38) 25 AIR 1938 F C 1 (3) 1 L R (1939) Kar (FC) 1 1939 F C R 13 180 Ind Cas 517 (FC) *Pashupati Bharti v Secy of State*

(38) 25 AIR 1938 All 639 (640) 180 Ind Cas 31 *Lakshmi Iron and Steel Manufacturing Co v Firm Radhey Lal Manni Lal*

(38) 25 AIR 1938 Lah 80 (81) 1 L R (1938) Lah 377 176 Ind Cas 761 *Peoples Bank of Northern India v Kanaya Lal* (High Court cannot interfere with judicial orders in the exercise of its administrative functions under S. 221)

(38) 25 AIR 1938 Lah 412 (412) 178 Ind Cas 292 *Amar Singh v Secy of State*

5 (43) 30 AIR 1943 Sind 10 (10) 1 L R (1942) Kar 193 44 Cri L Jour 167 201 Ind Cas 252 (DB),

(It must be assumed that each Court must be allowed to proceed with the business on its file without any intervention of this kind)

(33) 20 AIR 1933 Lah 37 (38 39) 34 Cri L Jour 96 (98) *Bashesharnath v Ratan Chand*

(16) 3 AIR 1916 Lah 137 (137 138) 17 Cri L Jour 205 (206) *Nur Din v Emperor*

(30) 17 AIR 1930 Lah 800 (803) 31 Cri L Jour 1053 *Lorund Singh v Emperor* (Rule of staying criminal trial when civil litigation is pending is rule of prudence and its application must depend on merits of each particular case)

in *Ram* (Order can be justified only on special grounds the general rule being that the High Court should avoid proceedings)

the matter is entirely one of *discretion* of the Court to be exercised having regard to the merits and all the circumstances of the case⁶ The real principle to be looked to is whether

- *zman v Vedamuthu* (If law allows a
..... *v Tajmuhammad Nasr.* (There is no proceeding)
(21) 8 AIR 1921 Pat 484 (484), *Jodhs Singh v Emperor* (Criminal case should not be stayed if questions involved are not identical)
..... *ah v. Ramiah*
..... only it is not desirable —
..... *Emperor* (Criminal law

should proceed with expedition)

- (12) 13 Cri L Jour 848 (848) 17 Ind Cas 720 (Bom), *In re Kesava Narayan*
(28) 29 Cri L Jour 1053 (1056) : 112 Ind Cas 477 (Bom), *Jehangir v Framji*
(08) 8 Cri L Jour 435 (437) : 35 Cal 909, *Hemchandra v Atal Behari*
(04) 1 Cri L Jour 852 (854) 31 Cal 658, *Duarkanath Rai v Emperor* (Special reason is necessary to grant stay)
(02) 2 Weir 415 (416, 417), *In re Subramania Chetty*
(29) 16 AIR 1929 Cal 563 (566) 57 Cal 658 31 Cri L Jour 211, *Gopal Chandra v Suresh Chandra*.
(In case of Crown prosecution with Crown a party whose interest is for public justice proceeding in Criminal Court cannot be stayed pending decision in civil suit)
But see the following cases which seem to proceed upon the view that ordinarily there should be a stay in such cases
(28) 13 AIR 1928 All 30 (33) 48 All 60 28 Cri L Jour 1485, *Kanhaya Lal v. Bhagwan Das* (Inherent power of the High Court to stay proceedings is very wide and can be properly exercised in such cases)

- *eror*
..... *imperor*
..... *rkar v. Kala Doyal*
..... *1 - D - Emperor*
..... *ihwe Dwin.*

(Matter purely of civil dispute)

- (16) 3 AIR 1918 Bom 163 (164) 17 Cri L Jour 153 (153) 41 Bom 1, *In re Markur*
(16) 3 AIR 1918 Lah 174 (175) 17 Cri L Jour 7 (8), *Parasram v Jalal Din*
(92) 16 Bom 729 (731) *In re Shri Nana Maharaj* (Criminal proceedings for perjury or forgery arising out of civil litigation)
(07) 5 Cri L Jour 199 (200) 5 Cal L Jour 233, *Ram Charan Singh v Emperor*
(21) 8 AIR 1921 Pat 495 (495) *Haridax Ram v Gopal Ram*

Euer v. Emperor (Irreparable in-

under S 82 of the Registration Act

— Civil suit pending)

- (06) 10 Cal W N 661 (662), *Gopeshwar Pal v Emperor*

(1882) 1 Mad H C R 66 (67, 68) 2 Weir 22, *Ex parte Varadarajulu Naidu*

- 6 (43) 30 AIR 1943 Oudh 184 (186) 18 Luck 419 44 Cri L Jour 189 204 Ind Cas 265 *Shatrungaya Singh v Saxena*

- *..... Singh v.*
..... *e suit*
..... *Both*
..... *— A*
..... *rown*

was party to suit)

(High Court will not ordinarily

v Abbas Jafferli.

the accused is likely to be *prejudiced* if the criminal proceeding is not stayed until the disposal of the suit.⁷ Where the matter in issue is not of such a complicated kind for the decision of which Civil Courts are preferred as peculiarly qualified as, for example, the genuineness of a will or other document, the validity of a will, and the *bona fides* of a civil claim, it cannot be assumed that there will be a manifest and irreparable injustice done in the Criminal Court when the integrity of the Court is not questioned.⁸

In exercising the discretion in the matter of stay, the following principles may be remembered

- (1) Where a criminal proceeding is instituted with the motive of hampering the conduct of the civil proceeding, the former may be ordered to be stayed.⁹ Thus, however, will not apply in the case of *public* prosecutions, such as prosecutions under S 195 or S 476, Criminal Procedure Code.¹⁰

- { 30 } 17 AIR 1930 Lah 802 (803) : 31 Cri L Jour 1053, *Lorind Singh v. Emperor*. (The rule that criminal proceeding should not be started when the same question is also involved in a pending civil litigation is a rule dictated by prudence and its application must depend on the merits of each case)
 { 29 } 16 AIR 1929 Pat 500 (501) : 30 Cri L Jour 1101, *Hriday Narain Singh v. Emperor*. (High Court cannot interfere with the lower Court's order unless it is unjusticial)
 { 27 } 14 AIR 1927 Lah 744 (745) : 28 Cri L Jour 326, *Linton v. Emperor*. (Matter in criminal case identical with issue to be decided in civil suit instituted prior to complaint in criminal case — Criminal case should be stayed.)
 { 25 } 12 AIR 1925 Pat 193 (193) : 26 Cri L Jour 286, *Dasarat v. Joy Chand*.
 { 25 } 12 AIR 1925 Mad 59 (42) : 47 Mad 722 : 25 Cri L Jour 1009, *Ramanathan v. Sivrama Subramaniya* (Prosecution not launched in public interest — This is good ground for staying criminal proceedings pending civil suit)
 { 92 } 1892 Rat 587 (588), *In re Ebrahim*.
 { 33 } 20 AIR 1933 Bom 907 (309) : 34 Cri L Jour 900, *In re Ramchandra Babaji*

subject matter of civil suit — Charge of theft of such property — Criminal case should be stayed)

ted as a
 appeal)

[See also { 27 } 14 AIR 1927 Mad 778 (779) : 50 Mad 839 : 28 Cri L Jour 812, *Ramiah v. Ramiah* (It must be assumed that in either Court justice will be done and which Court precedes the other is

al case
 when

there is long delay in presenting the criminal case)

- 10 { 29 } 16 AIR 1929 Cal 563 (568) : 57 Cal 553 : 31 Cri L Jour 211, *Gopal Chandra v. Suresh Chandra*
 { 28 } 29 Cri L Jour 1053 (1055) : 112 Ind Cas 477 (Bom), *Jehangir v. Framji*
 { 04 } 31 Cal 853 (862) : 1 Cri L Jour 852, *Dwarkanath Rai v. Emperor*.
 { 02 } 26 Bom 785 (791) : 4 Bom L R 618, *In re Dal Gangadhar Tilak*.
 { 22 } 23 Cri L Jour 84 (94) : 65 Ind Cas 436 (436) (All), *Anrudh Kumar v. Emperor*

- (2) Where a civil proceeding is filed for the purpose of delaying or the conduct of which would result in a long delay of the trial of the criminal case, no stay should be granted¹¹
- (8) Where the civil suit has been filed *before* the institution of the criminal proceeding and it appears that the decision in the former will be of value in arriving at the truth in the criminal case, the latter may be stayed¹²
- (4) Where the civil suit is filed *after* the criminal case and there is no possibility of its being decided soon, a stay should not be ordinarily granted¹³
- (5) Where the criminal prosecution in no way arises out of the civil suit and the decision in the Civil Court will not necessarily affect the decision of the Criminal Court it will be unreasonable and speculative to order stay of proceeding in the Criminal Court¹⁴

(12) 13 Cr L Jour 848 (848) 17 Ind Cas 720 (Bom), *In re Keshav Narayan*

(08) 8 Cr L Jour 435 (437) 35 Cal 909 *Hem Chandra v Atal Behari*

11 (14) 1 AIR 1914 Mad 143 (143) 15 Cr L Jour 568 *Pedda Baihah v Venkataswami* (In view of the suit being a summary one proceedings were stayed)

12 (43) 30 AIR 1943 Sind 10 (10) 1LR (1943) Kar 193 44 Cr L Jour 167 204 Ind Cas 252 (DB) *Moti Ram v Emperor* (The fact that the civil suit is pending in the Chief Court does not deprive the Magistrate of his power to stay the trial until an order is made for stay by the Chief Court)

(42) 29 AIR 1942 Bom 330 (331) 44 Cr L Jour 100 203 Ind Cas 517 (DB) *Thakorlal Vadilal v Ambalal Bhikabhai* (Criminal complaint filed during pendency of civil suit between the parties alleging criminal trespass and wrongful restraint in relation to portion of suit property by one of the parties to the suit held should be stayed pending the hearing of the suit)

(37) 24 AIR 1937 Pat 8 (9) 38 Cr L Jour 264 *Molhu Rai v Emperor* (Civil suit based on hand note—Defendant alleging that handnote was outcome of fraud on him—Complaint by defendant against plaintiff—Plaintiff applying for stay of criminal proceedings till decision of civil suit—Stay held should be granted)

(35) 22 AIR 1935 Rang 487 (488) 37 Cr L Jour 281 *U Tha Zan v U Pyant* (Cases in which stay is granted are usually those where the criminal proceedings arise directly out of the proceedings in or forgery in relation to documents put

n v Emperor

WN 254 *Mathura Kunwar v Durga*

Kunwar (Where the decision of the civil suit will not be evidence in the criminal case stay should be refused)

(35) 22 AIR 1935 Cal 182 (183) *Srisisson Berswala v Emperor* (Issues in criminal case likely to be included in issues in civil suit which is ripe for the hearing—Criminal case to be stayed—Even a prosecution launched by police can be stayed under such circumstances)

(35) 22 AIR 1935 Sind 187 (188) 36 Cr L Jour 1350 *Fazl Muhammad v Abbas Jafferah* (Disputes in criminal proceeding and civil suit intimately connected—Civil suit prior in time—Common issues capable of being decided more properly in civil suit—Held criminal case should be stayed)

(17) 4 AIR 1917 Pat 621 (622) 18 Cr L Jour 771, *Khobhara Rai v Bhagwat Rai* (Property subject matter of suit—It is just and proper to stay criminal trial)

(27) 14 AIR 1927 Lah 669 (670) 28 Cr L Jour 778 *Kalu Mal v Emperor* (Pronouncing of judgment in criminal case stayed pending decision in appeal in civil case out of which criminal case had arisen)

(35) 22 AIR 1935 Sind 81 (83) 36 Cr L Jour 881 *Kalumal Gelomal v Kistumal Issardas* (Statement made in affidavit filed in Court false—Complaint under S 500 filed before civil suit is over—There is no infraction of law patent on face of record to justify quashing of proceedings—But it is expedient that hearing of complaint should be stayed till disposal of civil suit)

13 (20) 7 AIR 1920 Lah 198 (198) 21 Cr L Jour 389 *Shib Dayal v Hans Ray* (If however the cause of action did not arise till after the filing of the criminal complaint the criminal proceedings should be stayed)

(10) 11 Cr L Jour 4 (6) 4 Ind Cas 485 (Cal) *Brojobashi Panda v Emperor*

(10) 11 Cr L Jour 291 (292) 6 Ind Cas 181 (Cal) *Haris Pada Pal v Jotish Chandra*

v Ratanchand (Civil suit likely to properly refused to be considered till

14 (43) 30 AIR 1943 All 14 (14 15) 1LR (1943) All 27 44 Cr L Jour 278 204 Ind Cas 497, *Panna Lal v Emperor* (Complaint under Ss 420 and 406 Penal Code—Civil suits by accused and

- (6) Where the subject matters of the dispute in the criminal and civil cases are not identical or have no bearing on one another, a stay will not be granted¹⁵
- (7) In cases of disputed title to land where it is difficult to draw the line between a *bona fide* claim and a criminal trespass, a stay can be granted¹⁶
- (8) Although it is not illegal to have two separate criminal proceedings in respect of accusations arising out of the same facts, such a course is obviously inconvenient and it is desirable that both the proceedings should be held in a Court having jurisdiction to conduct both¹⁷ See also Note 12 and section 190, Note 17.
- (9) The Court should consider where the public interest lies, and not merely where the supposed interest of the particular complainant lies. The interest of the public is opposed to multiplicity of proceedings. The Court should not regard the matter as a sort of competition between the Civil and Criminal Courts¹⁸

There is no provision in the Code enabling a District Magistrate to stay proceedings in the Criminal Courts subordinate to him¹⁹ Nor is there any provision enabling a Sessions Judge to stay a civil suit pending the decision of a criminal case²⁰

A Magistrate who has directed an inquiry by a subordinate Magistrate under S 202, can stay proceedings,²¹ and where there are two counter complaints the Magistrate will be justified in staying proceedings in one pending the disposal of the other²² See also Note 12

complainant connected with same affair — Criminal case being between Crown and accused Criminal Court held not bound or affected by decision of Civil Court.—Criminal case held should not be stayed)
(43) 30 AIR 1943 Nag 327 (329) : 1LR (1944) Nag 238 : 45 Cri L Jour 175 : 210 Ind Cas 188,
Hariramonaik v. Mt Radha Jaiaram (Complaint under S 487, I. P. C. for forgery of will by said

Also see S 439, Note 27

15 (21) 8 AIR 1921 Pat 434 (494), *Jodha Singh v. Emperor*. (Issue in civil suit not identical with issue in criminal case)

(21) 8 AIR 1921 Lah 386 (388) : 23 Cri L Jour 700, *Taj ud-din v. Taj Mahommed Nasir* (Criminal proceeding need not be stayed where questions are different though allied and arising out of the same transaction)

[See also (45) 32 AIR 1945 Sind 32 (33) : 1LR (1944) Kar 392 : 46 Cri L Jour 437 : 218 Ind Cas 230 (DB), *Mansharam v. Emperor* (Unless finding of Civil Court will dispose of point arising in criminal case, adjournment should not be granted merely for the purpose of enabling the Magistrate to have the benefit of the Civil Court's finding)

(33) 20 AIR 1933 Sind 359 (359) : 27 Sind L R 219 : 35 Cri L Jour 517, *Emperor v. Dinal Shah*. (Decision in civil suit not likely to conclude question before Criminal Court—Stay not necessary)]

16 See (27) 14 A 1 R 1927 Mad 778 (778) : 50 Mad 839 : 28 Cri L Jour 812, *Ramiah v. Ramiah*. (Obiter)

(23) 24 Cri L Jour 245 (247) : 71 Ind Cas 789 (Fesh), *Khemchand v. Emperor*. (Object of criminal proceedings to obtain an adjudication on question of title — Civil suit pending — Criminal proceeding quashed)]

17 (33) 20 A 1 R 1933 Nag 78 (80) : 29 Nag L R 201 : 34 Cri L Jour 519, *Kanhayalal v. Dainyath*.

18 (42) 29 AIR 1942 Bom 330 (331) : 41 Cri L Jour 100 : 203 Ind Cas 517 (DB), *Thakorlal Vadilal v. Ambalal Bhikhabhai*

19 (23) 10 AIR 1923 Mad 689 (688) : 25 Cri L Jour 277, *Krishna Rao v. Seshasubramania Iyer*.

(31) 18 AIR 1931 Pat 411 (414) : 33 Cri L Jour 147, *Jaganmuth Acharya Goswami v. Rajagopalachari*. (Deputy Commissioner had no jurisdiction either as a Revenue Court or as a District Magistrate to stay criminal proceedings pending before the Sub-divisional Magistrate)

Also see S 17, Note 9

[But see (23) 10 A 1 R 1923 Mad 595 (595) : 25 Cri L Jour 280, *Nambia Pillay v. Sudaisamuthu Nadan* (Magistrate has wide powers to stay, for reasons of expediency, trial pending before subordinate Courts)]

20 (67) 1897 All W N 102 (103), *Empress v. Unkar Das*.

21 (34) 21 AIR 1934 Sind 143 (144) : 36 Cri L Jour 91, *Rewatmal v. Sajjanmal*

Also see S 202, Note 13

22 (30) 17 AIR 1930 Pat 30 (32) : 30 Cri L Jour 551, *Parmanand v. Emperor*

(22) 9 AIR 1922 Pat 618 (618) : 21 Cri L Jour 120, *Lalji Singh v. Naurangi Lal*

No costs of adjournment can be awarded in criminal appeals¹³ or criminal revisions¹⁴ as the section does not apply to such proceedings. So also an adjournment granted on intimation by a party under S 526 (S) about his intention to move the High Court for transfer is not an adjournment under this section and therefore a Magistrate has no power to award costs of such adjournment¹⁵

15a Adjournment for cross examination of prosecution witnesses in trials of warrant cases — Power to impose terms on accused — In trials of warrant cases the accused has a statutory right to the recall of prosecution witnesses for cross examination after the charge is framed and he cannot be ordered to pay the expenses of the witnesses in such cases. See Notes on S 256. But this right applies only to the first recall of the witnesses. Where once the witnesses are recalled but the accused asks for an adjournment of the case on the ground of the absence of his pleader the Court can under this section grant him the adjournment on condition of his paying *bhatta* to the prosecution witnesses¹

16 Remand — A remand is a re committal to custody of a person who has been brought up in custody.¹ The scheme of the Code as to the detention of the accused persons in custody is as follows

A person arrested *without warrant* should be brought before a Magistrate without unnecessary delay (Ss 59 and 60) the maximum period of police custody allowed being twenty four hours (S 61). A person arrested under a warrant is similarly to be brought before a Magistrate without unnecessary delay (S 61). On the arrested person being so brought before the Magistrate the Magistrate may from time to time authorize the detention of the accused either in police custody or in the judicial lock up as he thinks fit for a term not exceeding fifteen days *on the whole* (S 167). If within that period the investigation shows that there is not sufficient evidence or reasonable ground of suspicion against the accused he should be released by the investigating officer on taking security for appearance before the Magistrate if and when he is required (S 169). If within that period the investigation shows that there is such evidence or if the period expires without the investigation having been completed the accused must be forwarded subject to the provisions as to bail to the Magistrate *empowered to take cognizance of the offence upon a police report* (S 170). If the latter also receives along with the accused a police report under S 173 he can take cognizance of the offence on such report and if necessary remand the accused to custody for fifteen days *at a time* for the purpose of obtaining further evidence or for other reasonable cause (S 344). If owing to the investigation not having been completed a final report is not sent with the accused under S 173 the Magistrate should release the accused. He cannot order a remand in such a case.² The High Court of Allahabad has however in the undermentioned case³ held that S 10 applies only to cases where the investigation has not been completed and further that

13 (02) 1902 All W N 59 (60) *King Emperor v Chhabraj Singh*

(33) 1933 Mad W N 878 (879) *Rajanna v Emperor* (Refusal to hear appeal for non payment of costs is not proper)

14 (36) 23 AIR 1936 S nd 235 (236) 38 Cr L Jour 119 30 S nd L R 357 *Jethanand v Tahiram*

15 (40) 29 AIR 1910 Mad 178 (179) 11LR (1912) Mad 661 43 Cr L Jour 451 199 Ind Cas 54 *In re T V Venkatarao Chetti*

Note 15a

1 (34) 1934 Mad W N 100 (100) *Pappi Naidu v Gangu Naidu*

Also see S 206 Note 11

Note 16

1 (67) 2 We r 109 (403) (Former must be present at the time of recommendation)

(See (24) 11 AIR 1904 Cal 614 (615 616) 26 Cr L Jour 68 *Bholanath Das v Emperor*]

2 (14) 11 AIR 1904 Cal 476 (478) 51 Cal 400 25 Cr L Jour 732 *Nagendra v Emperor*

(See also (88) 11 Mad 98 (100) 2 We r 140 *Queen Empress v Engadu*]

3 (31) 18 AIR 1931 All 617 (619 620) 53 All 709 30 Cr L Jour 1015 *Emperor v Sooba*

even where accused is sent up under that section *without any report* under S 173, the Magistrate can order a remand of the accused under this section and is not bound to release him. It is submitted that this view cannot be accepted as correct. This section clearly applies only where the Magistrate has *taken cognizance* of the offence and thus he could do only on a police report or in the other modes referred to in S 190. In the absence, therefore, of a police report or the other things referred to in S 190 the Magistrate could not act, and there being no subsisting order for detention, the accused must be released.

17. Distinction between detention under section 167 and under section 344.

- (1) Section 167 applies to detention of accused persons during police investigation. This section applies to detention *after* police investigation and before or pending inquiry or trial¹. Thus, where a Magistrate, having ordered the accused to be detained for a period of less than fifteen days, thinks no further detention is necessary and sends him to a Magistrate having jurisdiction, a remand by the latter Magistrate will be one under this section and not under S 167.²
- (2) The maximum period of detention under S 167 can be only fifteen days. The period of detention under this section cannot exceed fifteen days *at a time* though the *sum total* of the periods of detention may exceed fifteen days³.
- (3) A detention under S. 167 may be either in police custody or in judicial lock up. A detention under this section can only be in a judicial lock up.⁴
- (4) A Magistrate acting under S. 167 *need not* be one who has jurisdiction to try or commit the case. A Magistrate acting under this section must, however, be one who *has* such jurisdiction.⁵

See also Note 7 on Section 167.

18. Grounds of remand. — The words “may by a warrant remand” show that the Magistrate has a discretion in the matter of granting a remand¹. The discretion must, however, be a judicial one to be exercised in accordance with legal principles. The detention of an accused is not intended to be penal: its object is only to secure the attendance of the accused at the trial.² The Magistrate cannot, when an accused is brought

Note 17

1. (‘31) 18 AIR 1931 All 617 (620) : 53 All 729 : 32 Cri L Jour 1045, *Emperor v. Sooba*.
 2. (‘37) 24 AIR 1937 Sind 251 (252, 253) : 31 Sind L R 491 : 39 Cr L J 10, *Dharam Hirani v. Emperor*.
 3. (‘24) 11 AIR 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732, *Nagendra v. Emperor*.
 - (‘31) 18 AIR 1931 Lah 99 (100, 101) : 12 Lah 435 : 33 Cri L Jour 180, *Dal Krishna v. Emperor*.
 - (‘68) 5 Bom H C R Cr 31 (33), *Reg. v. Surkya*.
 - (‘88) 11 Mad 98 (101) : 2 Weir 142, *Queen Empress v. Engadu*.
 - (‘24) 11 AIR 1924 Cal 614 (616) : 26 Cri L Jour 69, *Bholanath v. Emperor*.
 - (‘09) 9 Cri L Jour 375 (377) : 36 Cal 166 : 1 Ind Cas 739, *Narendra Lal v. Emperor*.
- Also see Note 20

89, Dan

(‘97) 23 Bom 32 (34), *In re Krishnaji Pandurang*

(‘31) 18 AIR 1931 Lah 99 (100, 101) : 12 Lah 435 : 33 Cri L Jour 180, *Dal Krishna v. Emperor*.

(‘31) 18 AIR 1931 Lah 353 (355, 356) : 12 Lah 604 : 32 Cri L Jour 785, *Kundan v. Emperor*

(‘26) 13 AIR 1926 Cal 1121 (1130) : 54 Cal 218 : 27 Cri L Jour 1201 (121), *Muhammad Suleman v. Emperor*

5 (‘24) 11 AIR 1924 Cal 476 (478) : 51 Cal 402 : 25 Cri L Jour 732, *Nagendra v. Emperor*.

(‘24) 11 AIR 1924 Cal 614 (616) : 26 Cri L Jour 69, *Bholanath v. Emperor*.

Note 18

1. (‘31) 18 AIR 1931 All 617 (620) : 53 All 729 : 32 Cri L Jour 1045, *Emperor v. Sooba*

2. (‘09) 9 Cri L Jour 409 (412) : 36 Cal 174 : 1 Ind Cas 910, *Jamini Mullick v. Emperor*.

(‘27) 14 AIR 1927 Nag 53 (55) : 27 Cri L Jour 1063, *Tularam v. Emperor*.

before him in custody, further detain him in custody by remand without some reason made manifest to him either in the shape of sworn testimony given before him or in some other form which can be put upon the record and which is sufficient to justify him in sending the prisoner to prison there to be detained for a period not exceeding fifteen days.³ In *Emperor v Sooba*⁴ *Kendall, J* of the High Court of Allahabad, observed as follows

'Two considerations that should influence the Court in deciding whether a remand should be granted are —

1 whether sufficient evidence has been obtained to raise a suspicion that the accused may have committed the offence and it appears likely that further evidence may be obtained by a remand and

2 whether the time asked by the police for the remand is in the circumstances of the case, reasonable or not"

A mere expectation that after sometime by dint of enquiry some evidence might be obtained is not a sufficient cause for remand. It is only *after sufficient evidence* has been obtained to raise a suspicion that the accused may have committed an offence, that a likelihood of obtaining further evidence will be a reasonable cause for remand.⁵ Where some evidence was available but it appeared to the Magistrate necessary to defer the examination so that the inquiry might be continuous a further remand was held justified.⁶ Similarly where it was proved by an affidavit that there was a conspiracy and it was also proved by sufficient evidence that the accused were members of that conspiracy, it was held that the Magistrate was justified in keeping them in custody for such period as appeared to him to be reasonable.⁷ But where the complainant and his witnesses were not validly bound over to appear and did not appear on the date of the enquiry, it was held that a detention of the accused was not justified.⁸ A remand for the purpose of getting a confession from the accused is most improper.⁹

Where after one remand the accused is brought up and a further remand is asked for some *direct evidence* of his guilt should be required to justify his further detention, and with each remand the necessity for producing such evidence increases.¹⁰

In the undermentioned case¹¹ it was held by the High Court of Calcutta that the language of sub s (1) shows that where the Magistrate properly directs a postponement he has *unfettered* discretion to remand the accused to custody. It was further held that even assuming that there must be reasonable cause not only for the order of postponement

3 (73) 20 Suth W R Cr 23 (30) 11 Beng L R App 8 *Abdul Kadir Khan v Magistrate of Purneah* (87) 11 Mad 98 (102 103) 2 Weir 142 *Queen-Empress v Engadu*

(35) 22 AIR 1935 Lah 230 (243) 30 Cr L Jour 1180, *Jahangiri Lal v Emperor* (Duty to allow time for counsel to appear and argue matter before him)

4 (31) 18 AIR 1931 All 617 (671) 53 All 729 32 Cr L Jour 1045

5 (70) 25 Suth W R Cr 8 (8) *In re Zuhuruddeen Hossein* (17 Suth W R Cr 55 followed)

(72) 1872 Pun Re No 17 Cr, p 21 (23) *Akuda Bakhsh v Crown*

6 (83) 6 Mad 63 (67), *Manickam Mudali v Queen* (Reasonable ground not supported by sworn testimony is sufficient for remand)

7 (33) 20 AIR 1933 Cal 752 (753) 34 Cr L Jour 1104 *Sundar Ram v Emperor* (Magistrate properly directing postponement has unfettered discretion to remand accused to custody)

8 (69) 11 Suth W R Cr 47 (48) *Queen v Pooran Jalaha*

Also see S 170 Note 6

9 (80) 2 Weir 414 (415)

10 (15) 2 AIR 1915 Nag 29 (29) 16 Cr L Jour 70, 11 Nag L R 162 *Ahamadali v Emperor*

(83) 6 Mad 69 (70) *Ponnusiamam Chellai v Queen*

Also see S 497 Note 5

11 (33) 20 AIR 1933 Cal 752 (753) 34 Cr L Jour 1191 *Sundar Pam v Emperor* (For instance a remand would be proper where there is a strong *prima facie* case against the accused but it is impossible to proceed with the inquiry owing to the unavoidable absence of a witness though the explanation may not cover such a case)

but for the order of remand, the explanation to the section describes only one type of reasonable cause and there may be reasonable cause for a remand even though the circumstances do not fall under the terms of the explanation.

19 Remand in absence of accused — A remand cannot be granted in the absence of the prisoner. As has been seen already the use of the word remand shows that a prisoner is brought up under custody and is re-committed to custody¹.

20 Period of detention — There is no limit set to the total period of a series of orders of remand under this section¹; provided no single order of remand exceeds fifteen days at a time². An accused is entitled to have the evidence against him recorded as early as possible³ and the fact that there may be a large body of evidence forthcoming against him is not a good ground for detention for an indefinite period⁴.

Where no evidence of an incriminating nature was forthcoming even after the remand for six weeks a further detention was held not justified⁵. But in a conspiracy case where considerable time is required to collect evidence, detention for a period of three months was held good⁶.

21 "By a warrant" — A warrant for further detention of an accused should be a warrant of commitment directed to some jailor or other person having authority to receive and keep prisoners. The warrant must state that the prisoner is charged with some particular offence¹.

22 Magistrate's liability for unreasonable detention — A Magistrate who without reasonable cause and without good faith delays proceeding with the trial of persons whom he keeps in jail will be liable to an action in damages notwithstanding the Judicial Officers Protection Act 17 [XVII] of 1850¹.

345.* (1) The offences punishable under the sections of the Indian Compounding offences Penal Code specified in the first two columns of the

* Code of 1898 original S 345

345 (1) The offences punishable under the sections of the Indian Penal Code described in the Compounding offences first two columns of the table next following may be compounded by the

Note 19

1 (67) 2 We r 409 (409)

(67) 1867 Pan Re No 39 Cr p 72 (76) *Crown v Siera*

Note 20

1 (31) 18 AIR 1931 All 617 (620) 53 All 729 32 Cri L Jour 1045 *Emperor v Sooba*

2 (21) 22 Cri L Jour 669 (671) 63 Ind Cas 461 (Lab) *Wadhwa v Emperor*

(65) 5 Bom H C R Cr 31 (33) *Reg v Surkya*

Also see Note 17

3 (24) 11 AIR 1924 Cal 476 (478) 51 Cal 402 25 Cri L Jour 737 *Nagendra v Emperor*

[See (09) 96 Bom 557 (567) 4 Bom L R 276 *In the matter of Lakshman Gowind* (Complainant by omission to take out summons cannot keep case hanging over a man for indefinite time)]

4 (83) 6 Mad 63 (67) *Manickam Mudali v Queen*

5 (09) 9 Cri L Jour 409 (412) 36 Cal 174 1 Ind Cas 910 *Jamun Mullick v Emperor*

(70) 13 South W R Cr 27 (37) 5 Beng L R 274 *Queen v Surendro Nath*

(24) 11 AIR 1924 Cal 476 (479) 51 Cal 402 25 Cri L Jour 737 *Nagendra v Emperor*

6 (31) 18 AIR 1931 All 617 (61) 53 All 729 32 Cri L Jour 1045 *Emperor v Sooba*

Note 21

1 (70) 13 South W R Cr 1 (5) 4 Beng L R App 1 *In the matter of Mahesh Chunder*

Note 22

1 (69) 11 South W R Cr 19 (0) *Queen v Saloo*

table next following may be compounded by the persons mentioned in the

persons mentioned in the third column of that table.—

Offence	Sections of I. P. C. applicable	Persons by whom offence may be compounded
Uttering words, etc., with deliberate intent to wound the religious feelings of any person	298	The person whose religious feelings are intended to be wounded
Causing hurt	323, 331	The person to whom the hurt is caused
Wrongfully restraining or confining any person	341, 342	The person restrained or confined.
Assault or use of criminal force	352, 355, 358	The person assaulted or to whom criminal force is used
Unlawful compulsory labour	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person	426, 427	The person to whom the loss or damage is caused.
Criminal trespass	447	The person in possession of the property trespassed upon
House trespass	448	
Criminal breach of contract of service	490, 491, 492	The person with whom the offender has contracted
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with criminal intent a married woman	498	
Defamation	500	The person defamed
Printing or engraving matter knowing it to be defamatory	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	502	
Insult intended to provoke a breach of the peace	504	The person insulted
Criminal intimidation, except when the offence is punishable with imprisonment for seven years	506	The person intimidated.

(2) The offences of causing hurt and grievous hurt, punishable under S 324, S 325 S 335, S 337 or S 338 of the Indian Penal Code, may, with the permission of the Court before which any prosecution for such offence is pending be compounded by the person to whom the hurt has been caused

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner

(4) When the person who would otherwise be competent to compound an offence under this section is a minor, an idiot or a lunatic, any person competent to contract on his behalf may compound such offence

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be before which the appeal is to be heard

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused

(7) No offence shall be compounded except as provided by this section.

third column of that table —

Offence	Sections of I P C applicable	Persons by whom offence may be compounded
Uttering words etc with deliberate intent to wound the religious feelings of any person	298	The person whose religious feelings are intended to be wounded
Causing hurt	323, 334	The person to whom the hurt is caused
Wrongfully restraining or confining any person	341, 342	The person restrained or confined
Assault or use of criminal force	352, 355, 358	The person assaulted or to whom criminal force is used
Unlawful compulsory labour	374	The person compelled to labour
Mischief when the only loss or damage caused is loss or damage to a private person	426, 427	The person to whom the loss or damage is caused
Criminal trespass	447	The person in possession of the property trespassed upon
House trespass	448	
Criminal breach of contract of service	490, 491, 492	The person with whom the offender has contracted
Adultery	497	The husband of the woman
Enticing or taking away or detaining with criminal intent a married woman	498	
Defamation	500	The person defamed
Printing or engraving matter, knowing it to be defamatory	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	502	
Insult intended to provoke a breach of the peace	504	The person insulted
Criminal intimidation except when the offence is punishable with imprisonment for seven years	506	The person intimidated
Act caused by making a person believe that he will be an object of divine displeasure	508	The person against whom the offence was committed

(2) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table —

Offence	Sections of I P C applicable	Persons by whom offence may be compounded
Voluntarily causing hurt by dangerous weapons or means	324	The person to whom hurt is caused
Voluntarily causing grievous hurt	325	Ditto
Voluntarily causing grievous hurt on grave and sudden provocation	335	Ditto
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	337	Ditto
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	338	Ditto
Wrongfully confining a person for three days or more	343	The person confined
Wrongfully confining a person in secret	346	Ditto
Assault or criminal force in attempting wrongfully to confine a person	357	The person assaulted or to whom the force was used

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Wrongfully restraining or confining any person	341, 342	The person restrained or confined.
Assault or use of criminal force	352, 355, 358	The person assaulted or to whom criminal force is used
Unlawful compulsory labour	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person	426, 427	The person to whom the loss or damage is caused
Criminal trespass	447	The person in possession of the property trespassed upon
House trespass	448	
Criminal breach of contract of service	490, 491, 492	The person with whom the offender has contracted
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with criminal intent a married woman	498	
Defamation	500	The person defamed
Printing or engraving matter knowing it to be defamatory	501	
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	502	
Insult intended to provoke a breach of the peace	504	The person insulted
Criminal intimidation except when the offence is punishable with imprisonment for seven years	506	The person intimidated.

(2) The offences of causing hurt and grievous hurt punishable under S 324, S 325, S 335, S 337 or S 338 of the Indian Penal Code, may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the person to whom the hurt has been caused

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner

(4) When the person who would otherwise be competent to compound an offence under this section is a minor, an idiot or a lunatic, any person competent to contract on his behalf may compound such offence

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Insult intended to provoke a breach of the peace	504	The person insulted
Criminal intimidation except when the offence is punishable with imprisonment for seven years	506	The person intimidated
Act caused by making a person believe that he will be an object of divine displeasure	508	The person against whom the offence was committed

(2) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table —

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Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	337	Ditto
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others	338	Ditto
Wrongfully confining a person for three days or more	343	The person confined
Wrongfully confining a person in secret	345	Ditto
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Wrongfully confining a person for three days or more	343	The person confined
Wrongfully confining a person in secret	346	Ditto
Assault or criminal force in attempting wrongfully to confine a person	357	The person assaulted or to whom the force was used

Offence	Sections of I P C applicable	Persons by whom offence may be compounded
Dishonest misappropriation of property	403	The owner of the property misappropriated
Cheating	417	The person cheated
Cheating a person whose interest the offender was bound, by law or by legal contract to protect	418	Ditto
Cheating by personation	419	Ditto
Cheating and dishonestly inducing delivery of property or the making alteration or destruction of a valuable security	420	Ditto
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person	430	The person to whom the loss or damage is caused
House trespass to commit an offence (other than theft) punishable with imprisonment	451	The person in possession of the house trespassed upon
Using a false trade or property mark	482	The person to whom loss or injury is caused by such use
Counterfeiting a trade or property mark used by another	483	The person whose trade or property mark is counterfeited
Knowingly selling or exposing or possessing for sale or for trade or manufacturing purpose goods marked with a counterfeit trade or property mark	486	Ditto
Marrying again during the lifetime of a husband or wife	494	The husband or wife of the person so marrying
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman	509	The woman whom it is intended to insult or whose privacy is intruded upon

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner

(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court compound such offence

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard

(5A) A High Court acting in the exercise of its powers of revision under section 439 may allow any person to compound any offence which he is competent to compound under this section

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded

(7) No offence shall be compounded except as provided by this section

Synopsis

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| 1 Legislative changes | 8 Compoundable offences |
| 2 Scope and principle | 9 Who can compound |
| 3 Withdrawal and composition compared | 10 Minor |
| 4 What amounts to composition | 11 Composition under sub section (1) |
| 5 The offence must be compoundable | 12 Compositions under sub section (2) |
| 6 Consideration | 13 Proof of composition |
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- 24 Stage at which a compounding may be effected
- 25 Composition after committal or conviction
- 26 High Court's powers in revision
- 27 Rescission of compromise

- 18 Effect of compromise
- 19 Sub-section (7)
- 20 Civil suit
- 21 Procedure in non-compoundable cases where injured party declines to prosecute

NOTE to the Synopses—See the Notes indicated for the following topics—

- Accused sent up by police See Note 11
- All circumstances to be considered before sanction See Note 12
- Arbitration—When composition See Note 4
- Compensation to complainant See Notes 12 and 18
- Composition—Subsequent sanction of See Note 12
- Composition—What is See Note 4
- Compromise after remand See Note 15
- Composition and subsequent prosecution under S 211 See Note 18
- Composition in Court not needed See Note 11
- Composition in respect of some offences only See Note 18
- Composition with some accused only See Note 18
- Compound—Meaning See Note 3
- Compoundability—At what stage See Notes 5 and 18
- Compoundable and non-compoundable offences charged together See Note 5
- Court *functus officio* after compromise See Note 11
- Court to sanction See Note 12
- Enquiry into factum of compromise See Notes 12 and 18
- Filing compromise—No reduction of sentence See Note 12
- Trivial or vexatious complaint not to be considered after compromise See Note 11
- Incomplete arrangement—Not composition See Note 4

- Mistake in summons as non-compoundable See Note 5
- No delay after compromise See Note 11
- Non-applicability to other laws See Note 2
- Non-compoundable offence changed into compoundable one on appeal See Note 5
- No need to enquire into authority to compound See Note 9
- No option to Court under sub-section (1) See Note 11
- No reference to District Magistrate or police See Note 12
- No withdrawal of warrant-cases See Note 3
- No withdrawal of non-compoundable offences See Note 5
- Offence under S 143 Penal Code and another offence See Note 8
- Offence under S 147, Penal Code See Note 8
- Offence under S 24 Cattle trespass Act and offence under S 323 Penal Code See Note 8
- Onus of proof of composition See Note 13
- Police cannot withdraw complaint See Note 12
- Record of reasons for sanction See Note 12
- Rejection of sanction on improper grounds See Note 12
- Reading from compromise See Notes 4, 12 and 17
- Section complete in itself See Notes 2, 19 and 5
- Settlement in future—Not composition See Note 4
- Settlement of non-compoundable case See Notes 5 and 18
- Stalling prosecution See Notes 2 and 5
- Substance and not form of petition See Note 3

1 Legislative changes

Difference between the Codes of 1861 and 1872—

The Code of 1861 contained no provision such as that found in this section and it was not settled whether there might be a compromise in a criminal case¹

Section 188 of the Code of 1872 provided that in the case of offences *which may lawfully be compounded* injured persons may compound the offences out of Court or in Court with the permission of the Court. What those offences were 'which may lawfully be compounded', were not mentioned in the section for that information one had to refer to the exception to S 214 Penal Code.

Difference between the Codes of 1872 and 1882—

Section 315 of the Code of 1882 gave a tabulated list that was intended to be exhaustive of the offences that were compoundable. The Code also for the first time, introduced a distinction between offences compoundable with the permission of the Court and those compoundable without such permission. In keeping with this amendment to the Procedure Code and almost simultaneously with it an amendment was made to S 214, Penal Code, by Act 8 (VIII) of 1882 substituting for the original exception, referred to above, the exception that now finds place in the section reading thus 'The provisions

Offence	Sections of I P C applicable	Persons by whom offence may be compounded
Dishonest misappropriation of property	403	The owner of the property misappropriated
Cheating	417	The person cheated
Cheating a person whose interest the offender was bound by law or by legal contract to protect	418	Ditto
Cheating by personation	419	Ditto
Cheating and dishonestly inducing delivery of property or the making alteration or destruction of a valuable security	420	Ditto
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person	430	The person to whom the loss or damage is caused
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Knowingly selling or exposing or possessing for sale or for trade or manufacturing purpose, goods marked with a counterfeit trade or property mark	486	Ditto
Marrying again during the lifetime of a husband or wife	494	The husband or wife of the person so marrying
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman	509	The woman whom it is intended to insult or whose privacy is intruded upon

(3) When any offence is compoundable under this section, the abatement of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court compound such offence

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard

(5A) A High Court acting in the exercise of its powers of revision under section 439 may allow any person to compound any offence which he is competent to compound under this section

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NOTE to the Synops^s See the Notes indicated for the following topics :

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| <p>Accused sent up by police See Note 11</p> <p>All circumstances to be considered before sanction See Note 12</p> <p>Arbitration—When composition See Note 4</p> <p>Compensation to complainant See Notes 12 and 18</p> <p>Composition—Subsequent sanction of See Note 12.</p> <p>Composition — What is See Note 4</p> <p>Compromise after removal See Note 15</p> <p>Composition and subsequent prosecution under S 211 See Note 18</p> <p>Composition in Court not needed See Note 11</p> <p>Composition in respect of some offences only See Note 18</p> <p>Composition with some accused only See Note 18</p> <p>'Compound' — Meaning See Note 3</p> <p>Compoundability — At what stage See Notes 5 and 18</p> <p>Compoundable and non-compoundable offences charged together See Note 5</p> <p>Court functus officio after compromise See Note 11</p> <p>Court to sanction See Note 12</p> <p>Enquiry into factum of compromise See Notes 12 and 13</p> <p>Filing compromise—No reduction of sentence See Note 12</p> <p>F frivolous or vexatious complaint not to be considered after compromise See Note 11</p> <p>Incomplete arrangement — Not composition See Note 4</p> | <p>Mistake in summons as non-compoundable See Note 5</p> <p>No delay after compromise See Note 11.</p> <p>Non-applicability to other laws See Note 2</p> <p>Non-compoundable offence changed into compoundable one on appeal See Note 5</p> <p>No need to enquire into authority to compound. See Note 9</p> <p>No option to Court under sub section (1) See Note 11.</p> <p>No reference to District Magistrate or police See Note 12</p> <p>No withdrawal of warrant cases See Note 3</p> <p>No withdrawal of non-compoundable offences See Note 5</p> <p>Offence under S 143, Penal Code, and another offence See Note 8</p> <p>Offence under S 147, Penal Code See Note 8</p> <p>Offence under S 24 Cattle trespass Act and offence under S 323, Penal Code See Note 8</p> <p>Ous of proof of composition See Note 13</p> <p>Police cannot withdraw complaint See Note 12</p> <p>Record of reasons for sanction See Note 12</p> <p>Rejection of sanction on improper grounds See Note 12</p> <p>Resulting from compromise See Notes 4 12 and 17.</p> <p>Section complete in itself See Notes 2, 19 and 5</p> <p>Settlement in future—Not composition See Note 4.</p> <p>Settlement of non-compoundable case See Notes 5 and 19</p> <p>Stalling prosecution See Notes 2 and 5</p> <p>Substance and not form of petition See Note 3</p> |
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1. Legislative changes.

Difference between the Codes of 1861 and 1872 —

The Code of 1861 contained no provision such as that found in this section and it was not settled whether there might be a compromise in a criminal case¹

Section 188 of the Code of 1872 provided that in the case of offences which may lawfully be compounded, injured persons may compound the offences out of Court or in Court with the permission of the Court. What those offences were "which may lawfully be compounded," were not mentioned in the section, for that information one had to refer to the exception to S 214, Penal Code.

Difference between the Codes of 1872 and 1882 —

Section 315 of the Code of 1882 gave a tabulated list that was intended to be exhaustive of the offences that were compoundable. The Code also, for the first time, introduced a distinction between offences compoundable with the permission of the Court and those compoundable without such permission. In keeping with this amendment to the Procedure Code and almost simultaneously with it, an amendment was made to S 214, Penal Code, by Act 8 (VIII) of 1882, substituting for the original exception, referred to above, the exception that now finds place in the section, reading thus : "The provisions

of ss 213 and 214 do not extend to any case in which the offence may lawfully be compounded"

Changes introduced in 1898 —

Sub section (5) was newly added

Amendments introduced by Act 18 [XVIII] of 1923 —

- (1) Section 508, Penal Code, was added to the list of offences compoundable without leave of Court.
- (2) The present sub s (2) was substituted for the original sub section thus enlarging the list of offences compoundable with the leave of Court under sub s (2).
- (3) Sub-section (4) was amended by substituting the words "under the age of eighteen years or is" for the words "a minor," thus making it clear that the age of majority is eighteen years (There was a doubt regarding this before — see Note 10) The leave of the Court in the case of composition on behalf of persons under disability has also been made a necessary condition
- (4) Sub section (5A) was newly added (See Note 16)
- (5) Sub section (6) has been amended by adding the words "with whom the offence has been compounded" at the end so as to make it clear that the effect of a composition is to acquit only the accused with whom the offence has been compounded thereby setting at rest the controversy on this point also See Note 18

2. Scope and principle — The law makes a difference between various classes of offences and allows compromise in some and no compromise in others¹ Competence to accept satisfaction for wrong done to oneself which follows from the general rule of freedom of transactions is subject to limitations, those limitations corresponding generally with classes of wrongs in which, though a personal injury is sustained, a civil suit is not allowed, or is allowed only after the public interest has been satisfied In such a case, the institution of a prosecution is a duty which cannot be neglected in consideration of any private advantage²

The principle of English law is that the composition of an offence is illegal if the offence is one of public concern, but lawful if the offence is of a private nature and for which damages may be recovered in a civil action This principle was adopted in this country also, but there was, before the Code of 1862, an uncertainty as to what exactly were the cases which were compoundable³

The tabulation of offences in this section now removes all uncertainty⁴ and must be taken as a complete guide and test on the matter⁵ The policy of the Legislature adopted in this section is that in the case of certain minor offences, where the interests of the public are not vitally affected, the complainant should be permitted to come to terms with the party against whom he complains, the offences being specified in the section⁶ Where an offence with which a particular person is charged is compoundable, he is at liberty to come to a settlement with the prosecution and the settlement so arrived at cannot be considered to be one the consideration for which is illegal⁷ Where a case has

Note 2

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v Alibhai Abdul-

(Several accused — Composition with only one is legal — Case can proceed against the others)
7. (42) 29 AIR 1912 Mad 173 (176) 43 Cr L Jour 734. 201 Ind Cas 91, Chandanmal v Rupakula Ramakrishnayya (An agreement to compound an offence compoundable without the permission of

once been brought to Court and the parties have adjusted the matter between themselves lawfully it cannot be said that they are hushing up the matter⁸

The provisions of the section are not limited to cases wherein the accused *pleads guilty*. Such a view would limit the scope of the section to those comparatively few cases in which the accused is advised that defence would be hopeless⁹

The section does not apply to offences punishable under laws *other than the Penal Code*¹⁰ Sub section (6) of this section does not apply to a *Panchayat* under Bihar and Orissa Village Administration Act, 1922, and a Panchayat is not bound to accept a compromise entered into by the parties¹¹

3 Withdrawal and composition compared — An act of compounding is different from the withdrawal of a complaint made to a Magistrate. A withdrawal must be by intimation to the Magistrate and the complainant is required to satisfy the Magistrate that there are sufficient grounds for permitting him to withdraw it¹ A withdrawal is permissible in all summons cases. Composition is only permitted in respect of specified offences some of which are summons cases and others not, the offences being mentioned in this section. Again withdrawal is the act of one party to the proceeding, *viz.*, the complainant whereas the composition of an offence obviously requires the co operation of both parties. Permission is necessary in the case of withdrawal, because it is the act of one party alone. Complainants otherwise would be at liberty to bring frivolous and vexatious complaints and withdraw them calmly when they have caused the accused enough of annoyance and degradation. There is no such abuse of process to be guarded against in a composition it being the act of both the parties² Withdrawals are confined to summons cases warrant cases cannot be withdrawn³ A complaint can be withdrawn only by the complainant who may not necessarily be the person injured⁴ The word 'compound' means to withdraw for a consideration, and not merely to withdraw⁵ See also S 248, Note 3

Whether a petition is one for withdrawal or compromise, is to be judged from the fact whether the accused consented to it or not. The substance and not merely the form of the petition should be considered⁶ When the complainant put in a petition before the Court not asking for permission to withdraw but saying that he did withdraw against one of the accused as there had been an apology, and he wished the case to proceed only against the other accused, it was held that it was not a case of mere withdrawal but was one of

the Court is lawful there being no law or public policy violated in such a case. But in the case of a non-compoundable offence the agreement is unlawful.—Reversed in AIR 1942 Mad 662 1 L R (1943) Mad 183 41 Cr L Jour 29 on another point)

(30) 17 AIR 1930 Oudh 196 (193) 4 Luck 669 125 Ind Cas 385, *Saktay Sah v Mahadin*

8 (29) 16 AIR 1929 Pat 512 (512) 31 Cr L Jour 607, *Singheswar Prasad v Ali Hasan*

9 (09) 10 Cr L Jour 228 (228 229) 2 Sind L R 16, *Emgeror v Lslaram*

10 (84) Oudh Sel Cas No 78, *Queen Empress v Gundar*

11 (41) 29 AIR 1941 Pat 169 (172) 42 Cr L Jour 434 193 Ind Cas 491, *Goni Mahton v Emgeror* (By S 74 Bihar and Orissa Village Administration Act it is declared that the panchayat is not bound by laws of procedure other than those prescribed by or under the Act. There is no provision in that Act similar to S 345 (6) S 76 of that Act merely enables a panchayat to accept a compromise and decide the case accordingly. But a panchayat is not bound to do so. In a case where one of the parties resiles from the compromise, the panchayat would be exercising a wise discretion in not acting on the compromise.)

Note 3

1 (94) 21 Cal 103 (113) *Murray v Empress*

v Emperor
peror

composition⁷ and where the complainant wrote out and gave to the accused a document as follows 'This is to say that Mr John came to me and offered an unconditional apology; I beg to withdraw the case against him, the document was held to mean that the offence was compounded and not merely withdrawn⁸ It is open to the Magistrate to question the complainant to satisfy himself whether an application is in fact one for composition or for withdrawal⁹

4 What amounts to composition — A composition is an arrangement or settlement of differences between the injured party and the person against whom the complaint is made¹ A mere application by the complainant for permission to withdraw the case because his witnesses had turned round is not a composition of the offence²

The compounding of an offence supposes an arrangement whereby the parties have settled their differences and not a mere arrangement to settle their disputes in future as the result of some action either by themselves or third parties³ An incomplete arrangement will not amount to an actual acquittal within the meaning of the law⁴

Pending a criminal case, the parties entered into an agreement referring their disputes to arbitration No arbitration took place, but it was argued that the very signing of the *muchlikā* for reference to arbitrators amounted to a composition It was held however, that the *muchlikā* was only one step towards the composition and that there would have been a composition only if the *muchlikā* had been carried out and an award had been arrived at according to its terms⁵

A Magistrate is not bound to recognise a reference to arbitration and wait for the award, but it will be reasonable for him to do so If he however, chooses to wait and there is an award, the award may amount to a composition⁶ Where parties entered into a sort of compromise previously before a muktear to whom the case had been sent for local inquiry, but on the records being sent to the Magistrate both parties reculed from the agreement and then on the Magistrate's summoning the accused the latter sought to have the so called compromise recognised it was held that he could not take advantage of the compromise previously entered into before the local enquiry officer⁷

As to the effect of an agreement to be bound by the evidence on oath of a certain witness see the undermentioned case⁸

5 The offence must be compoundable — It is against public policy to compound a non compoundable offence¹ The Legislature has laid down in this section the

7 (24) 11 AIR 1934 Lah 595 (597 598) 5 Lah 233 25 Cri L Jour 629 *Anantia v Emperor*

8 (23) 10 AIR 1923 All 474 (476) 45 All 145 21 Cri L Jour 753 *John v Emperor*

9 (16) 3 AIR 1916 Pat 200 (201 202) 18 Cri L Jour 107 (103) *Baya v Ali v Emperor*

Note 4

1 (21) 8 AIR 1921 Bom 166 (167) 45 Bom 316 22 Cri L Jour 55 *Emperor v Alibhai*

2 (20) 4 Bom L R 718 (720) *Emperor v Asmal Hasan*

3 (25) 12 AIR 1925 Mad 1211 (1212) 26 Cri L Jour 1594 *Ramalinga v Varadaraajulu*

4 (25) 12 AIR 1925 Mad 1211 (1212) 26 Cri L Jour 1594 *Ramalinga v Varadaraajulu*

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of a civil Court]]

7 (18) 22 Cal W N clxxii (clxxi) *Ananda Chandra v Chandra Mohan*

Oaths Act Ss 8 to
reg the complainant

1 (45) 32 AIR 1945 Cal 218 (234) 220 Ind Cas 379 *London and Lancashire Insurance Co Ltd v Dinoy Kishor Na Mitra* (Compounding a non-compoundable offence is illegal as prohibited by S 345(7) — Agreement to compound such offence cannot develop into contract)

to it for determining the classes of offences which concern individuals only as distinguished from those which have reference to the interests of the State, and Courts of law cannot go beyond that test and substitute for it one of their own.² It is the duty of a criminal Court to refuse to allow the withdrawal of the prosecution if the case is non compoundable.³

A Magistrate should consider all the circumstances and make up his mind that only a compoundable offence is proved before he allows a compounding.⁴ Where the evidence taken by a Magistrate clearly disclosed a non compoundable offence, it was held that he had no authority to allow the offence to be compounded and in doing so had usurped jurisdiction not vested in him.⁵ See also the undermentioned cases.⁶ The withdrawal from the prosecution in a case in which the offence charged is non compoundable has not the effect of an acquittal,⁷ and an agreement entered into between the complainant and the accused for the refund of money embezzled by the latter was not allowed to be pleaded as a bar of prosecution for the offence.⁸

To determine whether a case is compoundable or not, the offence with the commission of which the accused were charged in the complaint or with which the Court charged them should be looked into.⁹ Where the offence, so far as was then known, believed and alleged, was punishable under S 323, it was held that the composition was legal.¹⁰ If a complaint alleges circumstances constituting a compoundable offence, as also other circumstances alleging a non compoundable offence, it has to be seen what are the essential circumstances.¹¹

The question of a case being compoundable or not must be decided with reference to the state of facts existing at the date of the application to compound. It is not possible for the Court to see what the ultimate result of the case will be.¹² Where a Magistrate allowed the non compoundable offence of rioting to be compounded upon a mere surmise, based on no evidence, that the case might in the end turn out to be one of a compoundable offence, it was held that he had no such power.¹³

Though the complainant accuses a person of a compoundable as well as of a non compoundable offence, if the Magistrate issues a summons to the accused for the

- (26) 13 AIR 1928 Cal 59 (63) 53 Cal 51 89 Ind Cas 200, *Dwijendranath v Gopram*
 (28) 15 AIR 1928 Bom 305 (305) 52 Bom 693 112 Ind Cas 459, *Ahmad Hasan v Hasan Mahomed*.
 (18) 22 Cal W N 113 (113) *Ananda Chandra v Chandra Mohan*
 (29) 16 AIR 1929 All 456 (456) 116 Ind Cas 749, *Sadho Kandu v Mt Jinla Kuer*
 (12) 40 Cal 113 (117, 118) 15 Ind Cas 259 (260) *Nuzebar Rahman v Muktashad*
 2. (04) 28 Bom 326 (328) 6 Bom L R 73, *Dalsukhram v Charles De Bretton*
 3. (14) 1 AIR 1914 Oudh 278 (279) 17 Oudh Cas 213 25 Ind Cas 409, *Lachman Das v Narain*
 4. (94) 1894 Rat 699 (700), *Queen Empress v Naran*
 (03) 16 C P L R 178 (179), *Sitaram v Hiralal*
 (1900 02) 1 Low Bur Rul 349 (349) *Crown v Kanoo*
 5. (02) 4 Bom L R 718 (720), *Emperor v Asmat Hasan*
 (1900) 2 Weir 151 (151) *In re Abdul Ally Sahib*
 6. (01) 1897 B. 321 (321) C. P. L. R. 178 (178)

- (13) 14 Cri L Jour 77 (78) 18 Ind Cas 413 37 Bom 369, *Emperor v Panchhod Daula*
 7. (88) 1889 Rat 391 (391) *Queen Empress v Moti Das* (Order permitting withdrawal amounts to an order of discharge)
 (75) 1 Bom 64 (66) *Peg v Decama (Do)*
 (93 1900) 1893 1900 Low Bur Rul 240, *Queen Empress v. Po Ba*
 8. (86) 1 Weir 462 (463), *In re Pennambalam Pillai*
 (83) 1 Weir 463 (465) *Zamindar of Yelliyapuram v Pamaswami Nadan*
 9. (30) 17 AIR 1930 Oudh 196 (196) 4 Luck 669 125 Ind Cas 385, *Sahay Sah v Mahadin*
 10. (84) 1894 All W N 13 (14), *Emress v Unkar*
 11. (29) 16 AIR 1929 All 456 (459) 116 Ind Cas 749 *Sadho Kandu v Mt Jinla Kuer*.
 12. (25) 12 AIR 1925 Nag 393 (395) 26 Cri L Jour 1428, *Mt Rani v Mt Jauranti*
 13. (07) 6 Cri L Jour 336 (336, 337) 1907 Pua Re No 11 Cr, *Emress v Hira Singh*.

compoundable offence alone, a composition may be effected¹⁴ Conversely, if in the trial of a compoundable offence, an offence which is not compoundable is by oversight mentioned in the summons, it does not deprive the parties of their right to compound¹⁵

Where a person was convicted of a non compoundable offence but on appeal was acquitted of that but the appellate Court considered that he should be convicted of a compoundable offence of which he had not been tried by the Magistrate, it was held that he should be allowed an opportunity of compounding the offence, if he could, before being convicted of the same¹⁶ Where this opportunity was not allowed, the High Court allowed it in revision¹⁷

6 Consideration — The compounding of an offence signifies that the person against whom the offence has been committed has received some gratification, not necessarily of a pecuniary character, to act as an inducement for his desiring to abstain from a prosecution¹

The composition spoken of in this section is in the nature of a contract, but monetary consideration is not necessary² It has even been suggested that a lawful composition may be effected within the scope of this section without the passing of any consideration, the only essential thing required being that some arrangement should have been arrived at between the parties, which settles their differences³ The Court is not concerned with the nature or value of the consideration If the complainant considers that his grievance is redressed by the mere fact of respectable persons having intervened, though he has received no money payment or even a direct apology from the accused, he is, nevertheless, at full liberty to compound the prosecution⁴ For instance, where a mere apology was the consideration, see the undermentioned case⁵

7. Free will is necessary. — Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which a Court requires for the proof of any agreement which is in issue, and unless it appears that the parties were free from influence of every kind and were fully aware of their respective rights, it would be impossible to give effect to a so called arrangement or composition¹

8. Compoundable offences — Under s 188 of the Code of 1872, which did not give a list of compoundable offences, it was held that the test for determining whether an offence was compoundable or not was that wherever a word such as "voluntarily," "intentionally," "fraudulently," etc., was an essential part of the definition of the offence, it was not compoundable, but that where the offence was one irrespective of the intention and for which a civil action might be brought at the option of the persons injured, instead

14 ('46) 33 AIR 1946 Mad 80 (80) *Kaisanna Goundan v Settia Goundan* (Case whether compoundable or not depends on sworn statement of complainant — Sworn statement disclosing compoundable offence in respect of which summonses were issued by Magistrate — Agreement in respect of, is not for stifling prosecution)

(16) 3 AIR 1916 Cal 917 (917, 918) 32 Ind Cas 227, *Mahomed Ismail v Samad Ali*

15 ('21) 8 AIR 1921 Pat 75 (75) 22 Cri L Jour 493, *Kadir Akram v Emperor*

16 (1900) 3 Oudh Cas 314 (315), *Girwar Singh v Queen Empress*

17. ('10) 11 Cri L Jour 496 (497) 7 Ind Cas 539 13 Oudh Cas 161 *Ram Sarup v Emperor*

Note 6

1 ('04) 21 Cal 103 (112, 115), *Murray v Empress*

(24) 11 AIR 1924 Lah 595 (599) 5 Lah 239 25 Cri L Jour 629, *Inantia v Emperor* (Consideration — Apology)

2 (16) 3 AIR 1916 Mad 854 (855) 16 Cri L Jour 803 (804) 30 Mad 946 *Mahomed Kanni v Inayatulla Sahib* (Consideration — To refrain from pursuing other case pending in which the other party was the accused)

3. (96) 1896 Pun Re No 9 Cr p 21 (23) *Haidayat Ali v Empress*

4 (09) 10 Cri L Jour 228 (229) 2 Sind L R 16, *Emperor v Lularam*

5 ('23) 10 AIR 1923 All 474 (476) 15 All 145 24 Cri L Jour 758, *John v Emperor*

Note 7

1 ('06) 21 Cal 103 (115), *Murray v Empress*

of criminal proceedings it was compoundable¹

An offence under S 143 of the Penal Code is not compoundable as it directly affects the public peace and not merely those immediately involved². The essence of an offence under S 143 is the combination of several persons united in the purpose of committing a criminal offence and such a combination in itself constitutes an offence distinct from the criminal offence which these persons agree to commit. So though the law may allow the latter offence to be compounded the effect of such composition is not to annul the common object charged and the prosecution under S 143 will not fall to the ground but may be proceeded with³.

The offence of rioting under S 147 of the Penal Code, being an offence against the public tranquillity primarily concerns the State more than the individual and that is probably one reason why that offence is not included by the Legislature in the category of compoundable offences⁴.

The offences of extortion and fabricating false evidence are not private disputes and neither of these offences is compoundable⁵.

An offence under S 24 of the Cattle trespass Act is not compoundable. But where that offence was charged along with an offence under S 323, Penal Code and the parties effected a compromise in respect of the latter offence it was held that the Magistrate if he thought fit to do so was entitled to deal with the compromise as a withdrawal of the complaint in respect of the offence under the Cattle trespass Act because a case in respect of such offence being a summons-case would result in an acquittal if no evidence were adduced⁶.

Note 8

1 (76) 1 Bom 147 (154) (FB) *Reg v Rahimat*

Cases where offence was held to be not compoundable

(76) 1 Bom 147 (157) (FB) *Reg v Rahimat* (Grievous hurt)

(74) 6 N W P H C R 302 (305) *Reg v Mudan Mohan* (Do)

(93) 1900) 1893 1900 Low Bor Rul 210 *Queen Empress v Po Ba* (Do)

(80) 6 Cal L Rep 392 (399) *In the matter of reference from the Chief Presidency Magistrate* (Criminal breach of trust)

under Ss 417 419 465

and 468)

Cases where offences were held to be compoundable

(74) 22 Suth W R Cr 26 (27) *Queen v Gopee Molun* (Kidnapping)

(84) Oudh Sel Cas No 74 *Queen Empress v Sidha* (Offences under S 330 or S 339 Penal Code)

(1865) 4 Suth W R Cr 31 (31) *Queen v Smith* (Adultery)

(73) 10 Bom H C R 64 (68) *Reg v Jetha Bhala* (Voluntarily causing hurt — See however (76) 1 Bom 147 (157) (FB) *Reg v Rahimat*)

2 (41) 28 AIR 1941 Sind 186 (188) 1 LR (1941) Kar 352 43 Cr L Jour 68 196 Ind Cas 751 *Agha Nazaratul Sultan v Emperor*

3 (41) 28 AIR 1941 S nd 186 (188) 1 L R (1941) Kar 352 43 Cr L Jour 68 196 Ind Cas 751 (DB), *Agha Nazaratul Sultan v Emperor* (Complaint or police-report mentioning offence under S 418 read with S 117 Penal Code — Facts disclosing offence under Ss 143 and 117 Penal Code — Order allowing compounding of offence under S 443, but refusing offence under S 143 to be compounded is legal)

(23) 10 AIR 1923 Mad 592 (599) 46 Mad 257 24 Cr L Jour 114 *Venkanna v Emperor*
[See however (13) 14 Cr L Jour 458 (459) 20 Ind Cas 618 (Cal) *Basireddi v Khayrat Ali* (Thus case should be read carefully, there is no real conflict between this and AIR 1923 Mad 592 46 Mad 257 24 Cr L Jour 114)]

4 (07) 6 Cr L Jour 336 (337) 1907 Poo Re No 11 Cr *Emperor v Hira Singh*

(18) 5 AIR 1918 Mad 494 (495) 18 Cr L Jour 329 (330) *In re Koyassan Kutty*

5 (36) 23 AIR 1936 Sind 146 (147) 37 Cr L Jour 1086 39 Sind L R 217, *Virumal Mangrammal v Mahammad Khan*

6 (19) 6 AIR 1919 All 31 (31) 42 All 202 21 Cr L Jour 305 *Emperor v Julua*.

compoundable offence alone, a composition may be effected¹⁴ Conversely, if in the trial of a compoundable offence, an offence which is not compoundable is by oversight mentioned in the summons, it does not deprive the parties of their right to compound¹⁵

Where a person was convicted of a non compoundable offence but on appeal was acquitted of that but the appellate Court considered that he should be convicted of a compoundable offence of which he had not been tried by the Magistrate, it was held that he should be allowed an opportunity of compounding the offence, if he could, before being convicted of the same¹⁶ Where this opportunity was not allowed, the High Court allowed it in revision¹⁷

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The composition spoken of in this section is in the nature of a contract, but monetary consideration is not necessary² It has even been suggested that a lawful composition may be effected within the scope of this section without the passing of any consideration, the only essential thing required being that some arrangement should have been arrived at between the parties which settles their differences³ The Court is not concerned with the nature or value of the consideration If the complainant considers that his grievance is redressed by the mere fact of respectable persons having intervened, though he has received no money payment or even a direct apology from the accused, he is, nevertheless, at full liberty to compound the prosecution⁴ For instance, where a mere apology was the consideration, see the undermentioned case⁵

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8. Compoundable offences — Under s 168 of the Code of 1872, which did not give a list of compoundable offences, it was held that the test for determining whether an offence was compoundable or not was that wherever a word such as "voluntarily," "intentionally," "fraudulently," etc, was an essential part of the definition of the offence, it was not compoundable, but that where the offence was one irrespective of the intention and for which a civil action might be brought at the option of the persons injured, instead

med Ismail v Samad 11;
Akram v Emperor
Empress
 Cas 161, Ram Sarup v Emperor

Note 6

1 (24) 21 Cal 103 (112, 115), *Murray v Empress*

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2 (16) 3 A I R 1916 Mad 854 (855) 16 Cri L Jour 803 (804) 39 Mad 946 *Mahomed Kanni v Inayatulla Sahib* (Consideration — To refrain from pursuing other case pending in which the other party was the accused)

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The offence of rioting under S 147 of the Penal Code, being an offence against the public tranquillity, primarily concerns the State more than the individual, and that is probably one reason why that offence is not included by the Legislature in the category of compoundable offences⁴

The offences of extortion and fabricating false evidence are not private disputes and neither of these offences is compoundable.⁵

An offence under S 21 of the Cattle trespass Act is not compoundable But where that offence was charged along with an offence under S. 323, Penal Code, and the parties effected a compromise in respect of the latter offence, it was held that the Magistrate, if he thought fit to do so, was entitled to deal with the compromise as a withdrawal of the complaint in respect of the offence under the Cattle trespass Act, because a case in respect of such offence being a summons case would result in an acquittal if no evidence were adduced⁶

Note 8

1 (76) 1 Bom 147 (154) (FB), *Reg v Rahimat*.

Cases where offence was held to be not compoundable:

(76) 1 Bom 147 (157) (FB), *Reg v Rahimat* (Grievous hurt)

(74) 6 N W P H C R 302 (305), *Reg v Mudan Mohan* (Do)

(93 1900) 1893 1900 Low Bur Rul 240, *Queen-Empress v. Po Ba* (Do)

(80) 6 Cal L Rep 392 (392), *In the matter of reference from the Chief Presidency Magistrate, (Criminal breach of trust)*

under Ss 417, 419, 465

Cases where offences were held to be compoundable

(74) 22 Suth W R Cr 26 (27), *Queen v Gopei Mohun* (Kidnapping)

(84) Oudh Sel Cas No 74, *Queen-Empress v Sidha* (Offences under S 335 or S 339, Penal Code)

(1865) 4 Suth W R Cr 31 (31) *Queen v Smith* (Adultery)

(73) 10 Bom 11 C R 63 (68), *Reg v Jetha Bhala* (Voluntarily causing hurt — See however (76) 1 Bom 147 (157) (FB), *Reg v Rahimat*)

2 (41) 29 AIR 1941 Sind 186 (188) • 1 LR (1941) Kar 352 • 43 Cr L Jour 68 • 196 Ind Cas 751, *Agha Nazarali Sultan v Emperor*.

3 (41) 29 AIR 1941 Sind 186 (188) • 1 L R (1941) Kar 352 • 43 Cr L Jour 68 • 196 Ind Cas 751 (DB), *Agha Nazarali Sultan v Emperor* (Complaint or police-report mentioning offence under S 418 read with S 117, Penal Code — Facts disclosing offence under Ss 143 and 117 Penal Code — Order allowing compounding of offence under S 444, but refusing offence under S 143 to be compounded is legal)

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4 (07) 6 Cr L Jour 336 (337) • 1907 Pun Re No 11 Cr, *Emperor v Hira Singh*

(18) 5 AIR 1918 Mad 494 (495) • 18 Cr L Jour 329 (330), *In re Koyassan Kulu*.

5 (36) 23 AIR 1936 Sind 146 (147): 37 Cr L Jour 1086 • 30 Sind L R 217, *Verumal Manginmal v. Mahammad Khan*

6 (19) 6 AIR 1919 All 31 (31) • 42 All 202 • 21 Cr L Jour 395, *Emperor v. Julua*.

See also the undermentioned cases⁷

9. Who can compound. — Any person may set the criminal law in motion but it is only the person specified in S. 345 who can compound the offence.¹ Hence, a husband may be a complainant when the offence is defamation of his wife by the imputation of unchastity to her but it is only the wife who is entitled to compound the offence.² Similarly, in the case of the offence of abduction, though the complaint may have been preferred by another person, *e.g.*, the father of the girl in whose custody the girl may have been at the time of the abduction, still it is only the husband who is competent to compound the offence.³

The offence of hurt can be compounded only by the person to whom the hurt is caused, and neither his heirs nor any other person can compound the offence.⁴ The offence of criminal trespass can be compounded by the person in whose possession the property was,⁵ the offence of wrongful restraint by the person restrained⁶ and the offence of wrongful confinement by the person confined.⁷

But where a person sends another man to the Court to represent him in filing a complaint, the Court is perfectly justified in accepting the latter's statement that he desires to compound the offence with the assumption that he is authorized by the former to compound it, and under the circumstances, it is not incumbent on the Court, before allowing the case to be compounded and acquitting the accused, to make any inquiry into his authority.⁸

7 ('87) 1887 Rat 330 (330), *Empress v Vithoba* (Section 506, latter part — Offence not compoundable); ('13) 14 Cri L Jour 492 (463): 20 Ind Cas 622 (Low Bur), *Sarma Iyer v. Emperor*. (Section 454, Penal Code — Not compoundable)

('01) 28 Cal 652 (863): 5 Cal W N 457 (FB), *Dwarkanath v. Beni Madhab*. (Offence of criminal breach of trust, not compoundable)

('12) 16 Cal W N 661vi (661vi), *Sasadhar Sanyal v. Soshet Bhushan* (Do)

('24) 11 AIR 1924 All 209 (209): 46 All 91: 25 Cri L Jour 1005, *Brij Behari Lal v. Emperor*. (Section 420, Penal Code — Compoundable)

('97) 22 Bom 389 (390), *In re Motiram*. (Mischief, when loss or damage is caused to person — Compoundable.)

('14) 1 AIR 1914 Oudh 284 (264): 17 Oudh Cas 18: 15 Cri L Jour 230, *Ramphal v. Emperor*. (Offence under S. 211, Penal Code, cannot be lawfully compounded)

Note 9

1 ('37) 24 AIR 1937 Nag 72 (73): 38 Cri L Jour 334: I L R (1937) Nag 286, *In re Khilawan Singh*. (Wrongful confinement — Offence can be compounded only by person confined)

('27) 14 AIR 1927 Bom 410 (411): 51 Bom 512: 28 Cri L Jour 581, *Dajiba Ramji v. Emperor*. (Complaint by wife for cheating husband — Composition by her — Composition not valid so as to bar complaint by husband)

2. ('91) 14 Mad 379 (381): 2 Weir 230: 1 Mad L Jour 242, *Chellam v. Ramaswami*.

('72 92) 1872 1892 Low Bur Rul 617, *Queen-Empress v. Nga Pau Gale*

3. ('22) 9 AIR 1922 Lah 177 (178): 23 Cri L Jour 690, *Mir Alam v. Emperor*.

('24) 11 AIR 1924 Lah 330 (331): 24 Cri L Jour 780, *Mahbub Ali Khan v. Emperor*.

4. ('15) 2 AIR 1915 All 443 (443): 37 All 419: 16 Cri L Jour 586, *Emperor v. Rahmat*. (Widow of the person hurt)

('92) 2 Weir 418 (418), *In re Gangamma Dorayya* (Do)

('15) 2 AIR 1915 Mad 635 (635): 37 Mad 885: 26 Ind Cas 181, *Mottai Reddy v. Thanappa Reddy*

('17) 4 AIR 1917 All 377 (378): 18 Cri L Jour 729, *Lala v. Emperor*. (Compromise cannot be accepted when some of the persons hurt are not parties to it)

('09) 10 Cri L Jour 473 (474): 31 All 606: 4 Ind Cas 21, *Emperor v. Sultan Singh* (Hurt caused to three persons — One dying — Survivors not competent to compromise the offence as regards the deceased)

5 ('05) 22 Cal 123 (130), *Chand Pershad v. Evans*

('24) 11 AIR 1924 Mad 40 (40): 24 Cri L Jour 824, *Atudayappa Mudahar v. Emperor*. (Offence committed within the Court compound is not criminal trespass)

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8 ('24) 11 AIR 1924 All 778 (779): 25 Cri L Jour 92, *Harbans v. Emperor*.

10 Minor—Sub-section (4) clearly implies that a person under eighteen years of age cannot compound an offence. Previous to the amendment of the sub-section in 1923, the word used in the section was a minor and no reference was made to the age limit. It was held that the age of majority contemplated by this section was not to be regulated by the personal law of the party concerned and that the effect of this section read with s 3 of the Indian Majority Act was that a person under eighteen years of age could not lawfully compound the offences declared to be compoundable by this section¹. This view has been given effect to by the amendment.

A husband committed the offence of hurt against his wife, a minor. She at the suggestion of her father with whom she was living, filed a complaint against her husband. It was held that the father of the girl was competent to compound the offence on her behalf². Where an offence is compounded on behalf of a minor under sub-s. (4), the permission of the Court is necessary for such composition³.

11. Composition under sub-section (1)—In cases falling under sub-s. (1), no leave of the Court is necessary for compounding¹ and in such cases the Magistrate has no option but is bound to allow the compromise². Parties are entitled to compound such offences unconditionally and when a *razinama* is filed by them, it is not for the Magistrate to inquire whether the complaint was frivolous or vexatious³. The mere fact that the accused has been sent up by the police does not prevent the person mentioned in the third column of the table from compounding the offence⁴.

Where the offence is compoundable by parties without the leave of the Court, and it is so compounded, and a deed of composition is filed by all the parties present in Court, the only verification necessary is to see whether the parties signed it and understood its contents, the Magistrate should not adjourn the case for verification or call for further proof of the compromise but should, without unnecessary delay, acquit the accused⁵.

Where the Court has drawn up a charge of an offence compoundable without the sanction of the Court and after this charge has been read and explained to the accused and pleaded to, a petition of composition is presented to it, the Court should at once accept the petition and acquit the accused, it has no power at that stage to alter the charge, the composition has the effect of an acquittal and is complete immediately the complainant puts it forward in Court⁶. Where a Magistrate records a compromise, he becomes *functus*

[See however (23) 24 Cr L Jour 170 (123) 71 Ind Cas 248 (750) (Pesh), *Harnam Das v. Sam Dass.* (It is not mentioned in this case whether the prosecution by the complainant was on behalf of herself or on behalf of the husband of the girl abducted.)]

Note 10

- 1 (91) 1891 Pun Re No 17 Cr p 55 (59) *Shib Singh v. Empress*
- 2 (29) 16 AIR 1929 Nag 278 (278, 279) 30 Cr L Jour 960, *Emperor v. Bhayyalal*
- 3 (37) 24 AIR 1937 Mad 825 (826) 39 Cr L Jour 133, *In re Ponnuswamy Ayyar*

Note 11

1. (37) 24 AIR 1937 Mad 805 (826) 39 Cr L Jour 133, *In re Ponnuswamy Ayyar* (Composition under S 345 (1) is an act of parties)

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- (10) 11 Cr L Jour 638 (639) 8 Ind Cas 397 1910 Pun Re No 30 Cr, *Emperor v. Sundar Singh*

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 (01) 28 Cal 692 (663) 5 Cal W N 457 (TB), *Dwarkanath v Beni Madhab* (Offence of criminal breach of trust not compoundable)
 (12) 18 Cal W N 603vi (603vi), *Sasadhur Sanyal v Soshee Bhushan* (Do)
 (24) 11 AIR 1924 All 209 (209) 46 All 91 25 Cri L Jour 1005, *Brj Behari Lal v Emperor*. (Section 420, Penal Code—Compoundable)
 (97) 22 Bom 889 (890), *In re Motiram* (Mischief, when loss or damage is caused to person — Compoundable)
 (14) 1 AIR 1914 Oudh 264 (264) 17 Oudh Cas 18 15 Cri L Jour 230, *Ramphal v Emperor* (Offence under S 211, Penal Code cannot be lawfully compounded)

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 (27) 14 AIR 1927 Bom 410 (411) 51 Bom 512 28 Cri L Jour 581, *Dajiba Ramji v Emperor* (Complicity by wife for cheating husband—Composition by her—Composition not valid so as to bar complaint by husband)
 2 (91) 14 Mad 379 (381) 2 Weir 230 1 Mad L Jour 242, *Ghellaam v Ramaswami*
 (72 92) 1872 1892 Low Bur Rul 617, *Queen Empress v Nga Pau Gale*
 3 (22) 9 AIR 1922 Lah 177 (178) 23 Cri L Jour 690 *Utr Alam v Emperor*.
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 5 (95) 22 Cal 123 (130), *Chand Pershad v Evans*
 (24) 11 AIR 1924 Mad 40 (40) 24 Cri L Jour 824 *Atudayappa Mudaliar v Emperor* (Offence committed within the Court compound is not criminal trespass)
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11 Composition under sub-section (1).—In cases falling under sub-s (1), no leave of the Court is necessary for compounding⁴ and in such cases the Magistrate has no option but is bound to allow the compromise⁵. Parties are entitled to compound such offences unconditionally and when a *razinama* is filed by them, it is not for the Magistrate to inquire whether the complaint was frivolous or vexatious⁶. The mere fact that the accused has been sent up by the police does not prevent the person mentioned in the third column of the table from compounding the offence.⁴

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[See however (23) 24 Cr L Jour 120 (123) 71 Ind Cas 218 (250) (Pesh), *Harnam Das v Sain Dass*. (It is not mentioned in this case whether the prosecution by the complainant was on behalf of herself or on behalf of the husband of the girl abducted)]

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1. (31) 1891 Pun Be No. 17 Cr, p 55 (59) *Shib Singh v Empress*
2. (29) 16 AIR 1929 Nag 278 (278, 279) 30 Cr L Jour 960, *Emperor v Bhayyalal*
3. (37) 24 AIR 1937 Mad 825 (826) : 39 Cr L Jour 133, *In re Ponnu-swamy Ayyar*.

Note 11

1. (37) 24 AIR 1937 Mad 825 (826) 39 Cr L Jour 133, *In re Ponnu-swamy Ayyar* (Composition under S 345 (1) is an act of parties)
- (21) 8 AIR 1921 Cal 403 (404) : 22 Cr L Jour 301, *Hem Chandra v Girindra Chandra*.
2. (86) 1886 All W N 167 (167), *Empress v Ramgopal* (Voluntarily causing hurt)

or v. Sundar Singh.

4. (84) 10 Cal 551 (553), *Queen-Empress v. Nauabjan* (Overruled in 12 Cal 473 (FB) on another point)

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officio, and an order stating that the parties should again appear on another date is of no effect⁷

In cases falling under sub s (1) in the absence of any express provision to the contrary, the natural interpretation is that the composition is not limited to acts done in Court or to cases in which the parties continue to be of the same mind until the case comes on for further hearing before the Court⁸. So far at least as offences falling under sub s (1) are concerned there is no necessity for the composition to be effected in Court in criminal trials any more than in civil suits⁹

12 Compositions under sub section (2) — In cases governed by sub s. (2), no effect can be given to a compromise as a plea in bar of conviction unless the Court has sanctioned the compromise. Without the sanction the so called compromise arrived at between the parties is of no effect. The jurisdiction of the Court to try the offence is unaffected and there is no rule of law which would enable the Court in a case falling under sub s. (2) to order an enquiry into the factum of compromise alleged by one party and denied by the other¹

An agreement to compound an offence falling within this sub-section can only be effected with the Court's permission after the institution of criminal proceedings². Where an agreement to compound has been arrived at, the operation of a composition is suspended till the Court sanctions it. But where the composition has been made out of Court and at a certain stage in the proceedings the Court gives its sanction thereto the composition is not bad³

The only Court which has power under s 345, sub s (2) is the Court before which the prosecution is pending⁴. A police officer is not competent to entertain an application for withdrawal of a complaint as permitting the withdrawal of a complaint is a judicial act the exercise of which is vested in the Magistrate by ss 248 and 345 and the police have no authority to interfere in such matters⁵

The judicial officer charged with the duty of determining judicially matters which come before him should himself decide the petition for withdrawal of a complaint or petition for a compromise and should not refer it to the District Magistrate or the police

7 (21) 8 AIR 1921 Pat 290 (291) 22 Cri L Jour 675 *Amar Ali v Emperor*

8 (16) 3 AIR 1916 Mad 854 (855) 16 Cri L Jour 803 (804) 39 Mad 946 *Id Kannu Routher v P Inayatulla*

9 (13) 14 Cri L Jour 292 (293) 6 Snd L R 234 19 Ind Cas 948 *Imperator v Mulo*

Note 12

1 (37) 24 AIR 1937 Mad 825 (826) 39 Cri L Jour 133, *In re Ponnuswamy Ayyar*

(28) 15 AIR 1928 Lah 232 (234) 9 Lah 400 29 Cri L Jour 585 *Naurang v Kidar*

2 (42) 29 AIR 1942 Mad 662 (669) 11 LR (1913) Mad 183 44 Cri L Jour 29 203 Ind Cas 272 (DB) *R. Chibhotla Venkatasubba Rao v Chandanmal* (Offence of cheating cannot be compounded without sanction of Court even if no prosecution is launched — A executing promissory note in consideration of payee unlawful — Pro note cannot be enforced)

(1910) Nag 195 *Harswarup Baburam v Emperor* (Offence under S 490 Penal Code — Agreement to compound the case before it came to Court is ineffective)

(37) 24 AIR 1937 Mad 825 (826) 39 Cri L Jour 133 *In re Ponnuswamy Ayyar* (Any act of parties in compromise under sub-s (2) and 1 has no effect on the trial)

(559) *Kishan Lal v Aman Singh*

3 Mad 685 19 Cri L Jour 359 *Kumaraswami Chetty v*

4 Cri L Jour 639 1 L R (1937) Nag 183, *Partap Singh v*

5 *Emperor*

(93 1500) 1893 1900 Low Bur Rul 392 *Tayya v Maung Da Hlaing*

5 (75) 1875 Rat 91 (91)

(92-95) 1 Upp Bur Rul 42 (42)

for their opinion.⁷ It is the duty of the Magistrate in each case, which is compoundable with his permission to decide whether or not he should allow the compromise, and the responsibility rests with him.⁸

In granting permission, the Court should exercise a sound and reasonable discretion. Permission is not to be granted as a matter of course*. A Magistrate is bound to consider all facts before acceding to a sanction: he ought not to permit an offence to be compounded until he is satisfied that such permission may be legitimately granted⁹. The Magistrate should record his reasons to enable the High Court to determine if the discretion has been exercised properly¹¹. The granting of permission under this sub-section being within the sole discretion of a Magistrate the High Court will not entertain an appeal against an order of acquittal passed under this section in the absence of proof of the grossest misuse of his discretion by a Magistrate¹¹. Where an application for leave to compound an offence under s. 25 was rejected by a Bench of Magistrates on improper grounds, the High Court in revision remanded the application to the trial Court for disposal according to s. 215, sub-s. (2)¹². But the High Court will not interfere with the discretion of the trial Court in refusing permission unless the permission has been improperly withheld.¹³

The following are instances wherein the withholding of permission was held to have been improper.

(1) Where the permission was refused because a third party, who had received no injury from the accused, had refused to allow the composition¹¹

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Imperator (The Magistrate himself must determine the question. *A fortiori* the Court is not permitted to refer the question to any outside agency much less to the District Superintendent of police.)

(20) 13 AIR 1926 Cal 590 (391) : 27 Cr L Jour 515, *Ansar Fakhr v. Emperor*. (Magistrate should not refer petition for withdrawal by complainant to Superintendent of police)

(30) 17 AIR 1930 Lah 272 (272) 32 Cri L Jour 20, *Parlap Singh v Emperor*, (District Magistrate)

(32) 1932 Mad W N 1098 (1099), *Sulbi Rao v Ahmad Durrani*. (Court is not entitled to substitute the discretion of the police-officer conducting the prosecution for his own in the matter of allowing composition.)

(35) 22 AIR 1933 Lah 226 (227): 35 Cr L Jour 1372, *Sultan v. Emperor* (Reference to District Magistrate for instructions is improper)

[See however (39) 26 AIR 1939 Pat 141 (142) : 40 Cr L Jour 460, *Dharichhian Singh v. Emperor*. (Observations in this case suggest that the Magistrate can act on the opinion of the police in granting or withholding permission but it is remarked that the proper course is not to send the file itself to

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the superior Court)
(22) 9 AIR 1922 Lah 139 (138) : 23 Cal L Jour 85, *Sera Singh v Emperor*. (Compounding at early

two years to

10 (02) 1 Low Bur Rul 349 (349), *Crown v Konoo Meah* (In case of grievous hurt medical evidence should always be recorded)

(92 96) 1 Upp Bur Ral 43 (43), *Queen-Empress v Ngā Po Saung*, (Do)

11. (42) 29 AIR 1942 Pat 58(59) : 43 Cri L Jour 44 : 196 Ind Cas 604 (DB), *Emperor v Gourishankar*, (Offence under S 420, Penal Code, committed and accused acquitted—High Court refused to interfere)

- (2) Where the offence related to public property but the matters were such as could not be suitably unravelled in a criminal case and the compromise was arrived at, at an early stage¹⁵
- (3) Where the permission was refused on the ground that petitioner was a clerk in the Collectorate and the Magistrate considered that as a serious charge had been made against him, he should clear his character¹⁶
- (4) Where parties are nearly related to one another and have succeeded in patching up their quarrels¹⁷
- (5) Where the offence is not a serious one and the compromise is arrived at, at an early stage¹⁸

On the other hand, where a compromise arrived at, at a late stage, was retracted by the complainant and one of the offences charged was a non compoundable one, it was held that the Magistrate had not acted improperly in refusing permission¹⁹

In cases falling under ss 324 and 325, all circumstances should be taken into consideration before sanctioning compromise, and the Magistrate should bear in mind that such an offence is punishable not only for the satisfaction of the person injured but for the protection of society. The degree of prevalence of such offences at a particular time and place may fitly be taken into consideration in determining whether a compromise should be allowed²⁰. Where all the circumstances were not considered, the compromise was set aside by the High Court in revision²¹

In the undermentioned case²² the allegations in the complaint were that the accused who was a clerk in the High Court had cheated the complainant by inducing him to pay a sum of money by way of bribe to be paid to the Judge of the High Court in charge of the complainant's case. The Magistrate allowed the offence to be compounded. In an appeal against the order the High Court set aside the composition on the ground that the matter was of very grave public concern.

In allowing a compromise, a Magistrate may impose a condition as to payment of some compensation to the injured man²³

The mere fact that a petition for compromise is filed in Court (but is not allowed) is no ground for the reduction of a sentence²⁴

13. Proof of composition — Where an accused person alleges that the offence of which he is charged has been compounded, the *onus* is on him to show that there has been a real and valid composition with the person entitled to compound¹. Before a composition can be allowed, the Court must be satisfied that it is legal and valid in law². Where a compromise is alleged by one party and denied by the other, the Magistrate must try the issue³. An order of the Magistrate, acquitting the accused without inquiry

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Note 13

- 1 (193) 21 Cal 103 (112, 115), *Murray v Empress*
- (27) 14 AIR 1927 Bom 410 (411) 51 Bom 512 28 Cri L Jour 581, *Dajuba Ramji v Emperor*
- 2 (29) 16 AIR 1929 Bom 375 (376) 51 Cri L Jour 553, *Hanmant Srinivas v Emperor*
- 3 (19) 6 AIR 1919 Mad 879 (880) 41 Mad 685 : 19 Cri L Jour 350, *Kumaraswamy Chetty v. Kuppaswamy Chetty*

into the truth of the alleged compromise is bad in law and may be set aside⁴

14 Stage at which a compounding may be effected — An offence which is compoundable without the permission of the Court may be compounded even before the filing of a complaint¹ A case may be compounded at any time before judgment is pronounced² The fact that the prosecution evidence has been closed and that a charge has been framed is no bar to the composition as the offence can be compounded at any time before the passing of the sentence³ After conviction however there can be no composition except with the leave of the appellate Court⁴ Where an order is made by a District Magistrate under S 435 calling for the record and proceeding before a Magistrate with a view to withdrawing the case and transferring it to another Magistrate the jurisdiction of the former Magistrate is suspended and he is not therefore entitled to record a composition of the offence and acquit the accused though at that time the case has not actually been transferred from his file⁵

15 Composition after committal or conviction — A committal once made by a Magistrate cannot be annulled by his allowing the prosecutor to file a compromise¹ After conviction a composition can be effected only with the leave of the appellate Court²

Where an accused is tried and convicted of an offence which is compoundable but on appeal the conviction is set aside and a retrial ordered it is open to the complainant and accused to compound the case in the same manner as they might have done prior to the conviction and no leave of the appellate Court is necessary³

A compromise entered into after the hearing of the appeal is too late and does not come within S 345⁴

Sub section (5) applies not only to offences compoundable under sub s (1) but also to offences compoundable with the permission of Court under sub s (2)⁵ Where an appli

(31) 18 AIR 1931 Lah 402 (402) 32 Cri L Jour 1034 *Madars v Emperor*
(16) 3 AIR 1916 Mad 804 (855) 16 Cri L Jour 603 (804) 39 Mad 946 *Mad Kanni Poulther v P Inayatulla*

(13) 14 Cri L Jour 292 (293) 6 Snd L R 284 19 Ind Cas 948 *Imperial v Mulo*
4 (30) 19 AIR 1932 Snd 7 (8) 25 Sind L R 341 33 Cri L Jour 109 *Abduljabar v Emperor*

Note 14

1 (19) 6 AIR 1919 Mad 879 (881 882) 41 Mad 685 19 Cri L Jour 359 *Kumaraswami Chetty v Kuppuswami Chetty*

(27) 14 AIR 1927 All 870 (376) 49 All 484 28 Cri L Jour 495 *F M Torpey v Emperor* (Composi

4 See Note 15

5 (25) 12 AIR 1925 Bom 247 (247) 49 Bom 533 26 Cri L Jour 996 *In re Maruthi & s/o*

Note 15

1 (1865) 2 Suth W R Cr 57 (57) *Queen v Salim Shah*

Also see S 213 Note 5 and S 215 Note 7

2 (20) 7 AIR 1920 Mad 245 (245) 20 Cri L Jour 832 *In re Pedakanti Chinna Naidu*

(15) 2 AIR 1915 All 8 (9) 37 All 127 18 Cri L Jour 247 *Ramchandra v Emperor*

[See (34) 21 AIR 1934 Snd 120 (120) 28 Sind L R 109 35 Cri L Jour 210 *Jumo Sierkhan v Emperor* (Court will be reluctant to grant leave where the conviction or committal is considered right.)]

[But see (79) 2 All 339 (340) *Empress of India v Thomson* (Case under Code of 1872 which did not contain a provision corresponding to the present sub-s. (5))]

3 (66) 4 Cri L Jour 35 (35) 3 All L Jour 573 1906 All W N 200 *Umrao v Malbhan*

4 (53) 20 AIR 1933 All 434 (436) 34 Cr L J 978 *Emperor v J M Chakraborty* ("Court before which the appeal is to be heard" in sub-s (5) indicates that compromise should not be after appeal is heard)
[See however (25) 12 AIR 1925 Cal 14 (17) 28 Cri L Jour 401 32 Cal 317 *T C S Martindale v Emperor* (Leave granted by High Court in appeal on date of judgment — Provisions of sub-s. (7) not adverted to)]

5 (41) 28 AIR 1911 Snd 216 (217) 1 L R (1911) Kar 409 43 Cri L Jour 293 19 Ind Cas 672 (DB) *Alan Sahasli v Emperor* (Conviction for offence under S. 325, Penal Code falling under S. 345 () —

- (2) Where the offence related to public property but the matters were such as could not be suitably unravelled in a criminal case and the compromise was arrived at, at an early stage¹⁵
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- (4) Where parties are nearly related to one another and have succeeded in patching up their quarrels¹⁷
- (5) Where the offence is not a serious one and the compromise is arrived at, at an early stage¹⁸

On the other hand, where a compromise arrived at, at a late stage, was retracted by the complainant and one of the offences charged was a non compoundable one, it was held that the Magistrate had not acted improperly in refusing permission¹⁹

In cases falling under ss 324 and 325, all circumstances should be taken into consideration before sanctioning compromise, and the Magistrate should bear in mind that such an offence is punishable not only for the satisfaction of the person injured but for the protection of society. The degree of prevalence of such offences at a particular time and place may fitly be taken into consideration in determining whether a compromise should be allowed²⁰. Where all the circumstances were not considered, the compromise was set aside by the High Court in revision²¹.

In the undermentioned case²² the allegations in the complaint were that the accused who was a clerk in the High Court had cheated the complainant by inducing him to pay a sum of money by way of bribe to be paid to the Judge of the High Court in charge of the complainant's case. The Magistrate allowed the offence to be compounded. In an appeal against the order the High Court set aside the composition on the ground that the matter was of very grave public concern.

In allowing a compromise, a Magistrate may impose a condition as to payment of some compensation to the injured man²³.

The mere fact that a petition for compromise is filed in Court (but is not allowed) is no ground for the reduction of a sentence²⁴.

13. Proof of composition. — Where an accused person alleges that the offence of which he is charged has been compounded, the *onus* is on him to show that there has been a real and valid composition with the person entitled to compound¹. Before a composition can be allowed, the Court must be satisfied that it is legal and valid in law². Where a compromise is alleged by one party and denied by the other, the Magistrate must try the issue³. An order of the Magistrate, acquitting the accused without inquiry

Emperor
Ali Hasan

Emperor.

Ramzan Bachal-
221 Ind Cas 208.

23 (22) 9 AIR 1922 Lah 138 (188) 23 Cri L Jour 65, *Sewa Singh v Emperor*

24. (11) 12 Cri L Jour 243 (243) 10 Ind Cas 773 (Low Bur), *Emperor v Mya Din*.

Note 13

into the truth of the alleged compromise is bad in law and may be set aside⁴

14 Stage at which a compounding may be effected — An offence, which is compoundable without the permission of the Court, may be compounded even before the filing of a complaint¹ A case may be compounded at any time before judgment is pronounced² The fact that the prosecution evidence has been closed and that a charge has been framed is no bar to the composition as the offence can be compounded at any time before the passing of the sentence³ After conviction, however, there can be no composition except with the leave of the appellate Court⁴ Where an order is made by a District Magistrate under S 435 calling for the record and proceeding before a Magistrate with a view to withdrawing the case and transferring it to another Magistrate, the jurisdiction of the former Magistrate is suspended and he is not, therefore, entitled to record a composition of the offence and acquit the accused, though at that time the case has not actually been transferred from his file⁵

15. Composition after committal or conviction — A committal once made by a Magistrate cannot be annulled by his allowing the prosecutor to file a compromise¹ After conviction a composition can be effected only with the leave of the appellate Court²

Where an accused is tried and convicted of an offence which is compoundable, but on appeal the conviction is set aside and a re trial ordered, it is open to the complainant and accused to compound the case in the same manner as they might have done prior to the conviction, and no leave of the appellate Court is necessary³

A compromise entered into after the hearing of the appeal is too late and does not come within S 345⁴

Sub section (5) applies not only to offences compoundable under sub s (1) but also to offences compoundable with the permission of Court under sub s (2)⁵ Where an appli:

(31) 18 AIR 1931 Lah 402 (402) 32 Cr L Jour 1034, *Madari v Emperor*

(16) 8 AIR 1916 Mad 854 (855) 16 Cr L Jour 803 (804) 39 Mad 940, *Mad Kanni Fowther v P Inayatulla*

(19) 14 Cr L Jour 292 (293) 6 Sind L R 281 10 Ind Cas 948, *Imperator v Mulo*

4 (32) 19 AIR 1932 Sind 7 (8) 25 Sind L R 341 33 Cr L Jour 109 *Abduljabar v Emperor*

Note 14

5 (33) 20 AIR 1933 All 434 (436) 34 Cr L Jour 926 *Emperor v J M Chatterji*

(Compos.)

4 See Note 15

5 (25) 12 AIR 1925 Bom 247 (247) 49 Bom 533 26 Cr L Jour 996 *In re Maruthi Vithu*

Note 15

1. (1865) 2 Bath W R Cr 57 (57) *Queen v Salim Sheikh*

Also see S 213 Note 5 and S 215 Note 7

2 (20) 7 AIR 1920 Mad 245 (245) 20 Cr L Jour 832 *In re Pedakanti Chinna Naidu*

(15) 2 AIR 1915 All 6 (9) 37 All 127 16 Cr L Jour 247, *Ramchandra v Emperor*

[See (34) 21 AIR 1934 Sind 122 (122) 28 Sind L R 109 36 Cr L Jour 210 *Jumo Sher Khan v Emperor* (Court will be reluctant to grant leave where the conviction or committal is considered right)]

[But see (79) 2 All 339 (340), *Empress of India v Thomson* (Case under Code of 1972 which did not contain a provision corresponding to the present sub-s. (5))]

3 (06) 4 Cr L Jour 35 (35) 3 All L Jour 523 1906 All W N 200 *Umrai v Malbhan*

4 (33) 20 AIR 1933 All 434 (436) 34 Cr L Jour 926 *Emperor v J M Chatterji* ("Court be re which the appeal is to be heard" in sub-s (5) indicates that compromise should not be after appeal is heard)

[See however (25) 12 AIR 1925 Cal 14 (17) 26 Cr L Jour 401 - 62 Cal 247, *T C S Marudane v Emperor* (Leave granted by High Court in appeal on date of judgment — Provisions of sub-s (5) not adverted to)]

5 (41) 24 AIR 1941 Sind 216 (217) 1 L R (1941) Kar 429 43 Cr L Jour 223 197 Ind Cas 424 (DE) *Alian Salsali v Emperor* (Conviction for offence under S. 325, Penal Code falling under S 345 (1))

- (2) Where the offence related to public property but the matters were such as could not be suitably unravelled in a criminal case and the compromise was arrived at, at an early stage¹⁵
- (3) Where the permission was refused on the ground that petitioner was a clerk in the Collectorate and the Magistrate considered that as a serious charge had been made against him, he should clear his character¹⁶
- (4) Where parties are nearly related to one another and have succeeded in patching up their quarrels¹⁷
- (5) Where the offence is not a serious one and the compromise is arrived at, at an early stage¹⁸

On the other hand, where a compromise arrived at, at a late stage, was retracted by the complainant and one of the offences charged was a non compoundable one, it was held that the Magistrate had not acted improperly in refusing permission¹⁹

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	Imperor
	Ali Hasan.
	Imperor
20. (1900 02) 1 Low Bur Rul 349 (349-350), <i>Crown v Konoa Meah</i>	
	Ramsan Bachal.
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Note 13

into the truth of the alleged compromise, is bad in law and may be set aside⁴

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Sub section (5) applies not only to offences compoundable under sub s (1) but also to offences compoundable with the permission of Court under sub s (2)⁵ Where an appli-

(31) 18 AIR 1931 Lab 402 (402) : 32 Cri L Jour 1034, *Madari v Emperor*

(16) 3 AIR 1916 Mad 854 (855) : 16 Cri L Jour 803 (801) : 39 Mad 916, *Mad Kanni Rauther v P Inayatulla*.

(13) 14 Cri L Jour 292 (293) : 6 Sind L R 284 : 19 Ind Cas 948, *Imperator v. Mulo*

4 (32) 19 AIR 1932 Sind 7 (8) : 25 Sind L R 341 : 33 Cri L Jour 109, *Abduljabar v Emperor*
Note 14

1 (19) 6 AIR 1919 Mad 879 (881, 882) : 41 Mad 685 : 19 Cri L Jour 352, *Kumaraswami Chetty v. Kuppuswami Chetty*

(27) 14 AIR 1927 All 875 (876) : 49 All 484 : 28 Cri L Jour 495, *F. M. Torpey v Emperor*.

[See also (37) 24 AIR 1937 Mad 825 (826) : 39 Cri L Jour 133, *In re Ponnuswami Ayyar*. (Composition under S 345 (1) may be made at any time)]

2 (18) 5 AIR 1918 Cal 238 (238) : 45 Cal 816 : 19 Cri L Jour 752, *Aslam Mea v Emperor*.

3 (28) 29 Cri L Jour 1038 (1039) : 112 Ind Cas 562 (Lab), *Muhammad Ali v. Emperor*

4 See Note 15

5. (25) 12 AIR 1925 Bom 247 (247) : 49 Bom 533 : 26 Cri L Jour 926, *In re Maruthi Vethu*.
Note 15

1. (1865) 2 Suth W R Cr 57 (57), *Queen v. Salem Sheik*.

Also see S 213, Note 5 and S 215, Note 7.

2. (20) 7 AIR 1920 Mad 245 (245) : 20 Cri L Jour 832, *In re Pedasanki Chinna Naidu*.

(15) 2 AIR 1915 All 8 (9) : 37 All 127 : 16 Cri L Jour 247, *Ramechandra v Emperor*

[See (34) 21 AIR 1934 Sind 122 (122) : 28 Sind L R 109 : 35 Cri L Jour 210, *Juma Sherkhan v Emperor*. (Court will be reluctant to grant leave where the conviction or committal is considered right)]

Case under Code of 1872 which did

Emrai v Malbala.

4 Chatterji ("Court before which the appeal is to be heard" in sub-s (5) indicates that compromise should not be after appeal is heard)

[See however (25) 12 AIR 1925 Cal 14 (17) : 26 Cri L Jour 401 : 52 Cal 347, *T. C. S. Marindale v. Emperor* (Leave granted by High Court in appeal on date of judgment — Provisions of sub-s. (5) not adverted to)]

5 (41) 25 AIR 1911 Sind 216 (217) : 1 L R (1911) Kar 429 : 43 Cri L Jour 293 : 197 Ind Cas 858 (DE), *Alian Salahi v Emperor*. (Conviction for offence under S 323, Penal Code, falling under S 345 (2))

cation to compound an offence under S 325 Penal Code is rejected by the trial Court and in appeal from conviction the appellate Court while writing the judgment finds that an offence compoundable under sub s (1) has been committed, it can consider an application for compounding and then pass an order allowing the offence to be compounded and the consequential order of acquittal⁶

16 High Court's powers in revision — Before the introduction of sub s (5A) by Act 18 [XVIII] of 1923 divergent views were held as to whether a High Court had power to apply the powers granted in S 345 to cases in revision, some cases holding that the High Court had no such power¹ and other cases taking the opposite view² The introduction of sub s (5A) leaves the position free from doubt and explicitly confers on the High Court acting in the exercise of its powers of revision under S 439 power to allow any person to compound offences which may lawfully be compounded³ One of the objects of the Legislature in enacting sub s (5A) was in suitable circumstances to allow the parties to compromise their disputes even after the cases in which they were concerned had been heard and determined by the Courts competent to try them⁴ But the sub-section should be interpreted very strictly and the discretion conferred upon the High Court should be exercised very sparingly and only in suitable cases⁵ The sub section has to be read subject to the preceding subsections of S 345 especially sub ss (1) and (2) and so read it is clear that sub s (5A) merely confers jurisdiction on the High Court in the exercise of its powers of revision under S 439 to allow the aggrieved persons mentioned in column three of the tables attached to subsections (1) and (2) to compound the various offences

Appellate Court can allow offence to be compounded — Question of reduction of offence under S 325 to S 323 taking effect only on pronouncement of judgment is immaterial)

6 (41) 28 AIR 1941 Sind 218 (217) I L R (1941) Kar 429 43 Cri L Jour 293 187 Ind Cas 888 (DB)
Akan Sabzali v Emperor

Note 16

1 (16) 3 AIR 1918 Mad 483 (484) 18 Cri L Jour 750 39 Mad 604 *Sankar Rangayya v Sankar Ramayya*

(15) 2 AIR 1915 All 8 (9) 37 All 127 16 Cri L Jour 247 *Ramchandra v Emperor*

(20) 7 AIR 1920 All 169 (169) 42 All 474 21 Cri L Jour 417, *Ram Daran Singh v Emperor*

(17) 4 AIR 1917 All 877 (378) 18 Cri L Jour 729 *Lala v Emperor*

(17) 4 AIR 1917 Cal 705 (706) 17 Cri L Jour 339 43 Cal 1143 *Ashoy Singh v Rameshwar*

(14) 1 AIR 1914 Cal 901 (901) 15 Cri L Jour 728 *Adhar Chandra v Subodh Chandra*

(19) 6 AIR 1919 Lah 471 (472) 1919 Pun Re No 35 Cr 20 Cri L Jour 87, *Emperor v Harnam Singh*

(23) 10 AIR 1923 Pat 89 (90) 23 Cri L Jour 80 *Audha Rai v Emperor*

2 (10) 11 Cri L Jour 203 (203) 32 All 153 5 Ind Cas 696 *Ram Piyari v Emperor*

(22) 9 AIR 1922 All 488 (488) 45 All 17 24 Cri L Jour 854, *Shibbo v Emperor*

(13) 14 Cri L Jour 48 (46) 18 Ind Cas 270 (All) *Naqi Ahmed v Emperor* (Power of revision Court doubted but on the authority of 11 Cri L Jour 203 32 All 153 compromise allowed)

(22) 9 AIR 1922 Lah 138 (139) 23 Cri L Jour 85 *Sewa Singh v Emperor*

(14) 1 AIR 1914 Oudh 167 (167) 17 Oudh Cas 92 15 Cri L Jour 587 *Lalla v Emperor*

(24) 11 AIR 1924 Oudh 260 (261) 24 Cri L Jour 530 *Chhotai Singh v Emperor*

(04) 1 Cri L Jour 509 (511) (Lab) *Nidhan Singh v Emperor*

(10) 11 Cri L Jour 496 (497) 13 Oudh Cas 161 7 Ind Cas 539 *Ram Sarup v Emperor*

3 (24) 11 AIR 1924 All 209 (209) 46 All 91 25 Cri L Jour 1095 *Dray Behari Lal v Emperor*

(29) 16 AIR 1929 Nag 278 (279) 30 Cri L Jour 960 *Emperor v Bhasjatal*

(30) 17 AIR 1930 Lah 272 (272) 32 Cri L Jour 20 *Partap Singh v Emperor*

(25) 12 AIR 1925 Pat 593 (594) 28 Cri L Jour 1345 *Nehal Ahmad v Emperor*

(29) 16 AIR 1929 Pat 512 (512) 31 Cri L Jour 607 *Singheswar Prasad v Ali Hasan*

(06) 27 Pun L R 231 (231) *Nisam Din v Emperor*

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4 (39) 20 AIR 1939 Cal 729 (730) 41 Cri L Jour 125 ILR (1939) 1 Cal 567 *Dabur Ali v Kala Chand*

5 (39) 20 AIR 1939 Cal 729 (730) 41 Cri L Jour 125 ILR (1939) 1 Cal 567, *Dabur Ali v Kala Chand*

mentioned in those sub sections. Thus, it would follow that ordinarily the party who seeks to invoke the jurisdiction of the High Court under sub s (5A) must be the person aggrieved by the offence which has been committed and not an accused person or a person who has been convicted in respect of that offence⁶

It will not be competent for the High Court to allow a compromise to be recorded under sub s (5A) unless the aggrieved persons were actually before the High Court and had expressly recorded their consent to such a compromise being recorded⁷

It has also been held that where the proceedings before the lower Courts disclose no irregularity or impropriety the exceptional power conferred on the High Court under sub-s (5A) should not ordinarily be used except in a case in which the record indicates that the parties made some attempt to compromise their differences while the matter was still before the trial Court and before that Court passed final orders in the case⁸

17 Rescission of compromise — A composition once effected cannot be withdrawn¹ It is entirely immaterial whether the terms of the compromise have been carried out or not, the sole question being whether there was a composition or not a breach of the agreement might give rise to other remedies² Since the compromise has the immediate effect of acquittal (see Note 18) so as to deprive the Magistrate of his jurisdiction to try the case the subsequent withdrawal from it by any party can neither affect the acquittal nor revive the jurisdiction of the Magistrate to proceed with the case³

18 Effect of compromise — When a case is compounded it results not merely in a *discharge* but in an *acquittal* and until such order of acquittal is properly set aside, the accused cannot be prosecuted again for the same offence¹ or for any other offence (which is not distinct) for which a different charge from that which was compounded might have been framed on the same facts² Where at the time of compromise of the offence it was believed that the offence fell under S 823 it was held that the discovery later that it fell under S 825 would not enable the Magistrate to re open the prosecution for that offence³ The composition of one offence will not however bar a prosecution for

6 (89) 26 AIR 1939 Cal 728 (730) 41 Cr L Jour 125 1LR (1939) 1 Cal 567 *Babur Ali v Kala Chand*

7 (89) 26 AIR 1939 Cal 728 (730) 41 Cr L Jour 125 1LR (1939) 1 Cal 567 *Babur Ali v Kala Chand*

8 (89) 26 AIR 1939 Cal 728 (730) 41 Cr L Jour 125 1LR (1939) 1 Cal 567 *Babur Ali v Kala Chand*

Note 17

1 (40) 27 AIR 1940 Nag 181 (182) 41 Cr L Jour 287 *Mt Rambai v Mt Chandrakumari* (If it is proved that the parties signed the document and understood its contents it is incompetent for any party to it to withdraw from it)

2 (30) 17 AIR 1930 All 409 (410) 52 All 254 31 Cr L Jour 1215 *Jhangloo Barai v Emperor* (In

has effect of acquittal though one of the parties later on resiles from the compromise AIR 1916 Mad 854 39 Mad 946 16 Cr L Jour 803 followed)

Note 18

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Also see S 403 Note 8

2 (90) 1890 Rat 519 (520) *Queen Empress v Wals Asmal* (Compounding of offence under S 34, Penal Code — Refusal on same facts on a charge under S 373 held improper)

3 (84) 1884 All W N 13 (14), *Empress v Unkar*

a distinct offence of which the accused might have been charged on the same facts under s 235 (1)⁴ Moreover, a composition has the effect of an acquittal only in respect of the offence which has been compounded and not of the other offences of which the accused is charged in the case⁵ and only as between the person who is entitled to compound and the accused with whom the composition takes place⁶ There was a doubt prior to the amendment of the Code in 1923 as to whether in the case of several accused the compounding of the offence against one or some of them alone affects the case against the others—some cases holding that it did not⁷ and others that it did⁸ The controversy has been set at rest by the amendment of sub s (6)⁹

If a non compoundable case is dismissed on the parties coming to an amicable settlement the dismissal does not amount to an acquittal but only to a discharge and does not bar the revival of the prosecution¹⁰ Where an order of acquittal has been passed on an invalid composition, it may be set aside in revision¹¹ A Magistrate is not competent to award compensation to the accused where an offence is compounded under s 345¹² The reason is that s 250 only applies where the Magistrate discharges or acquits the accused whereas under this section the acquittal takes place automatically on the composition of

4 (29) 16 AIR 1929 Bom 263 (235) 53 Bom 604 30 Cri L Jour 1059, *Manjubhai Gordhandas v Emperor* (Compounding of offence under S 324, Penal Code, does not bar prosecution under S 19 (e), Arms Act)

5 (30) 17 AIR 1930 All 92 (93) 30 Cri L Jour 1149, *Hukum Singh v Emperor*.

(25) 12 AIR 1925 Lah 464 (464) 26 Cri L Jour 686, *Emperor v Jarnally* (Charges under Ss 323 and 147, Penal Code—Compromise in respect of charge under S 325—Prosecution under S 147 not barred)

6 (38) 25 AIR 1938 Lah 739 (740) 40 Cri L Jour 131, *Mt Harbans Kaur v Lahari Ram* (Defamatory allegations against minor daughter affecting father—Father and daughter can file separate complaints—Compromise and consequent acquittal of accused to father's complaint do not affect complaint by daughter)

(37) 24 AIR 1937 Nag 72 (73) 38 Cri L Jour 334 • 1LR (1937) Nag 286, *In re Khilwan Singh*
The person compounding his case—

Naicken

v Riddani

7 (21) 8 AIR 1921 All 35 (35) 43 All 483 23 Cri L Jour 353, *Chandan v Emperor*
Alibhai
v Emperor
Emperor v. Abdul Hakim
Emperor

v Sagar Singh

v Emperor

9 (26) 13 AIR 1926 Lah 424 (424) 7 Lah 344 27 Cri L Jour 576, *Emperor v Mohna*

(24) 11 AIR 1921 Lah 595 (596) 5 Lah 239 25 Cri L Jour 629, *Anantia v Emperor*.

(33) 1933 Mad W N 222 (222) *Thirumalai Naicken v Emperor*

10 (41) 23 AIR 1941 Oudh 510 (511) 42 Cri L Jour 748 • 195 Ind Cas 488 *Ramcharan v Emperor*
(Complaint under Ss 452 and 392 Penal Code dismissed as complainant did not wish to proceed with case—Fresh application by complainant stating that withdrawal of complaint was based on mis conception of facts—Magistrate reviving original complaint and on evidence finding accused guilty under S 323, Penal Code, and not S 452 or S 392 Penal Code—Revival of complaint held justified—Conviction under S 323, Penal Code, held legal)

(75) 1 Bom 61 (66) *Neg v Detama*

11 (23) 24 Cri L Jour 120 (122) 71 Ind Cas 248 (250) (Fesh) *Harnam v Sain Dass*

In re Harkisandas Hari Das

Cr, Emperor v Sunder Singh

v Dhillawar (Dissented from in

an offence. But though the Magistrate cannot allow compensation if the complaint is wholly false he may consider whether a criminal prosecution for making a false complaint is desirable in the interests of justice¹⁵. In the case of a dispute between two brothers wherein the prosecution for theft was found to be false it was held that the parties being brothers the prosecution of the complainant under S 182 should not have been instituted¹⁶.

If a case is compounded the composition does not prevent the complainant being charged under S 211 if the complaint was false¹⁵.

Where a compromise has been entered into orders passed in connexion with the compromise by the Magistrate before whom the case was pending must be deemed to have been passed by him in his judicial capacity¹⁶.

Where an offence under S 324 Penal Code committed by a person who has executed a security bond under S 107 to keep the peace is compounded the composition has the effect of acquittal of the accused and unless there is any other evidence on the record to show that he committed the breach of the peace the bond cannot be forfeited¹⁷.

Sub section (6) does not contemplate the passing of an actual order of acquittal though in fact such orders are frequently passed. The words 'shall have the effect of an acquittal' imply that all the incidents attaching to an actual order of acquittal including a right of appeal will be brought into operation. Thus an order according sanction under S 345 (2) will be appealable under S 417 by virtue of this sub section¹⁸.

19 Sub section (7) — The provisions of sub s (-) seem to be perfectly general and govern the composition of offences whether any steps have been taken or not to prosecute the offender¹.

Section 345 contains provisions with regard to (a) persons who may compound (b) the nature of offences which may be compounded (c) the stage at which composition is sought to be made and (d) permission of Court in certain cases. Sub section (7) must be taken to mean that no offences shall be compounded except where the provisions of S 345 are satisfied as to all these matters².

20 Civil suit — Where the offences were compoundable and the complainant had already sued the accused on the same cause of action and obtained adequate damages it was held that in the circumstances of the case it was not necessary in the ends of justice that he should again be put to trial in a criminal Court for the same offence¹. The effect of the compounding of an offence which is compoundable apart from the acquittal of the accused would be that a suit for damages on the facts constituting the original offence would not lie².

13 (94) 1894 Rat 700 (700) *Queen Empress v Raoji*

Also see S 250 Note 7

to a Magistrate to take independent evidence to show that the accused committed the breach of the peace)

18 (15) 32 AIR 1915 Nag 104 (104) 1LR (1915) Nag 505 47 Cri L Jour 119 231 Ind Cas 203 *Provincial Government Central Provinces and Berar v Brijn Singh*

Note 19

1 (16) 5 AIR 1918 Nag 181 (183) 46 Ind Cas 424 *Harisai v Mohammad Asimulla Khan*

2 (17) 4 AIR 1917 Cal 705 (706) 43 Cal 1143 17 Cri L Jour 339 *Alshoj Singh v Rameshwar Bagdi*

(16) 3 AIR 1916 Mad 483 (485) 39 Mad 604 16 Cri L Jour 759 *Rangajya v Ramayya*

Note 20

1 (24) 11 AIR 1924 Mad 31 (31) 25 Cri L Jour 139 *Tiruvangadachariar v Clockalingam Chetty*

2 (33) 20 AIR 1933 Bom 413 (414) 57 Bom 678 147 Ind Cas 1095 *Sayamma v Punamchand*

21. Procedure in non-compoundable cases where injured party declines to prosecute.—Once the criminal law is set in motion by the issue of process in a non compoundable case, the Magistrate must require the complainant to carry his prosecution through to the end¹ The Legislature has not left it to the will of a Magistrate to proceed or not, as he thinks fit, with cases which cannot be legally compounded. It requires him, when once the complaint for such an offence is before him, to make a complete inquiry and to see that the accused who is guilty is brought to punishment²

In non-compoundable cases, once action has been taken the case will normally proceed and it is nowhere provided that a desire on the part of the complainant to refrain from further pursuing the case shall justify the arrest of further proceedings. The final responsibility of such cases, whether instituted on complaint or otherwise, rests with the State³

346.* (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

Synopsis

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| <ol style="list-style-type: none"> 1. Legislative changes 2. Scope and applicability of the section 3. Duty of the inferior Courts. 4. To whom the case should be submitted. | <ol style="list-style-type: none"> 5. Trial must be de novo — Sub-s (2) 6. Sub-section (2) — Reference to any sub-Magistrate having jurisdiction 7. Commitment to sessions See Note 5 8. "Inquiry," "evidence," meaning of. |
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* Code of 1832 · S 346 — Same.

Code of 1872 · S 45, paras 1 and 2.

Procedure of Magistrate in cases beyond his jurisdiction 45 If, in the course of a proceeding before a Magistrate, the evidence appears to him to warrant a presumption that the accused person has been guilty of an offence which such Magistrate is not competent to try, or for which he is not competent to commit the accused person for trial, he shall stay proceedings and submit the case to any Magistrate to whom he is subordinate or to such other Magistrate having jurisdiction, as the Magistrate of the district directs

The Magistrate to whom the case is submitted shall either try the case himself, or refer it to any officer subordinate to him having jurisdiction, or he may commit the accused person for trial

Code of 1861 · S 276.

How the subordinate Magistrate is to proceed in cases beyond his jurisdiction 276 If, in the course of a trial before a subordinate Magistrate, the evidence shall appear to him to warrant a presumption that the accused person has been guilty of an offence which such Magistrate is not competent to try, or for which he is not competent to commit the accused person for trial before the Court of Session, he shall stay proceedings and shall submit the case to the Magistrate to whom he is subordinate. The Magistrate to whom the case is submitted shall either try the case himself or refer it to any officer subordinate to him having jurisdiction, or he may commit the accused person for trial before the Court of Session. In any such case, such Magistrate or other officer as aforesaid shall examine the parties and witnesses, and shall proceed in all respects as if no proceedings had been held in any other Court

Note 21

NOTE to the Synopsis See the Notes indicated for the following topics

Applicability to European British subject See Note 2	Reference back to same Magistrate See Note 6
Commitment on evidence taken by another Magistrate See Note 5	Sections 347 to 349—Effect See Note 2
Grounds for action See Notes 2 and 3	Sections 349 and 350 and this section See Note 5.
Ignoring evidence and circumstantial See Note 3	Stage at which action can be taken See Note 3
Inquiry and evidence under S 202 See Note 8	Transfer to Magistrate with no jurisdiction See Note 4
No waiver to <i>de novo</i> trial See Note 5	Want of sanction under Ss 195 and 476 See Note 3
Non observance — Not void See Note 3	

1 Legislative changes

Difference between the Codes of 1861 and 1872 —

- (1) Section 276 of the Code of 1861 contemplated reference only by a "subordinate Magistrate". The subsequent Codes have omitted the qualifying word "subordinate," so that now a reference may be made by any Magistrate
- (2) Under the Code of 1861 a submission of a case could be made only to the Magistrate to whom the Magistrate submitting the same was subordinate. From the Code of 1872 onwards the section has been altered so as to allow a reference to 'such other Magistrate having jurisdiction, as the Magistrate of the district (District Magistrate) directs'
- (3) There was a specific provision in the Code of 1861 requiring that the Magistrate to whom a case was submitted, or the officer subordinate to him, to whom it may be referred, shall examine the parties and witnesses and proceed in all respects as if no proceedings had been held in any other Court. The later Codes have omitted this specific provision. As to the effect of this, see Note 5

Difference between the Codes of 1872, 1882 and 1898 —

- (1) Both the Codes of 1861 and 1872 restricted the application of the section to cases which the Magistrate was not competent to try or commit for trial. Section 346 of the Code of 1882 and the present section have removed such restriction. See Note 2
- (2) Section 45 of the Code of 1872 applied even to Magistrates within the presidency towns. The Codes of 1882 and 1898 have restricted the application of the section to trials before Magistrates outside the presidency towns

2 Scope and applicability of the section. — This section enacts the procedure to be followed by Provincial Magistrates where, in the course of an enquiry or a trial, the evidence appears to warrant a presumption that the case is one —

- (1) which should be *tried* by some other Magistrate in the district, or
- (2) which should be *committed* for trial by some other Magistrate in the district

The words "should be tried or committed for trial by some other Magistrate" do not necessarily mean that the Magistrate who is to take action under this section has no jurisdiction to try the case himself. Even if he has such jurisdiction he may still be of opinion that it "should be tried" by some other Magistrate on grounds such as complexity of facts, convenience of parties etc.¹

Section 346 — Note 2

1 (94) 1894 All W N 200 (200) *Empress v Chandra Ballab Joshi* (In this case, the fact that the accused had previous convictions on account of which he would be liable for enhanced punishment in the event of conviction was held sufficient ground for referring the case under this section — It should be presumed that this was not a case which came within the terms of S 343)

but the award must be noted that this does not seem to be a case under S 343, as the Magistrate's action was apparently not taken after taking the evidence for the prosecution and the accused as required by that section)

The provisions of this section should be construed so as not to overlap or conflict with ss 347, 348 and 349 which are specific provisions providing for particular classes of cases. Where therefore, a case falls under S 347, S 348 or S 349 the Court should only act under that section and not under S 346. Thus where a person is accused of an offence punishable with imprisonment for three years or upwards under Ch XII or Ch XVII of the Penal Code and by reason of previous convictions for similar offences would be liable for enhanced punishment in the event of his conviction for the present offence the proper procedure is under S 348 and this section is irrelevant in this connexion.³ Similarly, where the Magistrate is of opinion that the case is one which ought to be tried by a Court of Session and he is himself empowered to commit the same to such Court he should act under S 347 and not under this section.⁴

This section is not inapplicable to cases where the accused is a European British subject.⁴

It has been held that where a complaint is presented to a Magistrate not having territorial jurisdiction to inquire into or try the offence the proper procedure is to return the complaint for presentation to the proper Court and not to submit the papers to a superior Magistrate under this section.⁵

3 Duty of the inferior Courts — A Magistrate who finds that he has no jurisdiction to try a case cannot discharge an accused on that ground but should proceed under this section.¹ Nor can he clutch at jurisdiction by trying the accused for such offences only as he is competent to try even though other offences are disclosed during the trial which he is not competent to try.² Where therefore in the course of a trial for an offence which he is competent to try the evidence discloses also an offence beyond his jurisdiction he cannot ignore the latter and try the accused for the former offence only.³ Similarly where the evidence discloses circumstances of aggravation which make the offence cognizable by a higher Court he cannot ignore such circumstances and try the accused for the minor offence only.⁴ Where however, the graver offence disclosed was one

[See (19) 6 AIR 1919 Mad 907 (910) 49 Mad 83 19 Cri L Jour 997 *Crown Prosecutor v Bhagwathi* (Case under S 347 where the words ought to be tried have been given a similar interpretation)]

2 (05) 2 Cri L Jour 820 (822 823) 1 Nag L R 187 *Ladya v Emperor*

[But see (04) 1894 All W N 200 (200) *Empress v Chandra Ballab Joshi* (In this case the fact that there were previous convictions was held to be sufficient ground for reference under this section — But it is not clear whether the facts were such as to make S 349 applicable)]

3 (03) 7 Cal W N 407 (460) *Amirkhan v King Emperor* (Magistrate cannot send case to Magistrate empowered under S 30)

4 (11) 12 Cri L Jour 436 (437) 11 Ind Cas 690 7 Nag L R 93 *Emperor v F M C Nully*

5 (43) 30 AIR 1943 Mad 526 (527) 44 Cri L Jour 776 208 Ind Cas 400 *District Magistrate of Cuddappah v Sjed Abdul Kareem*

Note 3

1 (81) 2 Weir 393 (323 324) *In re Mumsams*

[See (41) 28 AIR 1941 Mad 833 (834) *Nany Reddi v Narasamma* (In this case the Magistrate was ordered to return the complaint for presentation to the proper Court)]

2 (45) 32 AIR 1945 S nd 125 (127) 1 L R (1945) Kar 109 47 Cri L Jour 37 221 Ind Cas 31 (DB) *Dr Sanmukhsing Tejasing Yogi v Emperor*

(81) 2 Weir 420 (471)

(1865) 3 Sath W R Cr 28 (28) *Queen v Shamsoondur Ghosal* (Wrongful confinement and extortion)

(66) 5 Sath W R Cr 65 (65) *Queen v Ramtahal Singh* (Magistrates are not at liberty to pass over material parts of evidence in cases before them and so to withdraw cases from the cognizance of proper tribunals)

3 (19) 6 AIR 1919 Mad 907 (910) 49 Mad 83 19 Cri L Jour 997

4 (44) 31 AIR 1944 Mad 166 (168) 45 Cri L Jour 608 212 Ind Cas 77 *In re Alfred Paul*
(41) 28 AIR 1941 Pat 297 (297) 42 Cri L Jour 622 194 Ind Cas 660, *Ramlakhan Dhobi v Racheya Aalwar*

for the trial of which sanction was necessary to be obtained, and such sanction had been refused it was held that the trial for the lesser offence was not incompetent⁵

But the fact that the Magistrate ignores the circumstances disclosing a graver offence for which he is not competent to try, and tries for the lesser offence, will not render the proceeding void, the reason being that the Magistrate is competent to try for the lesser offence⁶. The proceedings, therefore, will not be quashed where the accused is not prejudiced by such procedure and the sentence is not inadequate⁷.

A Magistrate is at liberty to stay proceedings at any time during the inquiry and submit it to the Magistrate to whom he is subordinate⁸.

This section requires that when in the course of an inquiry or trial it is found that the offence is beyond the competence of the Magistrate to try or inquire into, the latter should stay the proceeding and refer it to a superior Magistrate. *A fortiori*, where even at the outset, the offence disclosed on the allegations is beyond his competence to try or inquire into, he cannot ignore aggravating circumstances and proceed in respect of such

(41) 28 AIR 1941 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(35) 22 AIR 1935 Sind 221 (221) 29 S L R 428 : 37 Cr L Jour 80, *Shamboo Ram v. Emperor*. (Magistrate should not usurp jurisdiction by trying the accused for an offence of robbery when the evidence discloses an offence of extortion)

(25) 12 AIR 1925 Mad 367 (367) : 25 Cr L Jour 1193, *Rangayya v. Somappa* (Offence under S 420, Penal Code, tried by second class Magistrate on the ground that there is no distinction between S 417 and S 420, Penal Code — Conviction should be set aside in revision—2 Weir 2 relied on)

(89) 13 Bom 502 (505), *Queen Empress v. Gundyia* (High Court did not interfere in the absence of prejudice but accepted the principle)

(27) 14 AIR 1927 Mad 307 (308) 28 Cr L Jour 154, *Kalluva Rowther v. Suppan Asari* (Magistrate deliberately ignoring facts ousting his jurisdiction — High Court will interfere in revision)

(95) 19 Bom 340 (348), *In re Nagaraj Trikamji* (It is an evasion of law to treat an aggravated offence as an ordinary offence)

(100) 20 AIR 1941 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(101) 21 AIR 1942 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(102) 22 AIR 1943 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(103) 23 AIR 1944 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(104) 24 AIR 1945 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(105) 25 AIR 1946 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(106) 26 AIR 1947 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(107) 27 AIR 1948 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(108) 28 AIR 1949 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(109) 29 AIR 1950 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(110) 30 AIR 1951 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(111) 31 AIR 1952 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(112) 32 AIR 1953 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(113) 33 AIR 1954 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(114) 34 AIR 1955 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(115) 35 AIR 1956 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(116) 36 AIR 1957 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(117) 37 AIR 1958 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(118) 38 AIR 1959 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(119) 39 AIR 1960 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(120) 40 AIR 1961 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(121) 41 AIR 1962 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(122) 42 AIR 1963 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(123) 43 AIR 1964 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(124) 44 AIR 1965 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(125) 45 AIR 1966 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(126) 46 AIR 1967 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(127) 47 AIR 1968 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(128) 48 AIR 1969 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(129) 49 AIR 1970 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(130) 50 AIR 1971 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(131) 51 AIR 1972 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(132) 52 AIR 1973 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(133) 53 AIR 1974 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(134) 54 AIR 1975 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

(135) 55 AIR 1976 Sind 36 (37, 38) 42 Cr L Jour 460. 193 Ind Cas 451, *Mansharam Gianchand v. Emperor*

offence as is within his jurisdiction.⁹

The provisions of this section imply, however, that a subordinate Magistrate can legally enquire into a serious offence up to the stage at which the question of charge or discharge has to be decided. The mere fact, therefore, that in order to make his case more serious a complainant alleges the commission of an offence which could not be tried by a junior Magistrate will not render the proceedings of that Magistrate illegal if he goes on to try that case and decide it holding that the facts disclosed show that it is the lesser offence which he is competent to try.¹⁰

See also section 29, Note 1 and section 207, Note 3.

Where the trying Magistrate finds that the offence disclosed can only be tried by a Magistrate of a higher class, an order of the District Magistrate cannot confer jurisdiction on him.¹¹

4. To whom the case should be submitted.—A Magistrate may submit a case under this section to—

(1) any Magistrate to whom he is subordinate,¹ or

(2) such other Magistrate as the District Magistrate directs.

In either case it is essential that the Magistrate to whom the case is submitted should be one *having jurisdiction* over it.²

Pending inquiry into a charge of house breaking, the second class Magistrate of B Division was transferred to A Division. The case was, therefore, transferred to his file by the District Magistrate. In the course of inquiry the second class Magistrate found that the offence committed was *robbery* which was not triable by him and therefore he submitted the case to the Sub divisional Magistrate of A. It was held that the order of the District Magistrate transferring the case to the second class Magistrate at A did not give any jurisdiction to the Sub divisional Magistrate of A over the case (which arose in the territorial jurisdiction of the Court at B) and that the submission being thus not to a Magistrate "having jurisdiction" was bad.³

5. Trial must be de novo—Sub-section (2).—It is a general principle of criminal law that it is only an authority who has heard all the evidence that is competent to decide whether the accused is innocent or guilty.¹ The Criminal Procedure Code has,

9 ('25) 12 AIR 1925 All 290 (291) : 47 All 64 26 Cri L Jour 536 *Raghuveer Prasad v Emperor* (Complainant's statement determines jurisdiction, unless it has been clear at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress)

10 ('39) 26 AIR 1939 Lah 122 (123) : 40 Cri L Jour 515 ILR (1938) Lah 619, *Pranda v Mt Gulab Khatun*

11 ('26) 13 AIR 1926 Cal 590 (592) 27 Cri L Jour 545 *Asrar Rahman v Emperor* (Administratively such procedure might have been convenient but such convenience cannot give jurisdiction to a Magistrate)

Note 4

1 For subordination of Magistrate, see S 17

('68) 5 Bom H C R Cr 47 (47) *Reg v Bhagu Shabaz* (Magistrate F P with power to hear appeal is not thereby placed in the position of a District Magistrate to whom alone cases should be submitted)

ate has no jurisdiction

Note 5

1. (24) 11 AIR 1924 Nag 37 (37) : 22 Nag L R 166 24 Cri L Jour 738, *Daba v Emperor*.

(23) 10 AIR 1923 Mad 327 (327) : 24 Cri L Jour 413, *In re Chinn Venku Naidu* (Evidence taken by one Magistrate is not evidence in a trial before another Magistrate unless some provision of law expressly makes it so)

(33) 20 AIR 1933 Sind 191 (191) 27 Sind L R 266 : 34 Cri L Jour 749, *Sher Khan v Emperor* (Case stayed under S 316—Magistrate to whom case is submitted must try case de novo)

however made exceptions to this general rule in Ss 319 and 350. The exception enacted in the latter section is almost a general rule by itself in that it provides that whenever any Magistrate ceases to exercise jurisdiction in a case and is succeeded by another (and under sub s (3)—this applies to cases transferred from one Magistrate to another), the latter can act on the evidence recorded by his predecessor but the accused can claim a trial *de novo* and the High Court or the District Magistrate as the case may be may also where the accused has been prejudiced by a conviction on such evidence order a new trial or inquiry. Sub section (2) of that section expressly excepts proceedings under this section from the operation thereof. The reason is that S 350 contemplates cases where at the time the evidence is recorded the Magistrate recording it has jurisdiction to do so while in cases of submission under this section on the ground that the Magistrate is not competent to try the case the evidence is recorded by a Magistrate who is not competent to try the case.³

The general principle of law namely that a Magistrate cannot decide a case who has not heard all the evidence therefore applies to proceedings under this section and consequently the Magistrate to whom a case is submitted under sub s (1) of this section cannot act on the evidence recorded by the submitting Magistrate but must if he tries the case try it *de novo*.⁴ If he refers the case to a subordinate Magistrate for trial the latter must also on the same principle, try it *de novo*.⁵ The accused has no power to waive his right to such a trial.⁶

As regards the power of the superior Magistrate acting under sub s (2) to commit the case to the sessions acting on the evidence recorded by the submitting Magistrate it has been held that such a procedure is not illegal.⁷ No reasons have been given for such a view but it may be supported on the ground that the general rule prohibits only decisions by Magistrates who have not heard all the evidence and that in committing the accused,

(0.) 2 Cri L Jour 869 (370) 1905 Pun Re No 25 Cr *Muhammad v Emperor* (Case submitted to District Magistrate under S 346 who asked accused whether they wanted to recall witnesses and on their replying no convicted them—Conviction is illegal—Illegalities cannot be cured even by consent.)
(16) 3 AIR 1916 Nag 110 (116) 12 Nag L R 146 18 Cri L Jour 30 *Emperor v Ram Prasad*
Also see S 349 Note 2

2 (39) 20 AIR 1933 Sind 191 (191) 27 Sind L R 266 34 Cri L Jour 749 *Sher Khan v Emperor*
3 (18) 5 AIR 1918 Pat 676 (677, 678) 19 Cri L Jour 625 *Ambika Singh v Emperor*
4 (43) 30 AIR 1943 Lah 27 (28) 43 Cri L Jour 975 203 Ind Cas 178 *Gura v Emperor*
(39) 25 AIR 1938 Cal 415 (416) 39 Cri L Jour 606 *Sashtu Gopal v Haridas Bagdi* (The ordinary rule is that the Magistrate who tries the case is to record the evidence and unless an exception is definitely provided for by some statute that ordinary provision should prevail.)
(33) 20 AIR 1933 Sind 191 (191) 27 Sind L R 266 34 Cri L Jour 749 *Sher Khan v Emperor* (Failure to do so vitiates the whole trial.)
(97 01) 1 Upp Bur Rul 85 (85) *King Emperor v Nga At*
(05) 2 Cri L Jour 689 (690) (Lah) *Inayat Hussain v Emperor*

5 (39) 25 AIR 1933 Cal 415 (416) 39 Cri L Jour 606 *Sasthigopal v Haridas*
(18) 5 AIR 1918 Pat 676 (678) 19 Cri L Jour 625 *Ambika Singh v Emperor*
6 (18) 5 AIR 1918 Pat 676 (677, 678) 19 Cri L Jour 625 *Ambika Singh v Emperor* (While under S 350 accused has got option to have a trial *de novo* or not.)
(04) 1 Cri L Jour 1056 (1057) 17 C P L R Cr 159, *Emperor v Cokal*
(0.) 2 Cri L Jour 369 (370) 1905 Pun Re No 25 Cr, *Muhammad v Emperor* (Illegalities cannot be cured even by consent.)
(23) 10 AIR 1923 Mad 327 (327) 24 Cri L Jour 413 *Jasraj Chandra Venku Naidu* (Consent of parties will not exempt the Magistrate from holding a *de novo* trial.)
[But see (70) 14 Suth W R Cr 3 (3) *Kopal Nath v Koneeram* (Where the prisoners did not appeal or raise any objection at the trial on that ground, the High Court declined to interfere.)]
7 (07) 6 Cri L Jour 429 (430, 431) 12 Cal W N 156, *Kamins v Fakirchand* and
(16) 3 AIR 1916 Nag 115 (115) 18 Cal L Jour 35 12 Nag L R 146 *Emperor v Ramprasad*,

there is no decision of the case⁸. The High Court of Bombay has also held that such commitment is not illegal⁹. But the reason given therefor based on the assumption that s. 350 applies but that only the proviso therein does not apply to determinations under sub-s. (2) of this section is obviously incorrect in view of sub-s. (2) of s. 350 which clearly enacts that nothing in this section applies in cases in which proceedings have been stayed under section 346.

6 Sub section (2) — Reference to any sub Magistrate having jurisdiction — Where a Sub-divisional Magistrate in Burma proceeding under sub-s. (2) of this section transferred a case for trial to the township Magistrate of the office having been committed in the township of B it was held that there was nothing illegal in doing so inasmuch as a township is not recognized by the Code as a local area for purposes of territorial jurisdiction and under s. 10 sub-s. (3), except as otherwise provided the jurisdiction and powers of Magistrate extend throughout the district in which they are appointed¹.

It has been held by a Full Bench of the High Court of Madras² that the Magistrate to whom proceedings are submitted under this section can in a proper case refer the case back to the very Magistrate who made the submission. In this case eight persons were accused before a second class Magistrate of having committed dacoity and one of them the fifth accused was alleged to have been armed with a deadly weapon. The Magistrate acting under sub-s. (1) of this section submitted the proceedings to the Magistrate to whom he was subordinate. The latter went into the case and finding that there was no case against the fifth accused who was the only person charged with having a deadly weapon dismissed the complaint against him and referred the case back to the Magistrate who made the submission so far as the other accused were concerned. It was held that he was not incompetent to do so.

This view has however been dissented from in the undermentioned case³ of the Bombay High Court. It is there held that the words "Any Magistrate subordinate to him" mean a Magistrate other than the one who made the reference or report and competent to deal with the case as submitted. The superior Magistrate to whom a case is submitted cannot according to this view refer the case back to the very subordinate Magistrate who has reported the case.

A District Magistrate is not competent to cancel or set aside an order of a Sub-divisional Magistrate transferring a case referred to him under this section⁴.

7 Commitment to sessions. — See Note 5.

8 "Inquiry," "evidence," meaning of — The word inquiry is not restricted to proceedings after the Magistrate himself begins to take evidence. Nor is the word evidence restricted to evidence taken by the Magistrate himself. Where a Magistrate directs an inquiry by the police or another person under s. 307 he does so in the course of his own inquiry and all facts and statements disclosed by such inquiry including the report by the police or other person are evidence on which a Magistrate can act under this section¹.

8. (16) 3 AIR 1916 Nag 115 (116) 18 Cr L Jour 83 19 Nag LR 146 *Emperor v. Ramprasad*
9. (29) 15-2 Pat 470 (170) *Queen-Empress v. Shakti*.

Note 6

1. (10) 1 Low Bur. Ral 300 (309) *Crown v. La Fy*.

2. Held to sessions and sending case to District Magistrate — latter disagreeing and returning case back to second class Magistrate — He J he cannot do so).

4. (36) 23 AIR 1936 Nag 900 (2-1) 33 Cr L Jour 15 1 LR (1937) Nag 133 *Emperor v. Ganga*.

Note 8

1. (27) 14 AIR 1917 Mad 591 (591 59) 25 Cr L Jour 346 *Emperor v. Ganga*.

347.* (1) If in any inquiry before a Magistrate, or in any trial before a Magistrate, before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under section 346.

Synopsis

1. Legislative changes

2. Scope.

3. "Before signing judgment."

4. "Ought to be tried."

5. "Under the provisions hereinbefore contained."

NOTE to the Synopsis See the Notes indicated for the following topics :

Chapter XVIII — Procedure laid in See Note 5.

Commitment — Reasons for See Note 4

Cross-examination and witnesses — Right of See Note 5

Reference to superior Magistrate. See Note 2

The stage at which committal can be ordered See Note 3

1. Legislative changes. — Section 256 of the Code of 1861 and s 221 of the Code of 1872 which correspond to s 317 of the present Code found a place in the chapter relating to the trial of warrant cases, and the wording of these was such as to make them seem to be confined to "trial"

The Code of 1892 for the first time removed the section to the chapter dealing with general provisions as to inquiries and trials and by the insertion of the words, "in any inquiry" made it clear that the section applied not only to trials but also to inquiries. The reason for the change was possibly that according to some decisions a trial of a warrant case did not begin till the accused had been charged and his plea taken, and in order to avoid all possible question as to the applicability of the provision to any stage of the proceedings before a Magistrate the Legislature inserted the words "in any inquiry."¹

The corresponding sections of the Codes of 1861 and 1872 provided that the Magistrate shall stop further proceedings "under this chapter" (namely the chapter relating to trial of warrant cases) and commit under the provisions "hereinbefore contained" With the removal of the section from the chapter relating to trial of warrant cases and its insertion in its present place, the reference to the chapter became inappropriate and was therefore, omitted in the Code of 1892. But it has been held that the omission was not intended to make any difference or to dispense with obligation of the Magistrate to follow the provisions of chap XVIII, the words "stop further proceedings" meaning only proceedings in the trial or enquiry in which the Magistrate is engaged.²

The Code of 1872 restricted the discretion of the Magistrate to such cases as the Magistrate could not or ought not to make over to a Magistrate specially empowered under s 30. This restriction has been removed by the Code of 1892.

The Code of 1898 has made no change in the section.

The words "stop further proceedings and" after the words "he shall" in sub-s. (1) have been omitted by the amending Act 18 (XVIII) of 1923 and the ~~omitting sets at rest~~ conflict as to whether the section is or is not subject to the provisions of chap. XVIII.³

* 1882 : S 347; 1872 - Ss 46, 221, 436, 1861 : S. 256, 221 -

Section 347 — Note 1

1. (12) 13 Cri L Jour 677 (681) 17 Ind Cas 813 6 Low Bur Rul 129 (FB), *Magister v. Channing Arnold*.
2. (12) 13 Cri L Jour 677 (682) 17 Ind Cas 813 6 Low Bur Rul 129 (FB), *Magister v. Channing Arnold*.
3. See Note 6.

The section does not apply to a case where a Magistrate thinks from the first that the case ought to be tried by the Court of Session. In such a case the Magistrate must conform to the provisions of S. 209 from the start²

Sections 346, 347 and 349—A Magistrate taking up a case may try it himself if he has jurisdiction, or he may, if he thinks he cannot inflict an adequate sentence, act under s 346 or s 349 and send it to a higher Magistrate, or he may, if he thinks that it is a proper case for a Court of Session, commit the accused under s 347, or if he has no power to commit, send it under s 346 to another Magistrate for the purpose of commitment⁴

4 "Ought to be tried." — If the evidence discloses an offence triable only by a Sessions Court, the Magistrate must commit the case to the sessions¹ But where the evidence discloses both an offence exclusively triable by a Sessions Court and an offence which the Magistrate himself can try, a trial and conviction by the Magistrate in respect

1 (12) 13 Cr. L. Jour 877 (885) 17 Ind Cas 813 6 Low Bar Rul 129 (FB), *Emperor v. Channing Arnold*.
2 (19) 13 Cr. L. Jour 877 (883) 17 Ind Cas 813 . 6 Low Bar Rul 129 (FB), *Emperor v. Channing Arnold* (Robinson, J., dissenting)

3 (20) 7 AIR 1920 Sind 55 (57) 14 Sind L R 85 21 Cr L Jour 791, *Ghani Yakub v Emperor*
[But see (06) 3 Cr L Jour 94 (05) (All) *Emperor v Dharam Singh* (Case under Bs 352 417, Penal
Code — Summons case — Commitment quashed)]

[See (1938) 25 AIR 1939 Mad 529 (530) 39 Cri L Jour 715 *In re Ramasubbayya* (Calendar cases triable by first class Magistrate cannot be transferred to second class Magistrate with a direction to treat them as sessions cases - the cases being counter to preliminary registered cases and complicated - He should proceed under S. 347)]

Also see § 403 Note 9

6 See Section 362 and Notes thereon.

1 (26) 27 Cri L Jour 871 (1972) 96 Ind Cas 119 (Cal), *Hara Mohan Das v Emperor* (Where facts found show that offence committed falls under S 471, Penal Code, Magistrate should not convict accused under S 106, but should commit him to sessions for trial under S 471)

(80) 1890 Rat 478 (477), *Queen Empress v Jobana* (Magistrate not to clutch at jurisdiction by ignoring aggravating circumstances)
Also see S 206, Note 5

of the latter offence is not illegal²

If the offence is one which is not exclusively triable by a Court of Session the Magistrate can commit the accused to the Court of Session only if he be of opinion that the case is one which *ought to be tried by that Court*³ The Magistrate must use his discretion in determining whether a particular case should be committed or not⁴ and every circumstance of aggravation must be carefully weighed⁵ The discretion given to the Magistrate by this section being a judicial one, it should be exercised with care and on some proper ground The order of committal being a judicial order the Magistrate should state his grounds for committing in order to enable the Court of Session or the High Court to judge whether the committal is a sound exercise of discretionary power⁶ The reasons given should be not only for not discharging the accused but also for committing him to Sessions Court when the case is not exclusively triable by the latter⁷ Failure to give reasons for committal as required by S 213 may be only an irregularity where the case is one which plainly ought to be tried by Sessions Court, but where it is not exclusively triable by Sessions Court the failure amounts to an illegality⁸ If no reasons are given or if the reasons given are bad in law the committal may be quashed⁹

There is a conflict of opinions as to whether the only grounds on which a Magistrate could commit are want of jurisdiction in himself, or his inability to punish adequately Decisions which have been in favour of restricting the discretion of the Magistrate to these two grounds are based on the view that S 347 is controlled by S 254 which lays down that in the trial of a warrant case where there is ground for presuming that the accused has committed an offence which the Magistrate is competent to try and which in his opinion could be adequately punished by him he shall frame a charge against the accused¹⁰ The

2 (91) 8 AIR 1921 Cal 114 (115) 22 Cr L Jour 666 *Kalicharan v Emperor* (Offence under S 477A, Penal Code disclosed — Conviction by Magistrate in respect of offence under S 408 not bad where such offence also appears to have been committed)

[See also (61) 1 Cr L Jour 637 (638) 1904 All W N 165 27 All 69 *Emperor v Ishfaq Ahmad* (Magistrate not bound to commit to sessions merely because evidence disclosed another offence exclusively triable by Sessions Court where there was evidence to convict for the offence within his jurisdiction)]

3 (24) 15 AIR 1929 Pat 551 (552) 29 Cr L Jour 612 *Emperor v Deo Narain*
Also see S 207 Note 1

4 See (67) 8 Suth W R Cr 46 (46) *Queen v Doonda Bhoora* (It appearing to be convenient that Sessions Court should try — High Court declined to interfere)

5 (66) 2 Weir 19 (20) (In cases of theft the amount of property stolen is one very proper point for consideration in determining this question)

6 (30) 17 AIR 1930 Lah 312 (313) 31 Cr L Jour 178 *Emperor v Karam Singh*

(23) 15 AIR 1929 Pat 551 (559) 29 Cr L Jour 612 *Emperor v Deo Narain*

(69) 9 Cr L Jour 183 (184) 1 Ind Cas 104 (Bom) *Emperor v Mahammad Khan*

[But see (19) 6 AIR 1919 Mad 907 (908) 42 Mad 83 19 Cr L Jour 997 *Crown Prosecutor v Bilagattath* (This section does not say that the Magistrate is bound to put his reasons on record for certaining his opinion to commit)]

7 (14) 1 AIR 1914 Bom 237 (238) 38 Bom 114 14 Cr L Jour 609 *Emperor v Nanji*
Also see S 213 Note 4

8 (14) 1 AIR 1914 Bom 237 (238) 38 Bom 114 14 Cr L Jour 609 *Emperor v Nanji*
Also see S 537 Note 18

9 (26) 13 AIR 1926 Bom 251 (252) 27 Cr L Jour 479 *Emperor v Achaldas* (Committal is improper if made in pursuance of request by accused or because the case created sensation in accused's community or on ground that amount involved in offence is large)

(17) 4 A 1 R 1917 Bom 33 (34) 42 Bom 172 (178) 19 Cr L Jour 312 *Emperor v Dhimaji* (Grounds not good in law)

(24) 11 AIR 1924 Cal 61 (64) 17 Snd L R 189 26 Cr L Jour 149 *Uthibai v Emperor*

(14) 1 A 1 R 1914 Bom 237 (238) 38 Bom 114 14 Cr L Jour 609 *Emperor v Nanji Samal* (No

and can be adequately punished by him—Commitment illegal.)
v Girish Chandra (Offence Magistrate is competent to try

opposite view is that S 347 is not controlled by S 251 and that want of jurisdiction in the Magistrate or his inability to punish adequately are not the only grounds on which he may commit a case to the sessions, the section is wide enough to include other grounds.¹¹ Thus a Magistrate though having power to try the case himself, may commit it to sessions if he thinks the gravity of the case requires that it be tried by such Court.¹²

There is nothing anywhere which compels a Magistrate to frame that charge which on the most heinous view of the circumstances indicated by the evidence, is the gravest possible charge. It is left to the Magistrate to take a broad and commonsense view of the facts and determine whether the correct charge to be framed is or is not one which necessitates a trial by a Court of Session.¹³ A committal made under a misapprehension of the correct offence may be quashed.¹⁴ On the other hand, a Magistrate should not ignore aggravating circumstances and himself try a case which, taking a reasonable view of the depositions must be regarded as involving the trial of the accused for a grave offence¹⁵ or

- (24) 11 AIR 1924 All 185 (185) 25 Cr L Jour 665 *Emperor v Ram Jatan*
 (06) 3 Cr L Jour 91 (95-96) 1906 All W N 29 3 All L Jour 14, *King Emperor v Dharam Singh*.
 (Summons cases—Commitment not legal)
 (97) 24 Cal 429 (431-432) 1 Cal W N 414 *Queen Empress v Kayemullah Mandal*
 (19) 6 AIR 1919 All 366 (366) 41 All 454 20 Cr L Jour 273, *Empress v Budeshtri*
 (02) 4 Bom L R 65 (86) *King Emperor v Pema Ranchod*
 (18) 5 AIR 1918 Nag 141 (142) 20 Cr L Jour 97 *Emperor v Hanuman*
 (14) 1 AIR 1914 Sind 94 (95) 8 Sind L R 23 15 Cr L Jour 664 *Ditwanichand v Emperor*
 (16) 5 AIR 1918 Sind 60 (61) 11 Sind L R 79 19 Cr L Jour 319 *Emperor v Ismail*
 [See also (40) 27 AIR 1940 Oudh 15 (15) 40 Cr L Jour 903 *Sheo Mangal v Emperor*
 (32) 19 AIR 1932 Lah 166 (169) 33 Cr L Jour 255 *Emperor v Nathu*
 (32) 19 AIR 1932 Lah 203 (264) 33 Cr L Jour 680 *Kesar v Emperor* (Magistrate competent to dispose of case—Unnecessary commitment—Order is liable to be quashed)]
 11 (43) 80 AIR 1943 Sind 112 (113) 1 L R (1943) Kar 90 44 Cr L Jour 631 207 Ind Cas 272 *Emperor v Ghulam Hussain Mamik* (Case triable by Court of Session committed to Sessions—Counter-case can also be committed to Sessions though Magistrate is competent to try it and which he can adequately punish)
 (30) 17 AIR 1930 S nd 145 (146) 24 Sind L R 157 31 Cr L Jour 596 *Emperor v Allahabad*
 (19) 6 AIR 1919 Mad 907 (906-910) 42 Mad 83 19 Cr L Jour 907, *Crown Prosecutor v Bhagavathi*.
 (Magistrate having power to sentence adequately may still commit on such grounds as complicated questions of law or case being fit one to be tried by jury or with aid of assessors)
 (76) 1 Mad 289 (290) (FB) *In the matter of Chinnamarigadu*
 (29) 16 AIR 1929 Bom 313 (319) 53 Bo
 (Offence under S 124A Penal Code—offence and large circulation of the newspapers)
 (06) 13 AIR 1926 Bom 251 (251) 27 Cr L Jour 479 *Emperor v Achaldas* (Question left open)
 (25) 12 AIR 1925 Rang 207 (206) 3 Rang 42 26 Cr L Jour 1369, *Emperor v Ishahal*
 (17) 4 AIR 1917 Lah 251 (251-252) 18 Cr L Jour 524 (525) 1917 Pan Re No 13 Cr *Emperor v Ah*
 (20) 7 AIR 1920 Sind 55 (56-57) 14 Sind L R 85 21 Cr L Jour 791, *Ghani Yakub v Emperor* (Commitment for offence triable as summons case along with other accused triable by Sessions Judge—Magistrate can adequately punish is no ground against commitment if otherwise fit)
 [See also (33) 20 AIR 1933 Lah 500 (501) 34 Cr L Jour 314 *Emperor v Ujagar Singh* (Committal order justified on the ground of convenience)]
 12 (29) 15 AIR 1928 Pat 551 (552) 29 Cr L Jour 612 *Emperor v Deo Narain*
 13 (23) 10 AIR 1923 Cal 108 (111) 24 Cr L Jour 674 *Emperor v Hari Das*

1. information to police that certain person had committed murder — Held that offence fell under first

under S 392 and tried and convicted the accused though in fact he should have framed a charge under S 398 and should have committed the accused to the Court of Session under S 347 — It was held that he should not have done so.)

one in which complicated or difficult questions of law or fact arise which he is neither by training nor experience qualified to try.¹⁶

To decide whether he shall or shall not commit the case to the Court of Session, a Magistrate has to consider the gravity of the offence, the punishment with which, in his opinion it ought to be met and the section under which he charges the accused person. He may also consider special difficulties in the case or its peculiar importance and other matters might enter into his consideration.¹⁷

The following have been held to be good grounds for committal

- (1) Desirability that the case be tried by jury or the gravity of the case¹³
- (2) The Magistrate having put himself in the position of a witness by a local investigation¹⁴

(20) 7 AIR 1920 Cal 40 (42) 21 Cal L Jour 10 *More vs Emperor*

Magistrate)

- (01) 24 Mad 675 (677) 2 Weir 699 *King Emperor v Ayyar*
(89) 13 Bom 502 (505) *Queen Empress v Gundaya*

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Code — *Prima facie* case against accused of offence under S 366 Penal Code cognizable by Court of Session — Magistrate ought to have submitted record to District Magistrate under S 346 or committed to sessions under S 317, Cr P C)

Also see S 346, Note 3

- 16 (32) 19 AIR 1932 Rang 103 (194) 10 Rang 490 31 Cri L Jour 187 *Emperor v. Maning Chit Sen*
 17 (17) 4 A I R 1917 Bom 33 (3f) 42 Bom 172 19 Cri L Jour 342 *Emperor v. Bhismaji Venkaji*
 (But Magistrate must not determine whether he is to commit the case or try it himself, solely by the
 wish of the parties and the terms of a Government resolution)
 (30) 19 AIR 1932 Bom 63 (63 6f) 56 Bom 61 33 Cri L Jour 262 *Hari Moreshwar v. Emperor*
 18 (29) 16 AIR 1929 Bom 313 (316) 53 Bom 611 30 Cri L Jour 1090 *Krishnaji Prabhakar v.*
Emperor (Offence under S 101A Penal Code—Accused editor of widely circulated daily—Magistrate
 held just fled in committing case to High Court Sessions)
 (12) 13 Cri L Jour 443 (444) 15 Ind Cas 75 (All) *Durga Datt v. King Emperor* (Criminal breach of
 trust in respect of R 46 805—Case should be tried by Sessions Court and not by Magistrate)
 (1900 02) 1 Low Bur RL 259 (260) *Crown v. San Pe* (Where there is any doubt whether the intent or
 knowledge of the accused was such that the offence would be culpable homicide the case should not
 be tried by a Magistrate)

[See (30) 17 AIR 1930 Sind 145 (146) 24 Sind L R 157 31 Cri L Jour 526 *Emperor v Allahabad* (There is no reason to commit to the sessions cases where the Magistrate can adequately deal with the offence himself even if the death of a person is involved therein.)

n there is not sufficient evidence to

[" " " " " Emperor v Inayat Umar
cannot be said that nose-cutting cases should as a matter of course, be committed to the C
Sessions for trial although the Magistrate should always consider whether he ought not to commit
19 (12) 13 Cri L Jour 683 (Caw)

19 (12) 13 Cri L Jour 623 (Cst)

The following have been held not to be sufficient grounds for committal

- (1) The mere wish of parties²⁶ or the fact that the accused wants to have the benefit of a trial by jury²⁷
- (2) The mere fact that the case has caused a sensation in a particular community²⁸
- (3) The terms of a Government resolution²⁹

See also the cases cited below.³⁰

[See however (24) 11 AIR 1924 All 185 (186) 25 Cr L J 865 *Emperor v Ram Jatan* (Magistrate having been a witness to the identification proceedings is no ground for commitment — In such a case the proper course is to refer the matter to the District Magistrate for transfer of the case to another Magistrate)]

20 (17) 4 AIR 1917 Lah 251 (251). 18 Cri L Jour 524 (525). 1917 Pan Re No 13 Cr Emperor v Ali
21 (20) 4 AIR 1920 Sind 55 (57). 14 Sind L Rep. 21 Cr L J. 1920 Emperor v Ali.

22 (82) 19 AIR 1932 Lah 168 (169) 33 Cr L Jour 255 *Emperor v Nalhu* (Apparent connection of case under S 328 Penal Code with case under S 304 is no ground for committing when offence involved can be adequately punished by Magistrate)

(30) 17 AIR 1930 Lah 312 (313) 31 Cri L Jour 178 *Emperor v Karam Singh* (Theft case connected with murder case — Murder case pending in Sessions Court—Theft case also committed—Commitment quashed)

[See however (33) 20 AIR 1933 Lah 500 (501) 34 Cri L Jour 314 *Emperor v Ujagar Singh*]

23 (19) 6 AIR 1919 Mad 907 (908) 42 Mad 83 19 Cr L Jour 997 *Crown Prosecutor v Bhagavat/*

24 (82) 19 AIR 1932 M

[See also (40) 1940 Mac

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that the case is counter to a preliminary register case which has to be committed to the sessions is not a sufficient reason for treating the former case also a preliminary register case)

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25 (13) 14 Cr L Jour 657 (658) 21 Ind Cas 897 (Dom) *Emperor v Asha Bhatia*

[See also (09) 10 Cr L Jour 224 (225) 2 Sind LR 9 *Emperor v Tarumal* (Case committed merely because of counsel's wish — Commitment was quashed)]

27 (3^o) 19 AIR 193^o Dom 63 (61) 56 Dom 61 33 Cri L Joar 262 *Harj Moreshwar v Emperor*

28 ('6) 13 AIR 1926 Bom 251 (252) 27 Cri L Jour 479 *Emperor v Achaldas*

29 (17) 4 AIR 1917 Bom 33 (34) 4^o Bom 472 19 Cri L Jonc 342 *Emperor v Bhimaji Venkaji*

30 (76) 1676 Rat 110 (110) (Mere facts that the Magistrate is going on leave that the witnesses for the defence are not present and that his successor will find it inconvenient to try the case *de novo* are not sufficient grounds for committal)

(72) 17 South W R Cr 14 (14) *In re Annunzio Kyoburi* (That the accused has been committed to the sea on already for another offence is no ground for committing)

If a committal would result in an unwarrantable waste of time without advantage to anybody and the Magistrate is competent to try the case, he acts properly in not committing.³¹

It has been held in the undermentioned cases³² that where an offender appears to be deserving of a greater punishment than the Magistrate can inflict, he should commit the case. On the other hand it has been pointed out that where the sub Magistrate has no jurisdiction but the District Magistrate has, the former would be well advised to submit the case to the latter rather than to commit, so that the valuable time of the Sessions Court may be saved.³³ When two or more persons are jointly indicted and the jurisdiction of the Magistrate is ousted in the case of one of them, the proper course is to commit both or all for trial before a Court of Session.³⁴

The committal to sessions of a case which ought to have been tried by the Magistrate himself does not affect the jurisdiction of the Sessions Court to try the case and the conviction of the accused by the Sessions Court cannot be impeached as being one by a Court without jurisdiction.³⁵

5 "Under the provisions hereinbefore contained"—Before the amendment of this section it contained the words 'stop further proceedings'. These words gave rise to a conflict of opinions, one view being that they permitted the Magistrate to disregard the provisions of Chapter XVIII and commit the case to sessions immediately he formed the opinion that the case should be committed,¹ the other view was that s 347 did not in any way override the provisions of Chapter XVIII or dispense with the obligation of following them and that the words 'stop further proceedings' meant to stop proceeding with the case as a trial and to proceed to commit to sessions.² The conflict has been set at rest in favour of the latter view by the omission of the words in question.³ It is, therefore settled

- 31 (25) 12 AIR 1925 Pat 755 (759) 27 Cri L Jour 313, *B N Ry Co Ltd v Shook Mookbul*
[See also (08) 8 Cri L Jour 360 (361) 1 Sind L R 103, *Emperor v Ahmed Shoh* (Committing Magistrates are not to shirk their responsibilities of deciding cases by unnecessary committal to sessions)]
32 (34) 21 AIR 1934 Oudh 185 (185) 148 Ind Cas 653, *Emperor v Umrai*
(33) 20 AIR 1933 Lah 500 (501) 34 Cri L Jour 314 *Emperor v Ujagar Singh*
(13) 14 Cri L Jour 304 (304) 19 Ind Cas 960 (All) *Emperor v Baldeo*
(67) 14 Cal 355 (356) *Queen Empress v Chandu Gowala*

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33 (1865) 2 Suth W R Cr L 19 (19)

34 (68) 1 Weir 448 (449)

35 (45) 32 AIR 1945 All 340 (341 342) 1 L R (1945) All 423 221 Ind Cas 239 *Dowdeo v Emperor*
(Distinction between the power to take cognizance and competency to try, pointed out)

Note 5

- 1 (98) 1898 Rat 975 (975) *In re Clive Durant*
(09) 8 Cri L Jour 221 (223) 1 Ind Cas 469 36 Cal 48 *Pharindro Noth v Emperor* (1893 Rat 975 followed)
2 (12) 13 Cri L Jour 877 (882) 6 Low Bar Rel 129 17 Ind Cas 813 (FB) *Emperor v Channing Arnold* (Robinson J, dissenting)
(12) 13 Cri L Jour 778 (780) 36 Mad 321 17 Ind Cas 410 *Sessions Judge of Coimbatore v Immudai Kumara*

- (3) The fact that in respect of the same transaction another party of accused is being tried by sessions,²⁰ or that the facts constituting the offence form part of the same transaction with another offence triable by sessions²¹ The Lahore High Court has, however, held in the undermentioned cases²² that an apparent connexion of one case with another is no ground for committal. The Madras High Court has also held that while the fact that some connected matter is already before the Court of Session may be a good ground for committing a case to the sessions,²³ it is not an absolute rule that all charges and counter charges must be tried by the same Court²⁴. The Bombay High Court also has held that the fact that a case is connected with another which has been committed to the sessions is no ground for committal when the connexion between the two cases is not such as would embarrass or prejudice the accused in the absence of such commitment²⁵.

The following have been held not to be sufficient grounds for committal

- (1) The mere wish of parties²⁶ or the fact that the accused wants to have the benefit of a trial by jury²⁷
- (2) The mere fact that the case has caused a sensation in a particular community²⁸
- (3) The terms of a Government resolution²⁹

See also the cases cited below³⁰

[See however (24) 11 AIR 1924 All 185 (186) 25 Cri L Jour 865, *Emperor v Ram Jatan* (Vagratra having been a witness to the identification proceedings is no ground for commitment — In such a case the proper course is to refer the matter to the District Magistrate for transfer of the case to another Magistrate)]

- 20 (17) 4 AIR 1917 Lah 251 (251) 18 Cri L Jour 524 (525) 1917 Pan Re No 13 Cr, *Emperor v Ali*
 21 (20) 7 AIR 1920 Sind 55 (57) 14 Sind L R 85 21 Cri L Jour 791 *Ghani v Emperor*
 22 (32) 19 AIR 1932 Lah 168 (169) 83 Cri L Jour 255, *Emperor v Nathu* (Apparent connection of case under S 328 Penal Code, with case under S 304 is no ground for committing when offence involved can be adequately punished by Magistrate)
 (30) 17 AIR 1930 Lah 312 (313) 31 Cri L Jour 173, *Emperor v Karam Singh* (Theft case connected with murder case — Murder case pending in Sessions Court—Theft case also committed—Commitment quashed)

- [See however (33) 20 AIR 1933 Lah 500 (501) 34 Cri L Jour 314 *Emperor v. Ujagar Singh*]
 23 (19) 8 AIR 1919 Mad 907 (908) 42 Mad 83 19 Cri L Jour 997, *Crown Prosecutor v Bhagavathi*
 24 (32) 19 AIR 1932 Mad 502 (504) 33 Cri L Jour 765 *Lakshminarayana v Suryanarayana*
 [See also (40) 1940 Mad W N 580 (530), *Oonna Mudali v Emperor* (Where in a case the offences disclosed are triable by a second class Magistrate who can adequately deal with them, the mere fact that the case is counter to a preliminary register case which has to be committed to the sessions is not a sufficient reason for treating the former case also a preliminary register case)
 (32) 1932 Mad W N 692 (697), *Jaggunaidu v Emperor* (A Magistrate can never be justified in exposing any person to the anxiety and expense of a trial in the Sessions Court merely because he is the complainant or one of the prosecution party in a counter case in which the accused is committed to sessions for trial — Per Reilly, J)]

- 25 (13) 14 Cri L Jour 657 (658) 21 Ind Cas 897 (Bom) *Emperor v Asha Bhathi*

- 27 (32) 19 AIR 1932 Bom 63 (64) 56 Bom 61 33 Cri L Jour 262 *Hari Moreshtar v Emperor*

- 28 (26) 13 AIR 1926 Bom 251 (252) 27 Cri L Jour 479 *Emperor v Achaldas*

29. (17) 4 AIR 1917 Bom 33 (34) 42 Bom 472 19 Cri L Jour 342, *Emperor v Dhimaji Venkaji*

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If a committal would result in an unwarrantable waste of time without advantage to anybody and the Magistrate is competent to try the case he acts properly in not committing³¹

It has been held in the undermentioned cases³² that where an offender appears to be deserving of a greater punishment than the Magistrate can inflict he should commit the case. On the other hand it has been pointed out that where the sub Magistrate has no jurisdiction but the District Magistrate has, the former would be well advised to submit the case to the latter rather than to commit so that the valuable time of the Sessions Court may be saved³³. When two or more persons are jointly indicted and the jurisdiction of the Magistrate is ousted in the case of one of them the proper course is to commit both or all for trial before a Court of Session³⁴.

The committal to sessions of a case which ought to have been tried by the Magistrate himself does not affect the jurisdiction of the Sessions Court to try the case and the conviction of the accused by the Sessions Court cannot be impeached as being one by a Court without jurisdiction³⁵.

5 "Under the provisions hereinbefore contained."—Before the amendment of this section it contained the words 'stop further proceedings'. These words gave rise to a conflict of opinions one view being that they permitted the Magistrate to disregard the provisions of Chapter XVIII and commit the case to sessions immediately he formed the opinion that the case should be committed,¹ the other view was that s 347 did not in any way override the provisions of Chapter XVIII or dispense with the obligation of following them and that the words "stop further proceedings" meant to stop proceeding with the case as a trial and to proceed to commit to sessions². The conflict has been set at rest in favour of the latter view by the omission of the words in question³. It is, therefore, settled

- 31 (25) 12 AIR 1925 Pat 755 (759) 27 Cr L Jour 313, *B N Ry Co Ltd v Shank Makhul*
[See also (08) 8 Cr L Jour 360 (361) 1 Sind L R 103 *Emperor v Ahmed Shah* (Committing Magistrates are not to shirk their responsibilities of deciding cases by unnecessary committal to sessions)]
32 (34) 21 AIR 1934 Oudh 185 (185) 149 Ind Cas 653 *Emperor v Umrai*
33 (38) 20 AIR 1933 Lah 500 (501) 34 Cr L Jour 314 *Emperor v Ujagar Singh*

punishment he can award

would be inadequate, he can commit.)

- (71) 15 Suth W R Cr 58 (60) (FB) *Queen v Sheogolam Dass*
(92) 16 Bom 580 (583 586) 1892 Rat 577 *Queen Empress v Abdul*
(89) 11 All 393 (395) 1899 All W N 152 *Queen Empress v Khatak*
33 (1865) 2 Suth W R Cr L 19 (19)
34 (68) 1 Weir 448 (449)
35 (45) 32 AIR 1915 All 340 (341, 342) 1 L R (1915) All 493 221 Ind Cas 299 *Dasdeo v Emperor*
(Distinction between the power to take cognizance and competency to try, pointed out)

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- 1 (88) 1898 Rat 975 (975) *In re Chivv Durant*
(09) 8 Cr L Jour 221 (223) 1 Ind Cas 469 36 Cal 48, *Pharindra Nath v Emperor* (1898 Rat 975 followed)
2 (12) 13 Cr L Jour 877 (892) 6 Low Bur Rul 199 17 Ind Cas 813 (FB) *Emperor v Channing Arnold* (Robinson J, dissenting)
(12) 13 Cr L Jour 778 (780) 30 Mad 321 17 Ind Cas 410, *Sessions Judge of Coimbatore v Immudai Kumara*
(14) 1 AIR 1914 Mad 643 (644) 15 Cr L Jour 368, *In re Chinnavan* (13 Cr L Jour 877 6 Low Bur Rul 129 (FD) followed)

ing the provisions of Chapter XVIII)

- (32) 19 AIR 1932 Mad 502 (503) 33 Cr L Jour 765 *Lakshminarayana v Suryanarayana*
(31) 18 AIR 1931 Bom 517 (518) 33 Cr L Jour 69 *K R Dhat v Emperor*

law now, that this section is controlled by the provisions contained in Chapter XVIII⁴ The Magistrate must, therefore follow the procedure in Chapter XVIII, for, it can scarcely be disputed that the words 'under the provisions hereinbefore contained' must relate to the provisions in Chapter XVIII which define the procedure to be followed in inquiries into cases triable by sessions⁵

The Magistrate need not however, recommence the inquiry or take evidence *de novo*. It is only required that the further proceedings necessary for commitment shall be taken as directed in Chapter XVIII⁶. From the moment the Magistrate decides to commit what has hitherto been a trial becomes an enquiry under Chapter XVIII⁷. The charge already framed must be set aside in order that the Magistrate may get back to the stage at which preliminary case proceedings may be applied⁸.

But it is only in respect of the offence for which the accused is to be committed that the proceedings are taken out of Chapter XVI. The other proceedings must remain covered by that chapter. So where a Magistrate, having taken cognizance of a case, frames charges comes to the conclusion that so far as one of the charges is concerned the accused should be committed and as regards the other, the offence is not proved, he is entitled under S 317 to commit for the former charge but this does not affect his obligation to acquit the accused of the latter charge⁹.

Though the Magistrate need not commence proceedings *de novo*, once he decides to commit he must not deprive the accused of any right which he might have exercised under Chapter XVIII, had the case been treated from the outset as a preliminary enquiry¹⁰. Where the accused has had no opportunity of adducing evidence before the committal, the committal should be quashed¹¹. Also where the evidence had not been read over to the witnesses as required by S 203 read with S 360, it was held that it was not a mere formal omission but one that may deprive the accused of the valuable right to contradict the witnesses during the sessions trial by reference to their prior statements¹².

After the Magistrate has decided to commit the case, is the accused entitled to cross examine the witnesses? If the accused has cross examined the witnesses before the

- 4 (36) 23 AIR 1936 All 134 (135) 37 Cri L Jour 337 53 All 671 (FB) *Emperor v Asghar*
5 (36) 23 AIR 1936 All 134 (136) 37 Cri L Jour 337 53 All 671 (FB) *Emperor v Asghar*

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Emperor v Asghar

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trate must not deprive the accused of any right which he might have exercised under Chapter XVIII if the case had been treated as an enquiry under chapter from the outset)

- (80) 2 All 910 (912) *Empress of India v Hahs Baksh*

- (69) 1 N W P H C R Cr 307 (311) *Government Prosecutor v Ameer-ood-deen*

Also see S 206 Note 5

- 7 (30) 17 AIR 1930 Cal 666 (667) 32 Cri L Jour 243 *Panchanan Sarkar v Emperor*

- (33) 20 AIR 1933 Cal 351 (357) 60 Cal 643 34 Cri L Jour 611 *Sudhindra v Emperor*

- (31) 18 AIR 1931 All 431 (433) 53 All 69 37 Cri L Jour 819 *Rani Chulam v Emperor*

- 8 (32) 19 AIR 1932 Mad 502 (504) 53 Cri L Jour 765 *Lakshminarayana v Suryanarayana*

- 9 (10) 12 AIR 1925 Oudh 517 (518) 28 Cri I Jour 590 *Bishambhar Nath v Emperor*

- 10 (41) 28 AIR 1941 Oudh 409 (412) 42 Cri L Jour 636 191 Ind Cas 211 *Nasimullah v Emperor*
761 *Fazal*

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(Magistrate committing accused to Sessions Court after examining only some prosecution witnesses —
Committal should be quashed)

- (37) 19 AIR 1932 Mad 502 (502 503) 33 Cri L Jour 765 *Lakshminarayana v Suryanarayana*

- 12 (29) 16 AIR 1929 Mad 862 (863) 52 Mad 995 31 Cri L Jour 273 *Danodaran v Emperor*

Magistrate decides to commit, he has no further right of cross examination after the charge is amended. For, the amended charge is framed under S 210 which does not allow the accused the right of further cross examination.¹³ In the undermentioned case,¹⁴ during the examination of the first witness for the prosecution the Magistrate intimated to the accused his intention of committing him to a Court of Session but the accused declined to cross examine the witnesses and after the charge was framed he prayed that he might be allowed to do so, it was held that he was not entitled to do so. But it is surmised that if the accused, though having had the opportunity to cross examine does not avail himself of it because the enquiry having been originally under Chapter XXI, he was led to believe that he would have the right of cross examination after the charge is framed, the accused should not be prejudiced by the conversion of the trial into a preliminary enquiry and should be afforded an opportunity of cross examination.¹⁵ When the application to cross-examine is made before the Magistrate frames a charge and decides to commit the case, it must of course be granted.¹⁶ In the undermentioned case¹⁷ it was held that the accused would be allowed to cross examine the witnesses if his application was made before the prosecution closed its case, but not if the application was made after. Referring to this decision, however, a Calcutta case has held that such a distinction did not exist.¹⁸

In order that a committal may be quashed on the ground that the provisions of Chapter XVIII have not been followed, it must be shown that the accused has been prejudiced by the irregularity.¹⁹ But before the committal, the accused is entitled to claim that provisions relating to enquiries before the commitment shall be observed irrespective of any question as to prejudice.²⁰

Since the effect of the Magistrate's decision to commit is to convert the proceedings into a preliminary enquiry, it follows that if there be a change of Magistrates before the actual committal, the accused will not be entitled to a *de novo* enquiry as proviso (a) of S 350 (1) applies only to trials and not to enquiries.²¹

348. * (1) Whoever, having been convicted of an offence punishable

Trial of persons previously convicted of offences against coinage, stamp law or property. under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of

* Code of 1898, original S 348.

348. Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or upwards, shall be committed to the Court of Session or High Court, as the case may be, unless the Magistrate before whom the proceedings are pending is of opinion that he can himself pass an adequate sentence if the accused is convicted:

Provided that, if the District Magistrate has been invested with powers under section 30, the case may be transferred to him instead of being committed to the Court of Session.

1882 : S 348 , 1872 : S 315 ; 1861 — Nil.

13. (31) 18 AIR 1931 All 434 (435) : 53 All 692 : 32 Cri L Jour 819, *Ram Ghulam v Emperor*, (AIR 1924 All 665 : 25 Cri L Jour 798 to the contra, not approved)

14. (29) 16 AIR 1929 Cal 593 (595) : 57 Cal 41 : 30 Cri L Jour 1107, *G V. Raman v Emperor*

15. (29) 16 AIR 1929 Cal 593 (596) : 57 Cal 41 : 30 Cri L Jour 1107, *G V. Raman v Emperor*.

(32) 19 AIR 1932 Mad 502 (501) : 33 Cri L Jour 765, *Lakshminarayana v Su* (Obiter)

16. (24) 11 AIR 1924 Cal 780 (780) : 51 Cal 412 : 26 Cri L Jour 63, *Jyotsna Nath v*

17. (12) 13 Cri L Jour 638 (634) : 16 Ind Cas 336 (Cal), *Farrukh v Maharulla* all pro-
secut on witnesses but one were examined]

18. (29) 16 AIR 1929 Cal 593 (597) : 57 Cal 41 : 30 Cri L Jour 1107

three years or upwards, shall if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused, be committed to the Court of Session or High Court, as the case may be, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted

Provided that, if any Magistrate in the district has been invested with powers under section 30, the case may be transferred to him instead of being committed to the Court of Session

(2) When any person is committed to the Court of Session or High Court under sub section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under section 209

Synopsis

- | | |
|--|--|
| 1 Legislative changes | 7 'Shall be committed |
| 2 Scope of the section | 8 Magistrate cannot act under section 349 |
| 3 Previous conviction should have been under Chapter XII or Chapter XVII of the Penal Code | 9 'Unless he can himself pass an adequate sentence |
| 4 Having been convicted | 10 Transfer to Magistrate specially empowered |
| 5 'Punishable under of the Indian Penal Code' | 11 Procedure before specially empowered Magistrate |
| 6 'For a term of three years or upwards' | |

NOTE to the Synopsis See the Notes indicated for the following topics

- | | |
|---|---|
| Commitment to the District Magistrate See Note 11 | Second offence should be after previous conviction See Note 4 |
| Discretion of Magistrate See Note 7 | |
| Magistrate cannot convict See Note 7 | When the Magistrate can commit See Note 9 |

1 Legislative changes — The following changes were made in the section by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1923

- (1) The section was re numbered as sub s (1) and the words 'if the Magistrate before whom committing the accused were inserted in it The amendment has been made on the lines of s 209¹
- (2) In the same sub section the words 'is competent to try the case and have been substituted for the words 'before whom the proceedings are pending in order to make it clear that the section does not empower the Magistrate to pass a sentence in a case which he is not competent to try²
- (3) The words 'any Magistrate in the district in the proviso to the same sub section have been substituted for the words 'the District Magistrate By reason of the amendment a case of an old offender may now be transferred not only to a District Magistrate empowered under s 30 but also to any other Magistrate in the district specially empowered under that section
- (4) Sub section (2) is new

2 Scope of the section — Section 30 of the Penal Code provides for enhanced punishment or punishment of a different kind for offences under chapter XII (offences relating to coin or Government stamp) and chapter XVII (offences against property) of the said Code where the accused has been previously convicted for a similar offence There are also local or special laws which provide for enhanced punishment or punishment of a different kind on a second conviction for certain classes of offences specified therein See for an illustration s 23 of the Criminal Tribes Act (6 [VI] of 1924)

Section 348—Note 1

- 1 Select Committee Report of 1916 clause 80
- 2 Select Committee Report of 1922 clause 90

This section specifies the tribunal to which old offenders in respect of the offences specified should be sent for trial by the Magistrates before whom they are charged. The object underlying the section is that the accused should be tried by a tribunal which could award him a punishment adequate to the circumstances of his case.

In order that this section may apply —

- (1) both the offences, namely that for which the accused has been previously convicted and that for which he is being tried, must fall under one or other of the two chapters, namely, chapter XII or chapter XVII of the Penal Code, and
- (2) both must have been offences punishable with imprisonment for a term of three years or upwards.

The above conditions are the same as those necessary for the applicability of S 75¹ of the Penal Code and the cases bearing on the latter section have therefore been referred to in the following notes as an aid to the interpretation of this section.

3. Previous conviction should have been under Chapter XII or Chapter XVII of the Penal Code — As has been seen in Note 2 above, the previous conviction should have been one for an offence under chapter XII or chapter XVII of the Penal Code¹. From this the following propositions follow.

- (1) An attempt (to commit an offence) punishable under S 511 of the Penal Code not being an offence under chapter XII or chapter XVII of the Penal Code, a previous conviction therefor will not count for the purposes of this section². Conversely, no previous conviction under chapter XII or chapter XVII of the Code can be reckoned against an accused when the subsequent offence with which he is charged is an attempt punishable under section 511³.
- (2) A previous conviction under any local or special law is not a conviction for an offence under the Penal Code and will not count for the purposes of this

Note 2

1. Section 75 of the Penal Code is given below for facility of reference.

⁷⁵ Whoever, having been convicted,—

Enhanced punishment for certain offences under Ch XII or Ch XVII after previous conviction (a) by a Court in British India, of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, or

(b) by a Court or tribunal in any Indian State acting under the general or special authority of the Central Government or of the Crown Representative, of an offence which would if committed in British India have been punishable under those Chapters of this Code with like imprisonment for the like term,

shall be guilty of any offence punishable under either of those Chapters with like imprisonment for the like term shall be subject for every such subsequent offence to transportation for life, or to imprisonment of either description for a term which may extend to ten years."

Note 3

1 (23) 10 AIR 1923 Lah 286 (286). 24 Cri L Jour 944, *Fattu v Crown* (Conviction under S 411, Penal Code—Previous conviction under S 369 cannot be taken into account under S 75, Penal Code)

2 (68) 1 Weir 36 (36)

(68) 1 Weir 37 (37), *In re Motauel Paluran*

(61) 3 All 773 (774) - 1881 All W N 69, *Empress of India v Ramdayal*

-U 773 approved)

(60) 5 Bom 140 (142) *Empress v Nana Rahim* (For Westropp, C J and Kimball J. McVill J., dissenting)

(06) 5 Cri L Jour 85 (85). 1906 Pan Re No 14 Cr, *Jhamman Lal v Emperor*.

(87) 14 Cal 357 (357) *Queen Empress v Sretharan Bauri*

(74) 21 Suth W R Cr 35 (35) *Queen v Darau Harer*

(84) 1884 Pan Re No 34 Cr, p 59 (60) *Empress v Fattu*

3 (06) 5 Cri L Jour 85 (85). 1906 Pan Re No 14 Cr, *Jhamman Lal v Emperor*

section 4 The Sind Judicial Commissioner's Court has, however, held that where an offender is dealt with under a special law which provides that certain offences punishable under the Penal Code are punishable under that law, S 75 of the Penal Code will apply.⁵ See also the undermentioned cases⁶

- (9) A previous conviction given *before the Penal Code came into force* cannot be taken into account for the purposes of this section⁷

4 "Having been convicted"—The words 'having been convicted' shall be guilty of any offence in S 75 of the Penal Code have been held to imply that the previous conviction should have been *before* the commission of the offence with which the accused is subsequently charged¹ The reason is that a man should be treated as an old offender only if it can be shown that the first conviction had no effect on him. It cannot be said that the first conviction had no effect in a case where such conviction was after the commission of the offence for which the accused is subsequently tried² This section uses the words 'is again accused of any offence etc', but it is conceived that the said principle will equally apply to the interpretation of this section also. Consequently, this section will not apply unless the offence with which a person is "again accused" was committed after the previous convictions³ Under S 75 of the Penal Code the previous conviction must have been by a Court in British India or by a Court or tribunal, in any Indian State acting under the general or special authority of the Central Government or of the Crown Representative. A conviction by a Court in a Native State, not acting under any such authority, cannot be reckoned for the purposes of that section⁴ See also the undermen

- 4 (93 1900) 1893 1900 Low Bur Rul 378 *Queen Empress v Nga Tha Kaing* (Previous conviction under Lower Burma Villages Act)
 (04) 1 Cr L Jour 1061 (1062) 1904 Pun Re No 17 Cr, *Emperor v Khan Muhammad* (Previous conviction under the Punjab Frontier Crimes Regulation, 1887 on verdict of a Jirga)
 (77) 1 Weir 39 (39) (Prior conviction under Regn 4 [IV] of 1821)
 5 (17) 4 AIR 1917 Sind 17 (19) 11 Sind L R 46 18 Cr L Jour 909 (910) *Marar Attamahomed v Emperor* (Previous conviction by the Council of Elders under the Sind Frontier Regulation 1893)
 6 (93) 7 C P L R Cr 24 (26) *Empress v Lalsing* (Conviction in Berar Assigned Districts passed under the Penal Code in accordance with a executive notification of the Governor-General of India in Council is not a conviction under the Penal Code for purpose of S 75, Penal Code but such conviction can be taken into consideration for determining the measure of punishment to be awarded for the later offence)
 (33) 20 AIR 1933 Pesh 6 (8) *Emperor v Johnson* (District Magistrate passing sentence under Frontier Province Regulation on 1931—Such sentence can be taken into consideration—Previous conviction before Court martial cannot however be considered for enhancement under S 75 Penal Code)
 7 (66) 4 Bom H C R Cr 11 (12) *Reg v Kushya Yesu*
 (1865) 4 Suth W R Cr 9 (10) *Queen v Hurpal* (Per Kemp and Glover JJ Campbell J dissenting)
 (1865) 5 Suth W R Cr 66 (67) *Queen v Puban*
 (82) 10 Cal L Rep 392 (392) *Budhan Bujar v Empress*
 (68) 1868 Pun Re No 31 Cr p 69 (90) *Hurkishen v Crown*

Note 4

- 1 (75) 1 All 637 (637) *Empress of India v Megha* (Accused committing offence punishable under Chap XII or Chap XVII and previously to his being convicted of such offence commits another such offence S 75 not applied)
 (82) 1892 Pun Re No 39 Cr p 65 (65) *Gobind v Empress* (Previous conviction fourteen days after commission of subsequent offence—Section not applicable)
 (18) 5 AIR 1918 Low Bur 121 (121) 19 Cr L Jour 47 9 Low Bur Rul 77 *Po So v Emperor* (Previous conviction subsequent to commission of offence charged)
 (75) 1 Weir 39 (39) (Prisoner cannot be charged under S 75 for offence committed subsequent to the date of offence for which he is on his trial)
 2 (66) 5 Suth W R Cr 66 (67) *Queen v Puban*
 3 (79) 1879 Rat 143 (144) *Queen Empress v Appa*
 4 (19) 6 AIR 1919 All 63 (63) 42 All 136 21 Cr L Jour 144 *Bhanwar v Emperor* (Previous convictions by the Dig Nizam in the Bharetpur State)
 (05) 2 Cr L Jour 749 (750) 1 Nag L R 137, *Ghasia Telu v Emperor* (Previous conviction by Nandgaon State)

tioned case⁵

5 "Punishable under . . . of the Indian Penal Code" — It is to be noted that for the application of this section it is not necessary that the previous sentence should have been three years or upwards, it is sufficient that the offence of which the accused was convicted is punishable under the Penal Code with imprisonment for three years or more. See also Note 3 above.

6 "For a term of three years or upwards" — Where the subsequent offence though falling under Chapter XII or Chapter XVII of the Penal Code, is punishable with imprisonment for less than three years (e.g. Section 403, Penal Code), this section will not apply.¹

7 "Shall be committed" — It is the duty of the Magistrate to commit the accused to the Sessions Court or the High Court as the case may be, if the conditions of the section are satisfied^{1 12}

- (1) that the accused has been *previously convicted* of an offence of the kind referred to in the section,
- (2) that the Magistrate is satisfied that there are *sufficient grounds* for committing the accused and
- (3) that the Magistrate is either *not competent* to try the case or is of opinion that he cannot himself pass an *adequate sentence* if the accused is convicted.

The prosecution and the Magistrate should, therefore, ascertain and take notice of any circumstances showing that the accused is a habitual offender who ought, under this section to be committed.² For this purpose, the Magistrate must either as a preliminary matter or at any rate before framing a charge, determine whether there has been a previous conviction having decided that point, he will have to consider whether, in the circumstances of the case, his powers enable him to pass a sufficiently severe sentence. If they do not so permit but the evidence does not warrant the discharge of the accused, he must frame a charge under s 210 and commit him for trial under Chapter XVIII of the Code.³ When an old convict for theft is again found prowling about at night and seems to be again under these circumstances guilty of stealing he has created against himself a presumption of criminal habit which, if un rebutted, would justify a Magistrate in applying ordinarily the rule of this section.⁴

The fact that the property stolen was small in value is no reason by itself for not

(13) 14 Cr L Jour 527 (527) 20 Ind Cas 1007 1913 Pun Re No 17 Cr, *Bahawal v Emperor* (Previous conviction in Bikanir State)

Also see S 221 Note 6

5 (33) 20 AIR 1933 1 esh 6 (9) *Emperor v Johnson* (Previous conviction before Court martial cannot be taken into consideration under S 75, Penal Code)

Note 6

1 (93 1900) 1893 1900 Low Bur Bul 496 *Nga Pru Tun v Queen Empress*

(11) 12 Cr L Jour 439 (440) 11 Ind Cas 623 (Lah) *Chandaria v Emperor*

Note 7

1 (99) 2 Weir 422 (427) *In re Mari Naschen* (Section 3-0, Penal Code)

(7c) 1878 Pun Re No 18 Cr p 45 (15) *Crown v Subhan* (S 457, Penal Code, with four previous convictions of theft)

(99) 2 Weir 473 (473) *In re Dasari Pamudu*

(1864) 2 Bom 11 C R Cr 126 (127) *Fey v Gannu Ladu* (Sections 3-0 454 Penal Code)

(73) 19 Suth W R Cr 37 (37) *Doobri Hultari v A dumb person*

(94) 1894 Rat 704 (704) *Queen Empress v Gandasing* (Old offender under Ss. 3-0 457, Penal Code)

(72 92) 1872 1892 Low Bur Bul 335 (335) *Queen Empress v Agi Ne Dun*

2 (59) 18-9 Lat 461 (461) *Queen Empress v Karari*

3 (14) 1 AIR 1914 Mad 149 (149 150) 38 Mad 552 15 Cr L Jour 184 *In re Kora Sellardi* (Conviction before commitment however, would bar the trial by the Court of Session under S. 403 Criminal Procedure Code)

4 (81) 16-1 All W N 153 (153 154) *Empress v Budha*

committing the accused and for passing a small sentence on him⁵ On the other hand the Court should as was held by Macleod C J, in *King Emperor v Gala Mana*,⁶ exercise a wise discretion in making the penalty fit the crime and should not ordinarily consider petty offenders liable to such heavy punishment as to necessitate their committal to the Court of Session. Thus it has been held that the lapse of a long time since the previous conviction together with the fact that the accused has been leading a blameless life in the interval will make the application of S 75 Penal Code inappropriate⁷ See also the under mentioned case⁸

The Magistrate has no jurisdiction if the conditions of the section are satisfied to do anything but commit the case to the sessions or transfer it to a duly empowered Magistrate⁹ He has thus no power to *find the accused guilty*¹⁰ Accordingly where the accused had been previously convicted for an offence under Chap XVII of the Penal Code and the Magistrate noted his opinion that a more severe punishment than he could impose was required it was held that he would be acting *ultra vires* if he found the accused guilty¹¹ Where however, the fact of the previous conviction is not known to the Magistrate at the trial and he tries the case and passes a sentence not inadequate for a first offence he cannot be said to have acted with any material irregularity¹²

But where there were previous convictions alleged against the accused and the Magistrate without questioning or calling for proofs of those convictions, held that they were not proved and convicted and sentenced the accused the omission was held to

5 (87) 1887 All W N 194 (194) *Empress v Jhanda* (Theft of property worth rupee one or rupee one and annas four)

(08) 1903 Pun Rs No 28 Cr p 72 (73) 1 Cr L Jour 111 *King Emperor v Nur Din* (Theft of a pair of shoes)

6 (24) 11 AIR 1924 Bom 453 (458) 26 Cr L Jour 759 (Even if such petty offenders are committed there is no necessity for Sessions Judge to inflict a vindictive sentence)

7 (26) 18 AIR 1928 Lah 617 (817) 27 Cr L Jour 944 *Ishar Singh v Emperor* (Previous convict on 12 years back)

(27) 14 AIR 1927 Lah 647 (847) 28 Cr L Jour 160 *Khushdal v Emperor* (Previous conviction 20 to 25 years back)

(08) 7 Cr L Jour 293 (294) (Lah) *Kasim Ali v Emperor* (Accused of advanced age—Offence petty—Previous convictions for petty offences 10 years ago—Accused adopting regular life since then—Large

an elderly man—Pread)

(S 75 Penal Code is

directed against habitual offenders—Where the subsequent offence was committed after a lapse of nine years during which time the accused was leading a blameless life held that S 75 could not be invoked in such a case)

8 (33) 1933 Mad W N 1259 (1260) *Kuppusami Chetty v Emperor* (Accused cannot be sentenced to an altogether incommensurate punishment for a trivial offence merely because he has been convicted many times before)

9 (16) 8 AIR 1916 Low Bur 65 (66) 34 Ind Cas 313 (314) 17 Cr L Jour 201 *Emperor v Po Yin* (4 Low Bur Rul 282 8 Cr L Jour 478 referred.)

(08) 8 Cr L Jour 478 (480) 4 Low Bur Rul 282 *Emperor v Po Thue*

(72) 1872 Pun Rs No 31 Cr p 41 (41) *Bahadur Khan v Crown*

(89) 11 All 393 (395) 1889 All W N 152 *Queen Empress v Khalak*

[See also (72 92) 1872 1892 Low Bur Rul 335 (335) *Queen Empress v Nga Ne Dun* (Subordinate Magistrate should not attempt to deal with an old offender against whom there are two previous convictions under S 380 Penal Code)]

10 (14) 1 AIR 1914 Mad 149 (149) 38 Mad 552 15 Cr L Jour 189 *In re Kora Sellanda* (Magistrate in guilty

of theft

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amount to a material error, the conviction and sentence were set aside and the case was remanded to the Magistrate with a view to proceed under this section¹

8. Magistrate cannot act under section 349. — It follows from what has been stated in Note 7 above that in cases where the accused is liable to enhanced punishment under S 73 of the Penal Code, and the Magistrate thinks he cannot pass an adequate sentence he must act under S 348 and not under S 349¹

Where, in such case, he acts irregularly under S 349 it is open to the District Magistrate to take the case on his own file or transfer it to that of a first class Magistrate, the proceedings, in either case, being taken *de novo*²

9. "Unless he can himself pass an adequate sentence." — Where the Magistrate thinks that the circumstances of the case permit him to pass an adequate sentence, he should try and dispose of the case himself¹ It is only where, in the exercise of his discretion, he is of opinion that a higher punishment than what he is empowered to award is necessary that he is bound to commit the accused to the Court of Session. If, in the exercise of his discretion, he thinks he can award an adequate sentence and tries the case himself, he cannot be said to have acted without jurisdiction, although a more adequate sentence could have been passed by his committing the accused to the Sessions Court² An opinion has been expressed in the undermentioned case³ to the effect that even where the Magistrate considers that the circumstances of the case permit him to pass an adequate sentence, he may commit the accused to the Sessions Court for trial

Old offenders should ordinarily be charged before first class Magistrates to enable adequate sentences being passed without the necessity of always committing the accused to the Court of Session or the High Court⁴

10. Transfer to Magistrate specially empowered — A Magistrate may at any stage of the proceedings without framing a charge send the accused to any Magistrate in the district specially empowered under S 30 to be placed upon his trial Assuming that a charge should be drawn up before sending the case to such Magistrate, the charge may be drawn up whenever the Magistrate finds the offence proved which may be at any stage, the evidence of one witness may suffice¹ See also Note 11

11. Procedure before specially empowered Magistrate. — Before the amendment of S 330 it was held in some cases that as that section could not be held to cover a case of transfer from one Court to another, a specially empowered Magistrate to whom a case is transferred under S 348 cannot act on the evidence already recorded by

13 (74) 1874 Pun Re No 12 Cr, p 21 (21) *Crown v Santu*

Note a

1 (46) 33 AIR 1948 Mad 171 (172) *Public Prosecutor v Sleek Masoom*

(41) 28 AIR 1941 Mad 748 (748) *In re Shauk Mastan Sahib* (Irregularity could have been cured by the Sub-divisional Magistrate by a reference to the District Magistrate under R 97 of the Criminal Rules of Practice)

(08) 8 Cri L Jour 478 (480) 4 Low Bur Bul 282 *Emperor v Po Thwe*

(16) 3 AIR 1916 Low Bur 65 (66) 34 Ind Cas 313 (314) 17 Cri L Jour 201, *Emperor v Po Yin*

1. (99) 2 Weir 423 (424), *In re Dasars Papudu*

2. 8) 1878 Bat 70 (72) *Reg v Annaji Krishna*

3. 2 Weir 31 (32) (The Magistrate has a discretion to try the case himself)

4. 55 Mad 552 (553), *In re*

5. 422 (422) *In re*

Note 10

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committing the accused and for passing a small sentence on him⁵ On the other hand the Court should as was held by Macleod C J, in *King Emperor v Gala Mana*,⁶ exercise a wise discretion in making the penalty fit the crime and should not ordinarily consider petty offenders liable to such heavy punishment as to necessitate their committal to the Court of Session. Thus, it has been held that the lapse of a long time since the previous conviction together with the fact that the accused has been leading a blameless life in the interval will make the application of S 75 Penal Code, inappropriate⁷ See also the under mentioned case⁸

The Magistrate has no jurisdiction if the conditions of the section are satisfied, to do anything but commit the case to the sessions or transfer it to a duly empowered Magistrate⁹ He has thus no power to *find the accused guilty*¹⁰ Accordingly, where the accused had been previously convicted for an offence under Chap XVII of the Penal Code and the Magistrate noted his opinion that a more severe punishment than he could impose was required it was held that he would be acting *ultra vires* if he found the accused guilty¹¹ Where however the fact of the previous conviction is not known to the Magistrate at the trial and he tries the case and passes a sentence not inadequate for a first offence he cannot be said to have acted with any material irregularity¹²

But where there were previous convictions alleged against the accused and the Magistrate without questioning or calling for proofs of those convictions, held that they were not proved, and convicted and sentenced the accused the omission was held to

- 5 (67) 1887 All W N 194 (194) *Empress v Jhanda* (Theft of property worth rupee one or rupee one and annas four)
- (03) 1903 Pun Re No 26 Cr p 72 (73) 1 Cr L Jour 111 *King Emperor v Nur Din* (Theft of a pair of shoes)
- 6 (24) 11 AIR 1924 Bom 453 (453) 26 Cr L Jour 759 (Even if such petty offenders are committed there is no necessity for Sessions Judge to inflict a vindictive sentence)
- 7 (28) 13 AIR 1926 Lah 617 (617) 27 Cr L Jour 944 *Ishar Singh v Emperor* (Previous conviction 12 years back)
- (27) 14 AIR 1927 Lah 647 (647) 28 Cr L Jour 180, *Khushdil v Emperor* (Previous conviction 20 to 25 years back)
- (08) 7 Cr L Jour 293 (294) (Lah) *Kasim Ali v Emperor* (Accused of advanced age — Offence petty — Previous convictions for petty offences 10 years ago — Accused adopting regular life since then — Large family depending upon him — S 75 not applied)
- (65) 1935 Mad W N 1294 (1295) *Chinnathambi Gounden v Emperor* (Accused an elderly man — Previous conviction 7 years back — Value of property stolen small — S 75 not applied)
- (29) 16 AIR 1929 Lah 278 (278) 30 Cr L Jour 376 *Kunj Lal v Emperor* (S 75 Penal Code is directed against habitual offenders — Where the subsequent offence was committed after a lapse of nine years during which time the accused was leading a blameless life held that S 75 could not be invoked in such a case)
- 8 (33) 1933 Mad W N 1259 (1260) *Kuppasami Chetty v Emperor* (Accused cannot be sentenced to an altogether incommensurate punishment for a trivial offence merely because he has been convicted many times before)
- 9 (16) 3 AIR 1916 Low Bur 65 (66) 34 Ind Cas 313 (314) 17 Cr L Jour 201 *Emperor v Po Yui* (4 Low Bur Rul 282 8 Cr L Jour 478 referred)
- (08) 8 Cr L Jour 478 (480) 4 Low Bur Rul 282 *Emperor v Po Thue*
- (72) 1872 Pun Re No 31 Cr p 41 (41) *Bahadur Khan v Crown*
- (89) 11 All 393 (395) 1889 All W N 152 *Queen Empress v Khalak*
[See also (72 92) 1872 1892 Low Bur Rul 335 (335) *Queen Empress v Nga Ne Dun* (Subordinate Magistrate should not attempt to deal with an old offender against whom there are two previous convictions under S 380 Penal Code)]
- 10 (14) 1 AIR 1914 Mad 149 (149) 38 Mad 552 15 Cr L Jour 188 *In re Kora Sellandi* (Magistrate ought merely to frame a charge and then commit the accused to the sessions — If he finds him guilty before commitment it would bar a fresh trial before Sessions Court under S 403 Cr P C)

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amount to a material error the conviction and sentence were set aside and the case was remanded to the Magistrate with a view to proceed under this section¹³

8 Magistrate cannot act under section 349 — It follows from what has been stated in Note 7 above that in cases where the accused is liable to enhanced punishment under S 35 of the Penal Code and the Magistrate thinks he cannot pass an adequate sentence he must act under S 348 and not under S 349¹

Where in such case he acts irregularly under S 349 it is open to the District Magistrate to take the case on his own file or transfer it to that of a first class Magistrate, the proceedings in either case being taken *de novo*²

9 'Unless he can himself pass an adequate sentence.' — Where the Magistrate thinks that the circumstances of the case permit him to pass an adequate sentence he should try and dispose of the case himself³ It is only where, in the exercise of his discretion he is of opinion that a higher punishment than what he is empowered to award is necessary that he is bound to commit the accused to the Court of Session. If, in the exercise of his discretion he thinks he can award an adequate sentence and tries the case himself he cannot be said to have acted without jurisdiction although a more adequate sentence could have been passed by his committing the accused to the Sessions Court⁴ An opinion has been expressed in the unmentioned case⁵ to the effect that even where the Magistrate considers that the circumstances of the case permit him to pass an adequate sentence he may commit the accused to the Sessions Court for trial

Old offenders should ordinarily be charged before first class Magistrates to enable adequate sentences being passed without the necessity of always committing the accused to the Court of Session or the High Court⁶

10 Transfer to Magistrate specially empowered — A Magistrate may at any stage of the proceedings without framing a charge send the accused to any Magistrate in the district specially empowered under S 50 to be placed upon his trial Assuming that a charge should be drawn up before sending the case to such Magistrate, the charge may be drawn up whenever the Magistrate finds the offence proved which may be at any stage, the evidence of one witness may suffice¹ See also Note 11

11. Procedure before specially empowered Magistrate. — Before the amendment of S 50 it was held in some cases that as that section could not be held to cover a case of transfer from one Court to another, a specially empowered Magistrate to whom a case is transferred under S 349 cannot act on the evidence already recorded by

13 (74) 1874 Pun Re No 12 Cr, p 21 (21) *Crown v Santu*

Note 8

1 (46) 33 AIR 1946 Mad 171 (172) *Public Prosecutor v Sheik Masoom*

(41) 23 AIR 1941 Mad 748 (748) *In re Shauk Masian Sahib* (Irregularity could have been cured by the Sub-divisional Magistrate by a reference to the District Magistrate under R 97 of the Criminal Rules of Practice)

(1942) 2 Cr L J 117 (1942) 1 Cr L J 117 (1942) 1 Cr L J 117 — *Po Thue*

Cr L Jour 201 *Emperor v Po Yin*

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Note 9

1 (99) 2 Weir 423 (424) *In re Dasara Ramudu*

2 (73) 1873 Rat 70 (72) *Reg v Annaji Krishna*

(80) 2 Weir 31 (32) (The Magistrate has a discretion to try the case himself)

3 (15) 38 Mad 552 (553) *In re Kora Sellandi*

4 (99) 2 Weir 422 (422) *In re Mari Nasir*

Note 10

1 See (73) 1873 Pun Re No 12 Cr, p 13 (14), *In re a reference from the Commissioner of Lahore* (Case under 1872 Code — The proviso permitted transfer only to the District Magistrate invested with powers under S 30)

the transferring Magistrate but must hear the case *de novo*¹ After the amendment of S 30 by the addition of sub s (3) this is no longer good law.

But though the combined effects of ss 318 and 350 entitle a Magistrate to rely on the evidence already recorded he cannot at the same time proceed to recommence the enquiry and also rely upon the previously recorded evidence².

There is no provision for committing an accused person to the Magistrate empowered under S 30 to be tried as at a Court of Session. He must try the accused as a Magistrate invested with special powers³.

349.* (1) Whenever a Magistrate of the second or third class,

Procedure when Magistrate cannot pass sentence sufficiently severe having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate

(1A) When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33

Synopsis

- | | |
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* 1882 S 349 1872 S 46 1861 S 277

Note 11

- 1 (09) 15 C P L R Cr 66 (67 68) *Emperor v Kasim*
 (05) 2 Cr L Jour 820 (823 824) 1 Nag L R 187 *Ladja v Emperor*
 2 (27) 14 AIR 1927 Lah 238 (238) 28 Cr L Jour 302 *Kartar Singh v Emperor*
 Also see S 350 Note 5
 3 (73) 1873 Pon Re No 12 Cr p 13 (14) *In re a reference from the Commissioner of Lahore*

NOTE to the Editor — See the Notes indicated for the following topics

Cases on 1st Section 348 See Note 2

Powers of superior Magistrate See Notes 12 to 16

Procedure—Ordinary See Note 1

1st Section Magistrate—Ditto See Note 9

Return of cases—Initial reference See Note 16

Second and third class Magistrate only can refer See Note 3

Summary cases—Applicability to See Note 3

1 Legislative changes

Changes introduced in the Code of 1872—

- (1) For the words 'superior Magistrate' occurring in the Code of 1861 (s. 277) the words 'Magistrate of the second or third class' were substituted
- (2) The words 'shall record the finding and submit his proceedings' were altered into 'may record the finding and if sentence has not been passed, may submit his proceedings'
- (3) The words 'forward the accused' were newly added
- (4) Before the words 'sentence or order' in paragraph 2 the word 'judgment' was introduced
- (5) A proviso limiting the power of the superior Magistrate to those ordinarily exercisable by him under s. 20 of that Act was newly added

Changes introduced in the Code of 1882—

- (1) For the words 'finds an accused person guilty' in the first paragraph the words 'is of opinion that the accused person is guilty' were substituted
- (2) The words 'after hearing the evidence for the prosecution' in the first paragraph were introduced
- (3) For the words 'record the finding' the words 'record the opinion' were substituted
- (4) The proviso was amended by the substitution of the words 'shall not inflict a punishment more severe than' under ss. 32 and 33 for the words 'shall not exceed the powers ordinarily exercisable' under s. 20 of this Act'

Changes introduced in 1898—

No change has been effected except the numbering of the first and second paragraphs of the old section as sub-sections (1) and (2)

Changes introduced in 1923—

Sub-section (1A) has been introduced by the Code of Criminal Procedure (Amendment) Act, 18 (XVIII) of 1923. It is similar in terms to sub-s. (2) of s. 348 and is intended to secure identity of treatment to all accused

2 Scope of the section—It is a general principle of law that only an authority who has heard the evidence is competent to decide whether the accused is innocent or guilty.¹ This section creates an *exception* to this rule in that it provides that the Magistrate to whom the proceedings are submitted under this section may pass such judgment, sentence or order in the case as he thinks fit even on the evidence recorded by the referring Magistrate.² As such it should be construed strictly.³

In order that the section may apply the following conditions must be satisfied—

- (1) The Magistrate submitting proceedings should have *jurisdiction* to try or commit the case.⁴

Section 349 — Note 2

1 (24) 11 AIR 1924 Nag 37 (37) 22 Nag L R 166 21 Cr L Jour 738 *Daba v Emperor*
 (16) 3 AIR 1916 Nag 115 (116) 18 Cr L Jour 35 (36) 12 Nag L R 146 *Emperor v Ramprasad*
 Also see S 346 Note 5

2 (24) 11 AIR 1924 Nag 37 (37-38) 22 Nag L R 166 21 Cr L Jour 738 *Daba v Emperor*
 (05) 2 Cr L Jour 369 (370) 1905 Pun Re No 25 *Cr Muhammad v Emperor*

[See however (91) 2 We r 690 (690) *Sundarayyar v Tiruvengada Naicker* (Joint Magistrate with drawing case to his file cannot dispose of case on evidence recorded by Magistrate from whom the case is withdrawn)]

3 (24) 11 AIR 1924 Nag 37 (37) 22 Nag L R 166 21 Cr L Jour 738 *Daba v Emperor*

4 See Note 4

(2) He must be of opinion, after hearing the evidence, that the accused is guilty and that he ought to receive a punishment different in kind from or more severe than that which he is empowered to inflict⁵ or that he ought to be required to execute a bond under S 106

(3) He should record such opinion⁶

This section must be read subject to the provisions of S 348 and when a case falls under that section, the Court should proceed only thereunder and not under this section⁷

3 Who can make a reference under this section — This section does not apply to *first* class Magistrates¹ According to the Chief Court of Lower Burma, it does not also apply to Magistrates trying cases *summarily*, the reason being that the procedure of this section is obviously unsuited to cases tried summarily² The High Court of Allahabad seems to hold a contrary view³

It is in the discretion of the subordinate Magistrate to decide whether he will send up a case or not under this section An order by a superior Magistrate directing a subordinate Magistrate to send up a case under this section is *ultra vires*⁴ A District Magistrate is not competent to forbid by circular, all subordinate Magistrates in his district from taking up cases (which the Criminal Procedure Code says they may take up) if they think they shall have to act under this section in disposing of the case⁵

4 "Having jurisdiction" — A Magistrate has no power to refer, under this section a case which he has no jurisdiction to try If he does so, his proceedings are illegal and void and will not empower the superior Magistrate to proceed under sub s (2) of this section¹ But where the offence was one for which the Magistrate was not competent to try the accused but for which he was empowered to commit him to the Court of Session, it was held that he was not entirely without jurisdiction and that the Magistrate to whom he referred the case could if he thought proper, commit the same to the Court of Session²

5 Record of opinion — As has been seen in Note 2 above it is necessary that the Magistrate should record his opinion as to the guilt of the accused and the necessity for inflicting on him a punishment different in kind from or more severe than that which he is empowered to give or the necessity for taking a bond from him under S 106 of this Code

Where a case was transferred by a Magistrate of the third class to a District Magistrate without any request to the latter to take up the case and without stating any

5 (29) 16 AIR 1929 Pat 511 (512) 31 Cri L Jour 608, *Suraj Narayan v Emperor*

6 See Note 5

7

(91) 2 Weir 423 (423) *In re Dasari Ramudu*

(08) 8 Cri L Jour 478 (480) 4 Low Bur Bul 287 *Emperor v Po Thwe*

(91) 2 Weir 422 (422) *In re Mari Natchen*

Note 3

1 (85) 7 All 414 (419 423) 1885 All W N 105 (FB) *Queen Empress v Pershad*

(08) 8 Cri L Jour 475 (475) 4 Low Bur Bul 277 *Emperor v Jalal Khan* (Bench of Magistrates are not authorized to refer under S 349)

2 (08) 8 Cri L Jour 475 (475) 4 Low Bur Bul 277, *Emperor v Jalal Khan*

3 (37) 19 AIR 1932 All 507 (507 508) 23 Cri L Jour 472 *Gopal v Emperor*

4 (91) 2 Weir 427 (427) 9 Mad 377, *Empress v Vsranna*

5 (66) 3 Bom H O R Cr 29 (37) *Reg v Guna*

Note 4

1 (99) 1 Bom L R 27 (29) *Queen Empress v Sita Ram*

2 (86) 13 Cal 305 (307) *Abdul Wahed v Chandia*

Also see Note 14 and S 206 Note 3

of the three grounds mentioned in the section, it was held that the transfer could not be considered to be one under this section¹

6 Punishment "different in kind." — It has been held by the Judicial Commissioner's Court of Nagpur that a submission of proceedings for the purpose of taking action under S 362 cannot be considered to be one under this section inasmuch as the order under that section directing the release of the accused on probation of good conduct is not a punishment at all, and is, therefore, not a "punishment different in kind" from that which the Magistrate is empowered to inflict¹ In the undermentioned case² where the sub-Magistrate convicted the two accused and sent up the third (a youth) under this section because he could not deal with a juvenile offender, the High Court of Madras held that the case of all the three accused should have been referred and not that of the third accused alone. It seems to have been assumed that a submission of proceedings in respect of an adolescent offender for being dealt with under S 362 may be done under this section. The actual decision was, however, to the effect that one of the accused *alone* could not be sent up under this section

7. "More severe" — Where a Magistrate of the third class who is empowered to inflict a fine not exceeding fifty rupees convicted certain persons of theft, but sent them up to a superior Magistrate under this section recommending the infliction of a fine of Rs 15 on them, it was held that the submission was improper inasmuch as the proposed fine could be inflicted by the third class Magistrate himself and as the section did not apply unless the referring Magistrate was of opinion that he *was not competent* to inflict the punishment deserved by the accused¹

8 "Or that he ought to be required to execute a bond under section 105." — When a Magistrate is of opinion that the accused ought to be required to execute a bond under S 105, he ought not to convict and sentence the accused before referring the case under this section, for S 105 requires that the conviction and order for furnishing security should be passed by one and the same Magistrate¹ If he convicts the accused, his recommendation that an order for furnishing security be passed will be without jurisdiction and any order of the superior Magistrate under S 105 will also be without jurisdiction. It does not necessarily follow, however, that the conviction will be defective² Similarly, where a second class Magistrate sent up a case to a joint Magistrate as he was of opinion that an order under S 105 was necessary, and the latter passed the order under that section, but returned the case to the sub-Magistrate for conviction, it was held that the joint Magistrate acted without jurisdiction³

9. Procedure of referring Magistrate.

"Cannot convict" — A Magistrate submitting proceedings under this section is required only to record his opinion that the accused is guilty¹ but cannot legally convict

Note 5

1. (90) 12 All 66 (68) 1890 All W N 7, *Empress v Radhe*

Note 6

1 (24) 11 AIR 1924 Nag 37 (38) 22 Nag L R 166 24 Cri L Jour 733, *Baba v Emperor*

2. (28) 29 Cri L Jour 674 (624) 103 Ind Cas 816 (Mad) *Murugesu Koundan v Emperor*

Note 7

1 (81) 1881 All W N 99 (99), *In re Phullu*

Note 8

Note 9

1 (88) 1888 Rat 397 (387), *Queen Empress v Mahadu*.

[See also (91) 2 Weir 423 (423), *In re Raghava Naidu*]

him² But in view of the amendments effected in S 215, sub s (2) and S 239, sub s (2), it has been held that those sub sections cannot be read as necessarily prohibiting a Magistrate dealing with a case under this section from *finding* the accused guilty. But the conviction will not be one that has any legality in the sense of prohibiting the Sub-divisional Magistrate or District Magistrate from dealing with the case under this section, or as constituting a conviction which would prevent any further trial under S 403³ Hence, where a Magistrate submitting a case under this section gives a conviction, it is not necessary that it should be formally *quashed*. It will be treated as mere surplusage and as a legal nullity, so that the Magistrate to whom the case is sent can proceed with it without a reference to the High Court for the purpose of having the conviction formally quashed⁴ The High Court of Patna has, however, held that where a Magistrate convicts the accused before referring his case, "ordinarily, the case is one which should go back for re trial owing to the trial Court not carrying out the provisions of S 349"⁵

As to the difference between proceedings under this section and those under S 562, see S 562, Note 3

"Forward the accused"—Under the Code of 1861 the subordinate Magistrate was not required to forward either the accused or the witnesses to the District Magistrate, he had only to submit his proceedings⁶ It was nevertheless held that the accused was entitled to be present before the District Magistrate to offer such reasons as he may have against the finding of the sub Magistrate or to offer his plea for a lenient sentence,⁷ the proceedings before the superior Magistrate being a continuation of the proceedings before the referring Magistrate⁸

'Framing of charge'—See Section 254, Note 6

10 Sub-section (1A)—Several accused.—It was held under the Code of 1892 that it was open to a Magistrate to send up one only of several accused for enhanced punishment and to convict the others himself¹ and, in the absence of any appeal to him, the District Magistrate to whom the case of only some accused was referred had no jurisdiction to set aside the conviction of others regarding whom no reference had been made,² though it was desirable that all the accused should be sent up³ Shortly prior to the coming into force of the amending Act of 1923, it was doubted in the undermentioned case⁴ whether in a case where the Magistrate considers it necessary to proceed against one of several accused under sub s (1), he could validly forward all the other accused also

Under the section as now amended in 1923, it is clear that all the accused must be forwarded in such cases⁵ The failure to send up all the accused will not, however, vitiate the jurisdiction to try such of the accused as are *actually* sent up⁶

2 (88) 1888 Rat 387 (387) *Queen Empress v Mahadu*

(28) 15 AIR 1928 Bom 240 (240) 52 Bom 456 29 Cr L Jour 904, *Emperor v Narayan*

(24) 11 AIR 1924 Pat 764 (765) 3 Pat 1015 - 25 Cr L Jour 1276, *Prayag Gope v Emperor*

3 (28) 15 AIR 1928 Bom 240 (240) 52 Bom 456 29 Cr L Jour 904, *Emperor v Narayan*

4 (28) 15 AIR 1928 Bom 240 (240) 52 Bom 456 29 Cr L Jour 904 *Emperor v Narayan*

{See also (97) 1897 Rat 945 (945) *Queen Empress v Chinnappa* (It might be taken to have been the record only of his opinion of their guilt)}

5 (24) 11 AIR 1924 Pat 764 (765) 3 Pat 1015 25 Cr L Jour 1276, *Prayag v Emperor*

6 (66) 3 Bom H C R Cr 29 (31), *Reg v Guna*

7. (70) 7 Bom H C R Cr 31 (34), *Reg v Ragha Narayan*

8 (67) 7 Suth W R Cr 88 (38), *Queen v Gunesh Sircar*

Note 10

The Magistrate is required to forward only such accused as are in his opinion *guilty*. An order, referring the case of those accused who in his opinion are not guilty is illegal, they being entitled to an acquittal under Section 259 sub-section (1).⁷

This sub-section has no application to the procedure under S 562. It is therefore open to a Magistrate in a case falling under S 562 to sentence some of the accused and refer the remainder of the accused for the application of S 562.⁸

In the undermentioned case⁹ there were three accused, one of them being a boy of fourteen years of age and therefore a young person within the meaning of the Madras Children Act 1920. The Stationary Sub-Magistrate was of opinion that this accused should be dealt with under the Madras Children Act and accordingly referred the case so far as this accused was concerned to a joint Magistrate. It was held that the case fell under this sub-section which meant that the Magistrate could not convict any of the accused and was required to send all of them to the joint Magistrate. See also the undermentioned case¹⁰ to a similar effect.

11 To whom reference can be made — Under the Code of 1861 (S 977) the Magistrate had to submit his proceedings to the Magistrate to whom he was *subordinate*.¹ Under the present Code he should submit his proceedings to the District Magistrate or to a Sub-divisional Magistrate who alone has jurisdiction to dispose of the matter.² The City Magistrate of Nagpur is not a Sub-divisional Magistrate and no reference could be made to him under this section.³ A Magistrate located in a division temporarily in the discharge of his public duties will be deemed to have validly referred his proceedings under this section if he submits them to the Magistrate of that division of the district.⁴

12 Procedure of the Magistrate to whom a case is referred — When proceedings are sent up to a superior Magistrate under this section the whole case is opened up for him to deal with according to his discretion.¹ He is not however bound to hold a trial *de novo*.² He may act on the evidence recorded by the referring Magistrate and adopt his opinion or he may re-examine the witnesses already examined and take further evidence,³ but in any case he is bound to exercise his independent judgment in the matter and write a judgment according to the provisions of S 367.⁴

- 7 (196) 13 AIR 1936 All 176 (176) 26 Cr L Jour 1630 *Sultan Md Khan v Emperor*
8 (43) 30 AIR 1943 Mad 390 (391) 44 Cr L Jour 563 906 Ind Cas 577 *Piramanayaga Padarasa v Emperor*
9 (45) ILR (1945) Mad 594 (596) 58 Mad L W 96 *In re Subbar Gounder*
10 (41) 1941 Mad W N 768 (768) *Emperor v Mottayyan*

Note 11

- 1 (69) 11 Suth W R Cr 7 (8) *In re Nedree Telkinee*
(68 69) 5 Bom H C R Cr 47 (47) *Reg v Bhagu* (Case under S 276 corresponding to the present Section 346)
(66 67) 4 Bom H C R Cr 8 (8) *Reg v Kuberio Ratno*
2 (14) 1 A I R 1914 Bom 217 (218) 38 Bom 719 16 Cr L Jour 273 *Emperor v Vinayak Narayan* (The Sub-divisional Magistrate cannot transfer the case to first class Magistrate)
3 (27) 11 AIR 1927 Nag 209 (210) 28 Cr L Jour 489 *Rajaram v Emperor*
4 (82) 4 All 366 (371) 1892 All W N 48 *Empress of India v Kallu*

Note 12

whom the case is referred can

Emperor v Dodo
v Haridas Dagdi (Accused)

cannot insist on a *de novo* trial]]

Also see S 350 Note 16

- 3 (91) 2 Weir 478 (429) *In re Raghava Narlo*

- 4 (43) 30 A I R 1943 Mad 315 (316) 44 Cr L Jour 573 207 Ind Cas 58, *In re Pedda Kambli Reddy*

But the nature of the trial is not altered by the proceedings being submitted under this section.⁵ The superior Magistrate cannot, therefore, convict the accused sent up in an *aggravated form of offence*.⁶ Nor could he, where the case was triable summarily, pass a sentence of imprisonment exceeding three months as prescribed by S 262.⁷

Where the superior Magistrate examines the accused under sub s (2), the examination should be reduced to writing as required by S 361.⁸

Where a Magistrate acts irregularly under this section, it is open to the District Magistrate to take the case on his own file or to transfer it to that of some first class Magistrate, the proceedings in either case being taken *de novo*.⁹

13. "Shall pass such judgment, sentence or order." — The superior Magistrate must form his own judgment and pass sentence on the case referred to him. The opinion of the referring Magistrate that the accused is guilty is not binding on the superior Magistrate and the latter may direct an acquittal or discharge.² But he must confine himself to merely seeing whether the decision of the referring Magistrate is opposed to the evidence, he must consider whether the evidence is worthy of belief and pass such judgment, sentence or order as he deems proper.³ Such judgment should conform to the requirements of S 267 of the Code.⁴

The word "order" in sub s (2), being associated with the words "judgment" and "sentence," what the section contemplates must be taken to be a final order disposing of the case so far as the Magistrate is concerned.⁵

14. Committal to sessions — A Magistrate to whom the proceedings are submitted under this section has power to commit the case to a Court of Session.

6 (91) 2 Weir 21 (22) (Conviction by second class Magistrate under S 417, Penal Code—Sub divisional Magistrate to whom case is referred under S 349 cannot convict under S 420, Penal Code, without commencing trial afresh)

7 (132) 19 AIR 1932 All 507 (507) 33 Ch L Jour 472, *Gopal v Emperor*

Also see S 262, Note 3

8 (108) 7 Cri L Jour 177 (177) (Mad), *In re Venkataraya*

9 (91) 2 Weir 422 (422, 423), *In re Mari Naicken*

Note 13

1 (39) 26 AIR 1939 Oudh 35 (36) 39 Cri L Jour 1005, *Lattu Ram v Emperor*

(70) 5 Mad H C R App xliii (xliii)

(20) 7 AIR 1920 Mad 171 (172) 21 Cri L Jour 53 *In re Karupiah Pillai* (It is not necessary to

see Singh v Emperor.)

2 Magistrate can order acquittal or ca

(102) 1 Low Bur Rul 141 (142), *Crown v San E* (Though a Magistrate to whom case is referred should as a rule pass final orders and should not return the case he is not debarred from committing the case or referring it to a higher Magistrate)

(82) 1892 Pun Re No 44 Cr, p 73 (74), *Musa v Babri* (Order of discharge)

necessary¹ As was observed by a Full Bench of the High Court of Madras the words of the section enabling the Magistrate to pass such judgment sentence or order etc expressly provide for the disposal of the case otherwise than by an acquittal or sentence,

and it was quite competent to the Magistrate to whom the case was referred to say that either from the gravity of the matter or other sufficient reason the Sessions Court was the proper tribunal for the disposal of the case, and to make an order in accordance with that opinion²

The undermentioned cases³ which held a contrary view were decided under the Codes of 1861 and 1872 and are no longer good law

15 Whether superior Magistrate can quash proceedings — A Magistrate to whom a case is submitted under this section has no power to quash the proceedings of the referring Magistrate and send the case to another Magistrate for re trial If he considers that such proceedings are incorrect or illegal he should report them for orders under S 438¹

16 Whether superior Magistrate can return case — A Magistrate to whom proceedings are submitted under this section is not at liberty to return the case to the submitting Magistrate but must dispose of it himself¹ Where a case was returned by a Sub-divisional Magistrate to the submitting Magistrate to pass such sentence as the latter was competent to pass the conviction and sentence of the latter acting under such order were reversed and the Sub-divisional Magistrate directed to dispose of the case himself² Where however, the case was returned for committal although the procedure of the superior Magistrate was held to be incorrect the committal was allowed to stand by the Madras and Calcutta High Courts as not being illegal³ The Bombay High

Note 14

1 (86) 9 Mad 377 (378) 2 Weir 427 *Empress v Viranna*
97 1007 D 250 252 C = F = = D =

Also see S 206 Note 3

2 (76) 1 Mad 289 (290) 2 Weir 425 (FB) *In the matter of Chinnmarigadu* (Case under S 46 of the Code of 1872 corresponding to this section)

Also see Note 4 and S 206 Note 3

3 (77) 1877 Rat 130 (131) *Queen Empress v Lakshman*

(68) 10 Buth W R Cr 50 (51) *In the case of Bhikares Mullick*

Note 15

1 (1900) 1900 Pun L R Cr p 37 (38) *Jawand Singh v Empress*

Note 16

1 (42) 29 AIR 1912 Mad 281 (282) 43 Cri L Jour 457 199 Ind Cas 50 *In re Sudalamadadudam* (Sub Magistrate finding accused guilty and submitting proceedings to Sub-divisional Magistrate on ground that order under S 106 Cr P C was necessary — Superior Magistrate considering that such order was unnecessary must nevertheless dispose of case himself)

Note 17

v Emperor

(86) 10 Bom 196 (197) *Empress v Hama Tellapa*

(1900 02) 1 Low Bur Rul 124 (125) *Queen Empress v Nga Khan*

(04) 1 Cri L Jour 137 (138) 26 All 344 1904 All W N 49 *Emperor v Thakur Dayal*

Also see S. 206 Note 3

2 (80) 6 Cal L Rep 276 (277) *Dula Foquer v Bhagirat Sircar*

(89) 1889 Rat 479 (480) *Queen Empress v Sitarum*

(12) 18 Cri L Jour 16 (16) 36 Mad 470 13 Ind Cas 110 *Ponnusamy v Emperor*

3 (86) 9 Mad 377 (378) 2 Weir 427 *F v Viranna*

Court⁴ on the other hand held in a similar case that the action of the Sub-divisional Magistrate in returning the case to the second class Magistrate was illegal and annulled the order of the superior Magistrate but nothing was said about the order of committal being illegal.

It has been held in the undermentioned case⁵ that there is nothing illegal in the action of a District Magistrate pointing out that the reference was informal since the inquiry was defective (statements of the accused not having been recorded), and requiring the defect to be supplied before the case was laid before him and further that the proceedings of the submitting Magistrate being incomplete, he is not precluded when he has remedied the defects from coming to a different finding from that previously recorded and acquitting some of the accused whom he had formerly believed to be guilty. On the other hand where a Magistrate recorded a plea of guilty and submitted the case and the same was returned to him with the remark that in warrant cases the accused could not be convicted on a mere plea of guilty, it was held that S 319 does not give the superior Magistrate any power to return the case for supplying omissions and that if there had been any need for taking the accused's defence the superior Magistrate ought to have done it himself⁶.

17. Transfer to another Magistrate. — The jurisdiction to deal with proceedings under this section is conferred as has been seen already in Note 11 upon District Magistrates and Sub-divisional Magistrates and upon no other Magistrates. A Sub-divisional Magistrate to whom a case is submitted under this section cannot therefore transfer it to a Magistrate who is not empowered to act under this section¹. But he can commit the case to a Court of Session or transfer to a District Magistrate who can act under the section.²

18 Whether superior Magistrate can order re trial. — It is open to the superior Magistrate to acquit the accused on the charge framed and order a fresh trial before a competent Magistrate under such section as he thinks proper³.

But a Magistrate should not pass a sentence under S 349 and then try the accused on another charge arising in the same case. If he wishes to do so the proper course for him is to set aside the proceedings and direct a fresh trial before himself *ab initio*⁴.

19 Proviso — When a case is sent up under this section to a District or Sub-divisional Magistrate such Magistrate is not competent to inflict a punishment more severe than what he is empowered to inflict under S 32 or S 33¹.

A District Magistrate acting under this section must be regarded as a Magistrate not empowered under S 30 and hence cannot pass a sentence longer than what he is

(88) 2 Weir 428 (478) *In re Nagularapu Dasarigada*

(87) 14 Cal 355 (356) *Empress v Chandu Govala*

4 (86) 10 Bom 196 (197) *Queen v Havia Tellapa*

5 (91) 2 Weir 426 (426 427)

6 (07) 5 Cri L Jour 416 (417) 3 Low Bur Rul 279 *Emperor v Taw Pyu*

Note 17

1 (14) 1 AIR 1914 Bom 217 (218) 39 Bom 719 16 Cri L Jour 273 (273) *Emperor v Inayak Narayan*

v Agt Po St (Transfer by

(81) 2 Weir 424 (424)

Also see S 19^a Note 6 and S 598 Note 11

2 (1900-09) 1 Low Bur Rul 141 (141) *Crown v San E*

Note 18

1 (1900-09) 1 Low Bur Rul 141 (142) *Crown v San E*

2 (92-96) 1 Upp Bur Rul 241 (243) *Queen Empress v Nga Park Hmtoe*

Note 19

1 (03) 1903 Pan Re No 12 Cr p 32 (33) *Allah Baksh v Emperor*

empowered to pass under s 32 ¹¹², two years² Where he does pass a sentence in excess of those powers an appeal will lie to the Sessions Court under s 408 of the Code and not to the High Court³

350. (1) Whenever any Magistrate, after having heard and recorded

Convicted on or committed on evidence partly recorded by one Magistrate and partly by another the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial.

Provided as follows —

(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re heard,

(b) the High Court, or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial

(2) Nothing in this section applies to cases in which proceedings have been stayed under section 346 or in which proceedings have been submitted to a superior Magistrate under section 349.

¹ Code of 1882 S 350 — Same

Code of 1872 Ss 328 and 329

328 Whenever any Magistrate after having heard part of the evidence in a case ceases to exercise jurisdiction on in such case and is succeeded by another Magistrate who has and who exercises jurisdiction on in such case such last named Magistrate may decide the case on the evidence partly recorded by his predecessor and partly recorded by himself or he may re-summon the witnesses and commence afresh

Provided that the accused person may when the second Magistrate commences his proceedings, demand that the witnesses shall be re-summoned and re-heard in which case the trial shall be commenced afresh

has been materially prejudiced thereby and may order a new trial

Commitments on evidence partly recorded by one officer and partly by another, valid 329 Whenever from any cause a Magistrate making an inquiry under Chap. XV of this Act is unable to complete the proceedings himself, any other Magistrate having jurisdiction to inquire and to commit may complete the case and proceed as if he had recorded all the evidence himself

Code of 1861 — Nil

2 (07) 6 Cri L Jour 289 (290) 4 Low Bur Bul 53 *Aga Pya v Emperor* (In this case one of the accused was sentenced to five years' imprisonment)

(69) 1869 Pun Re No 16 Cr p 31 (3rd) *Dhag Singh v Crown* (Sentence of three years rigorous imprisonment.)

3 (07) 6 Cri L Jour 289 (290) 4 Low Bur Bul 53 *Aga Pya v Emperor*

(73) 1873 Pun Re No. 2 Cr p 3 (3) *Crown v Rahim*

Also see S 34 Note 3 and S 408, Notes 4 and 7

(3) When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub-section (1)

Synopsis

- 1 Legislative changes
- 2 Scope and applicability of the section
- 2a Applicability of the section to summary trials
- 3 'Ceases to exercise jurisdiction'
- 4 'Is succeeded by another Magistrate'
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Applicability to enquiries. See Notes 2 and 10

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Consent of counsel immaterial See Note 2

Death of Magistrate See Notes 2 and 4

Defamation — Exemption of complainant at trial See Note 15

De novo trial and mere re-hearing of witnesses See Note 12

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Evidence wholly taken by another Magistrate See Note 2

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Failure to inform accused of his right — Curable irregularity See Note 11

First class Magistrate — Subordinate to District Magistrate See Note 15

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Mere absence of Magistrate — No cessation of jurisdiction See Note 3

No prejudice See Note 2

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Non-applicability to committals See Note 2

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Object of the section See Note 12

Part heard trials See Note 3

Re-calling not wanted at framing charge — Immaterial See Note 7

Refusal of *de novo* trial — Incurable defect See Note 7

Re-hearing and not reading out of prior statement — See Notes 7 and 12

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Remand merely for further evidence — Section 37 applies See Note 7

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Shifting of jurisdiction — No automatic removal of cases See Note 3

Successive transfers See Note 2

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Successor — No powers under S 203 or S 202 See Note 13

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1. Legislative changes.

Code of 1861 — The Code of 1861 contained no corresponding section and hence, when a Magistrate was transferred pending a part heard case, the same had to be heard

*de novo*¹ But even under that Code, it was held that in inquiries preliminary to commitment it would be waste of time and vexation to the witnesses to insist on their being examined again in all cases²

Code of 1872—Section 329 contemplated cases in which only *part* of the evidence had been recorded by the outgoing Magistrate, it did not contemplate cases where the *whole* of the evidence had been recorded by the first Magistrate³

Under the first proviso to S 329 it would seem that where the accused exercised his option and had the witnesses re-summoned, the trial had to commence afresh

The case of one Magistrate succeeding another pending an enquiry preliminary to commitment was provided for separately by S 329 of the Code of 1872

Code of 1882—The wording of the section was appropriately altered to cover not only cases where a *part* of the evidence had been recorded, but also cases where the *whole* evidence had been recorded by the outgoing Magistrate

While under the Code of 1872 power to set aside the conviction on the ground of prejudice to the accused was given to *all Courts* of appeal and revision and to the District Magistrate, S 350 of the Code of 1882 mentions only the High Court and the District Magistrate having such power

Act 18 [XVIII] of 1923—The words "or in which proceedings have been submitted under S 349 have been added to sub s (2) and this addition makes it clear that such proceedings also are not covered by this section Sub section (3) has been added and sets at rest the question whether the provisions of the section applied to cases where the Magistrate ceases to exercise jurisdiction by reason of the transfer of a case from his file The amendment endorses the view that had been followed already by the majority of Courts that such cases also come within the scope of the section

2 Scope and applicability of the section—It is a general principle of law that only a person who *has heard the evidence in the case* is competent to decide whether the accused is innocent or guilty¹ This section is another exception to that rule and has been introduced purely for administrative convenience² See also S 349, Note 2 It is obviously intended to meet the case of transfers of Magistrates from one district to another, and to prevent the necessity of trying from the beginning all cases which may be part heard at the time of such transfer³ It applies as much to cases in which a Magistrate ceases to exercise jurisdiction by reason of the *transfer of a case* to another Court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of *his own death or transfer* to another post⁴

Section 350 — Note 1

going on leave — District

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2 (67) 7 Suth W R Cr L 3 (4) *In re Shiboo Acorui*

3 See Note 2

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1 (38) 25 AIR 1939 All 536 (537) 11LR (1938) All 791 39 Cri L Jour 978, *Shyama Pado Deb v Sunder Das*

(37) 1937 Mad W N 1245 (1247) *Maddeem Sahib v Emperor*

(37) 24 AIR 1937 Nag 147 (148) 33 Cri L Jour 697 11LR (1937) Nag 538, *Sardars Lal v Emperor*
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3 (93) 20 Cal 870 (873) *Hardwar Singh v Klega Ofha*

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(3) When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub section (1).

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1. Legislative changes
2. Scope and applicability of the section
- 2a Applicability of the section to summary trials
- 3 "Ceases to exercise jurisdiction"
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Code of 1872—Section 323 contemplated cases in which only *part* of the evidence had been recorded by the outgoing Magistrate it did not contemplate cases where the *whole* of the evidence had been recorded by the first Magistrate³

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Section 350 — Note 1

— District

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Note 2

1 (38) 2, AIR 1938 All 636 (537) ILR (1938) All 794 39 Cal L Jour 978 *Shyama Pado Deb v Sunder Das*
[1937] 1037 Mad L J 1038

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- 2a Applicability of the section to summary trials
- 3 "Ceases to exercise jurisdiction"
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Code of 1872—Section 528 contemplated cases in which only *part* of the evidence had been recorded by the outgoing Magistrate, it did not contemplate cases where the *whole* of the evidence had been recorded by the first Magistrate³

Under the first proviso to S 528 it would seem that where the accused exercised his option and had the witnesses re-summoned, the trial had to commence afresh

The case of one Magistrate succeeding another pending an enquiry preliminary to commitment was provided for separately by S 529 of the Code of 1872

Code of 1882—The wording of the section was appropriately altered to cover not only cases where a *part* of the evidence had been recorded, but also cases where the *whole* evidence had been recorded by the outgoing Magistrate

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2 (67) 7 Suth W R Cr L 3 (4) *In re Shiboo Koorul*

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1 (38) 25 AIR 1933 All 536 (537) ILR (1938) All 794 39 Cri L Jour 978 *Shyama Pado Deb v Sunder Das*

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1. Legislative changes
2. Scope and applicability of the section
- 2a Applicability of the section to summary trials
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Death of Magistrate See Notes 2 and 4

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Remand merely for further evidence—Section applies See Note 7

Section 33, Evidence Act applies See Note 7

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(1937) 1027 M.L.J. 1027 W.N. 1027 (1937) 1027 M.L.J. 1027

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Undertaking against *de novo* trial — Repudiated on See Note 7

1. Legislative changes.

Code of 1861 — The Code of 1861 contained no corresponding section and hence, when a Magistrate was transferred pending a part heard case, the same had to be heard

This section does not purport to deal with cases in which process has been issued by a Magistrate who is transferred *before the cases come up for hearing*. But it has been held that a similar rule must prevail and that if jurisdiction may as a matter of course be exercised by the successor after evidence has begun there seems no reason why it should not be exercised where it has not been commenced.¹³

Where a Magistrate is transferred pending a trial but the case is also transferred to his file for completion by him, there is no necessity for a *de novo* trial, there being no change of Magistrates and the judicial mind brought to bear on the case throughout being the same. Neither this section nor any other provides for such a case.¹³

Similarly where a Bench of Magistrates consisting of A and B hears a case but the depositions are recorded by A and subsequently the Bench is dissolved and the case is transferred to A alone sitting singly this section does not apply and he is not bound to re-hear the witnesses already examined by him¹⁴ See also note 14

This section does not permit of a commitment by a Magistrate upon evidence recorded partly by himself and partly by a Magistrate who has not ceased to exercise jurisdiction¹⁵

Section 398 of the Code of 1872 was more restricted in its scope than the present section and did not allow of one Magistrate deciding a case upon evidence *wholly* recorded by another¹⁶ But on principles analogous to s 328, the High Court declined to interfere when the accused was not prejudiced¹⁷

Where evidence has been recorded wholly or partly by a Magistrate who has no jurisdiction and the case is then transferred to the file of a Magistrate having jurisdiction, this section does not apply and such evidence cannot be legally considered by the latter Magistrate the trial must be held *de novo* ¹⁹

2a Applicability of the section to summary trials — The Nagpur High Court holds that this section applies to summary trials¹ The opposite view is held by the Sind Judicial Commissioner's Court² The conflict of views arises from the fact that this section applies to cases where the evidence has been recorded wholly or partially by the first Magistrate whereas the recording of evidence is dispensed with under the law in the case of summary trials According to the Nagpur High Court notwithstanding this if evidence is recorded as a matter of fact in a particular case there is no reason why this section should not apply to it The Sind Court thinks that such evidence does not form part of the record and cannot be taken into consideration under this section

Where a case is summarily tried by a Magistrate and before the trial is complete the case is transferred to another Magistrate having no power to try cases summarily, the latter Magistrate must commence the trial *de novo*. The reason is that a case cannot be tried summarily as to a part of it and in the ordinary way as to the rest of it.²

12 (93) 1893 Rat 652 (654) *Queen Empress v Gotanda*

13 (98) 22 Mad 47 (49) 2 Weir 430 *Queen Empress v* *rs Ahoballamalai*

Also see Note 14

14 (35) 22 AIR 1935 Cal 287 (298, 299) 62 Cal 266 36 Cri L Jour 857 *Abdul Hakim v Foru Mia*

15 (93 1900) 1893 1900 Low Bur Rul 5' *Queen Empress v Nga Shue The*

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¹ *udhu Talua v Emperor*

Note 2a

1 (40) 27 AIR 1910 Nag 239 (240) 189 Ind Cas 689 41 Cri L Jour 781, *Emperor v. Durga Prasad*
(Where only scanty notes of evidence are made they need not be kept on the record and cannot be
relied on)

2 (36) 23 AIR 1936 Sind 40 (40) 37 Cri L Jour 455 *Emperor v Hemandas Deransingh* (Section 350 relates to jurisdiction and an error in jurisdiction is not a mere irregularity)

3 (3^d) 19 AIR 1932 Mad 505 (507); 33 Cri L J 653 55 Mad 79 *Nonner v Dasgupta*

The section is wide enough to cover every trial or enquiry under the Code⁵ and is applicable to summons cases as well as to warrant cases⁶. Its application is however, limited to *Magistrates*, the section does not cover trials before *Sessions Judges*, so that a Sessions Judge is not empowered to try a case in which part of the evidence has not been recorded by himself⁷. Not even the accused's consent will give the Sessions Judge such jurisdiction⁸. But where a sessions trial had not begun but only the preliminary proceedings of swearing in the jury and reading out of the charges to them had been gone through before a change of Judge took place it was held that the successor could conduct the trial without going through the preliminary proceedings over again⁹.

The application of the section is not confined to the single occurrence of one Magistrate succeeding another as may be suggested by the use of the word 'second' in proviso (a). On principle if a second Magistrate can act on evidence recorded by his predecessor there seems to be no reason why a third Magistrate should not act on evidence recorded by his predecessors¹⁰.

Nor is there any distinction between cases where there has been a change of Magistrates in the course of the enquiry in the original Court and cases where the inquiry has been closed by one Magistrate in the original Court by an order of discharge and then re opened by the Sessions Judge when another Magistrate has succeeded¹¹. See also Note 5

5 (10) 11 Ori L Jour 440(400) 7 Ind Cas 54 37 Cal 812 *Ann Sleikh v Jitu Sleikh* (Proceeding under S 145 is an enquiry and S 350 applies)

(08) 9 Cri L Jour 278 (279) 1 Ind Cas 336 (Cal) *Ali Mahomed v Tarah Chandra* (Do)

(24) 11 AIR 1924 Pat 786 (786 787) 25 Cri L Jour 89 *Sondal Singh v Govind Singh* (Sect on 350 applies in part to proceedings under S 145)

(79) 4 Cal L Rep 452 (454) *Buroda Kant v Korumudda* (Applies to security proceedings)

(25) 12 AIR 1925 Oudh 228 (229) 27 Oudh Cas 323 25 Cri L Jour 1380 *Day Nath v Emperor* (Do)

(07) 6 Cri L Jour 1 (a) 11 Cal W N 789 *Wahid Ali Khan v Emperor* (Do)

Applies to enquiries under

Decided with reference to

Day Nath v Emperor

7 (81) 3 Mad 112 (113) 2 Weir 430 *Tarada Daladu v Queen*

(94) 7 C P L R Cr 1 (2) *Empress v Kaluram*

(74) 21 Suth W R Cr 47 (47) *Queen v Gopi Noshyo*

(90) 1890 Pun Re No 1 Cr p 1 (2) *Duta Singh v Empress* (Such defect cannot be cured by S 537)

(19) 13 Cri L Jour 861 (862) 35 All 63 17 Ind Cas 797 *Badri Prasad v Emperor*

(02) 26 Bom 50 (53) 3 Bom L R 558 *King Emperor v Sakharam Pandurang*

(75) 23 Suth W R Cr 59 (60) *Queen v Righoonath Dass*

[See (42) 09 AIR 1942 Sind 122 (130) 11 R (1942) Kar 259 44 Cri L Jour 367 205 Ind Cas 309]

8

(9)

Also see S 286 Note 2

10 (39) 25 AIR 1938 Nag 288 (289) 39 Cri L Jour 815 1 L R (1939) Nag 79 *Moti Shankarlal v Keshrichand* (Each transfer gives accused fresh chance of exercising his right under proviso to S 350)

—Word 'predecessor' means predecessors where there are more than one)

(24) 11 AIR 1924 Mad 227 (228) 47 Mad 245 25 Cri L Jour 566 *Govindan Nair v Krishnan Nair*

11 (31) 18 AIR 1931 Mad 488 (489) 54 Mad 512 32 Cri L Jour 635 *Lakshmireddy v Mumtaz Reddy*

(27) 14 AIR 1927 Pat 5 (6) 27 Cri L Jour 1125 *Daroga Singh v Emperor* (Case remanded by appellate Court for further evidence — Transfer of Magistrates in the meanwhile — New Magistrate is bound to hold *de novo* trial at the request of the accused)

to act on the evidence recorded by his predecessor or partly by his predecessor and partly by himself¹

The undermentioned cases² which held that when a case is remanded for further enquiry to another Magistrate by a Court of revision, the Magistrate must hear the evidence over again are not really restrictive of the scope of S 350 but are based upon the interpretation therein placed on the words "further inquiry" in S 436

But he cannot recommence the enquiry and at the same time rely upon evidence already recorded³

A statement of an accused was recorded by a Magistrate who was thereafter transferred. The case was subsequently committed to sessions by his successor. It was held that the statement though not recorded by the committing Magistrate could nevertheless, in view of S 350 be admitted in evidence in the sessions case under S 237⁴

6 Delivery of judgment of predecessor — Section 350 gives a Magistrate jurisdiction under certain circumstances to decide a case upon evidence recorded by his predecessor but does it give him a jurisdiction to deliver a judgment written by the latter? According to the Calcutta High Court it does not, the reason being that the Magistrate who makes himself responsible for the judgment, must always be the Magistrate who, before delivery thereof, had considered the evidence on record fairly and had also listened to the arguments, if any, of the accused¹. The Rangoon High Court also agrees with this view but points out that if there is no demand for a new trial by the accused the succeeding Magistrate may take the judgment of his predecessor and compare it with the evidence recorded in the case and if he finds that it expresses what he himself would have decided in the case he may deliver it as his own judgment². The Nagpur High Court has also followed the view of the Calcutta High Court³

The High Court of Madras and the Chief Court of Oudh take the opposite view, viz., that there is no irregularity in a Magistrate's pronouncing the judgment of his predecessor⁴

Note 5

- 1 (38) 25 AIR 1938 Mad 742 (743) 39 Cri L Jour 628 *In re Harichandra Reddy*
 (12) 9 All L Jour 3n (3n)
 (21) 8 AIR 1921 All 122 (122) 22 Cri L Jour 406 *Rani Devi v Govind Sahai* (Evidence recorded

(Case withdrawn by Sub divisional Magistrate from Bench of Magistrates after some witnesses for prosecution had been examined — Sub-divisional Magistrate discharging accused on ground that no evidence had been produced — Held that the Sub-divisional Magistrate ought to have considered the evidence

- (1934) 2 Low Bur Bul 17 (18) *King Emperor v Nga Pe*

Also see S 348 Note 11

- 4 (26) 13 AIR 1926 Lah 271 (271) 7 Lah 70 27 Cri L Jour 637, *Ghulam Jannet v Emperor*
 Also see S 237, Note 3

Note 6

Maung Mya Thi (Succeeding Magistrate delivering judgment written by his predecessor without adopting it as his own judgment or signing or dating it — Defect is not mere irregularity curable under Section 537)

3 "Ceases to exercise jurisdiction." — Where a Magistrate is transferred from one district to another, his jurisdiction ceases in the former district when the transfer takes effect,¹ and he can no longer be held to be the presiding officer of the Court from which he was transferred.² With his transfer his office *qua* the exercise of jurisdiction in any particular case in which he was engaged is vacated.³

But the words "ceases to exercise jurisdiction therein" do not mean that the Magistrate should have ceased to occupy the *particular post*, but mean that he should have ceased to exercise jurisdiction *in the enquiry or trial*.⁴ Thus, the words would apply even to cases where the Magistrate's connection with a part heard case is terminated by the transfer of the case to the file of another Magistrate.⁵ See Note 17.

A mere shifting of local areas from the jurisdiction of one Magistrate to that of another does not automatically remove cases from the file of the former, and the former will not automatically cease to have jurisdiction over such cases.⁶

Nor does a Magistrate cease to have jurisdiction in a case merely by absenting himself from a subsequent hearing.⁷

4. "Is succeeded by another Magistrate." — When a new officer is appointed to any magisterial office he becomes the successor of the outgoing Magistrate.¹ Further, when a case is transferred from the file of one Magistrate to that of another, the former is succeeded by the latter in the sense that the latter exercises the jurisdiction over the case which had been exercised by the Magistrate who had begun it.² See Note 17.

On the death of a Magistrate empowered under s 20 of the Code, the District Magistrate, being the only remaining Magistrate in the district having powers under that section, took upon his file a case which was being tried by the deceased Magistrate. It was held that the District Magistrate must be regarded as having *succeeded* the deceased within the meaning of this section.³ See also Note 14.

5. "May act on the evidence so recorded." — When the accused persons do not insist upon a *re hearing* of the witnesses, a Magistrate succeeding another is entitled

Note 3

- 1 (81) 3 All 583 (565, 506) 1881 All W N 37 (FB) *Empress of India v Anand Sarup* (Spankie, J. dissenting)
 (02) 15 C P L R Cr 16 (16) *Emperor v Dhondu Singh* (Order passed by a Magistrate after his successor had taken charge set aside)
 (96) 19 All 114 (115) 1896 All W N 195, *Balwant v Kishen* (Da)
 (13) 14 Cri L Jour 239 (240) 19 Ind Cas 335 (All), *Hira Lal v Emperor*
 2. (24) 11 AIR 1924 All 770 (771) 46 All 851 25 Cri L Jour 1277, *Emperor v Baldeo*
 3 (10) 11 Cri L Jour 440 (440) 7 Ind Cas 54 37 Cal 812 *Anu Sheikh v Jitu Sheikh*
 4 (12) 13 Cri L Jour 218 (220) 14 Ind Cas 314 39 Cal 781, *Kudrutullah v Emperor* (Dissenting from 12 All 86)
 (06) 4 Cri L Jour 140 (142) 1906 All W N 201 3 All L Jour 825 *Emperor v Sajjad Husain* (Trial commenced by the same Magistrate while acting as District Magistrate but completed as first class

Emperor

Chandra v

Emperor

- (14) 1 AIR 1914 All 45 (46) 15 Cri L Jour 354 36 All 315, *Emperor v Nankhua*
 6 (12) 13 Cri L Jour 203 (204) 14 Ind Cas 203 (All), *Mt Mithani v Emperor*
 7 (23) 10 AIR 1923 Oudh 163 (163) 25 Cri L Jour 193, *Brij Bhudan v Ram Kirat*

Note 4

- 1 (93) 1893 Rat 652 (651), *Queen Empress v Govinda*
 (09) 9 Cri L Jour 278 (280) 1 Ind Cas 336 (Cal), *Ali Mahomed Khan v, Tarak Chandra* (When there is only one Deputy Magistrate and he is transferred it is reasonable to regard the new Magistrate as his successor)
 2 (10) 11 Cri L Jour 440 (440) 7 Ind Cas 54 37 Cal 812 *Anu Sheikh v. Jitu Sheikh*
 3 (17) 4 AIR 1917 Nag 63 (64) 19 Cri L Jour 705, *Gorelal v Emperor*.

to act on the evidence recorded by his predecessor or partly by his predecessor and partly by himself¹

The undermentioned cases² which held that when a case is remanded for further enquiry to another Magistrate by a Court of revision, the Magistrate must hear the evidence over again are not really restrictive of the scope of S 350 but are based upon the interpretation therein placed on the words 'further inquiry' in S 436

But he cannot recommence the enquiry and at the same time rely upon evidence already recorded³

A statement of an accused was recorded by a Magistrate who was thereafter transferred. The case was subsequently committed to sessions by his successor. It was held that the statement though not recorded by the committing Magistrate, could nevertheless, in view of S 350 be admitted in evidence in the sessions case under S 287⁴

6 Delivery of judgment of predecessor — Section 360 gives a Magistrate jurisdiction under certain circumstances to *decide* a case upon evidence recorded by his predecessor but does it give him a jurisdiction to deliver a judgment written by the latter? According to the Calcutta High Court it does not the reason being that the Magistrate who makes himself responsible for the judgment, must always be the Magistrate who, before delivery thereof, had considered the evidence on record fairly and had also listened to the arguments, if any, of the accused⁵. The Rangoon High Court also agrees with this view but points out that if there is no demand for a new trial by the accused the succeeding Magistrate may take the judgment of his predecessor and compare it with the evidence recorded in the case and if he finds that it expresses what he himself would have decided in the case he may deliver it as his own judgment⁶. The Nagpur High Court has also followed the view of the Calcutta High Court⁷

The High Court of Madras and the Chief Court of Oudh take the opposite view, i.e., that there is no irregularity in a Magistrate's pronouncing the judgment of his predecessor⁸

Note 5

- 1 (38) 25 AIR 1938 Mad 742 (743) 39 Cri L Jour 828 *In re Harichandra Reddy*
 (19) 9 All L Jour 8n (3n)
 (21) 8 AIR 1921 All 122 (122) 22 Cri L Jour 406 *Ram Devi v Gound Sahai* (Evidence recorded

had been examined — Sub-divisional Magistrate discharging accused on ground that no evidence had been produced — Held that the Sub-divisional Magistrate ought to have considered the evidence

- 4 (26) 13 AIR 1926 Lah 271 (271) 7 Lah 70 27 Cri L Jour 627, *Ghulam Jannet v Emperor*
 Al o see S 287, Note 3

Note 6

Section 531)

- (31) 18 AIR 1931 Cal 637 (638) 33 Cri L Jour 60, *Jayashchandra v Surendra Mohan*
 3 (42) 1942 Nag L Jour 302 (302) *Emperor v Phulchand*
 4 (08) 7 Cri L Jour 459 (459) 18 Mad L Jour 197 *In re Sanjarn Pillai*
 (33) 20 AIR 1933 Mad 251 (251) 34 Cri L Jour 117 *In re Chinn Somappa*

At the same time the Madras High Court makes it clear that a Magistrate cannot be compelled to pronounce a judgment of his predecessor and thereby adopt it as his own.⁵ The Allahabad High Court has considered the procedure as being at most an irregularity curable under S 537 in the absence of prejudice to the accused.⁶ The Lahore High Court has held a similar view in the undermentioned cases.⁷

The Madras and Lahore High Courts have held in the cases cited below⁸ that even where the accused demands a re-hearing the Magistrate is entitled to refuse his request and deliver the judgment written by his predecessor. This view proceeds on the ground that trial must be deemed to have ended on the writing and signing of the judgment by the first Magistrate and the mere pronouncing of the judgment is no part of the trial. But in the undermentioned decision⁹ the Madras High Court considered it very doubtful if a re-hearing could be refused if it was demanded by the accused. The Oudh Chief Court has also held that a re-hearing cannot be refused if it is demanded by the accused on the ground of there having been a change in the Magistrates.¹⁰

There is however certainly no provision in the Code for delivery of a judgment written by a Magistrate *after* he had ceased to have jurisdiction in the district.¹¹ A judgment so written is in fact no judgment at all.¹²

7 Proviso (a) — The discretion given to a Magistrate by sub s. (1) to act or not to act in a trial upon evidence recorded by his predecessor is controlled by this proviso.¹ Under this proviso the accused is entitled to demand that witnesses already examined be re-called and re-heard.² As to whether he is entitled to demand that witnesses examined on commission be re-examined see Note 10. Refusal by a Magistrate to re-summon

(25) 12 AIR 1925 Oudh 0° (63) 28 Oudh Cas 109 25 Cri L Jour 1075 *Chandika Prasad v Emperor*
[See also (17) 4 AIR 1917 Mad 340 (341) 49 Mad 108 17 Cri L Jour 166 (167) *In re Savarimuthu Pillai*: (Whether it is legal for a Magistrate to pronounce his predecessor's judgment in face of demand for *de novo* trial doubted)]

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7 (40) 27 AIR 1940 Lah 289 (290) 41 Cri L Jour 803 *Harnam Singh v Emperor*
(39) 28 AIR 1939 Lah 21 (22) 1LR (1938) Lah 567 40 Cri L Jour 289 *Gian Singh v Amar Singh*
(Magistrate signing judgment written by him in absence of accused and keeping it for pronouncement by his successor — Judgment is delivered with a S 366 (3) and the failure to pronounce it is a mere irregularity)

8 (39) 28 AIR 1939 Lah 21 (22) 40 Cri L Jour 289 1LR (1938) Lah 567 *Gian Singh v Amar Singh*

Also see S 12 Note 7 and S 366 Note 3

Note 7

1 (37) 24 AIR 1937 Nag 147 (148) 38 Cri L Jour 697 1LR (1937) Nag 538 *Sardari Lal v Emperor*
(30) 17 AIR 1930 Nag 59 (60) 31 Cri L Jour 282 *Emperor v J B Sane* (The right to be exercised by the accused under this proviso can be exercised only at the time when second Magistrate commences his proceedings)

(34) 21 AIR 1934 Oudh 324 (325) 35 Cri L Jour 1147 *Manzoor Ali v Abdul Salam*

2 (37) 24 AIR 1937 All 438 (439) 38 Cri L Jour 604 *Vahtab Singh v Emperor* (This applies to inquiries under S 110 also)

(1900-02) 1 Low Bur Rul 139 (140) *U Waradama v Crown*

witness as required by the accused is a defect which is not curable by S 537³. The Madras High Court has however held that proviso (b) applies to such cases and that the proceedings are not vitiated in absence of proper law⁴. But subject to giving effect to this right of the accused the option lies with the Magistrate to start the inquiry or trial all over again or not⁵. The accused has no right to insist that there shall not be a *de novo* trial or inquiry and if the Magistrate begins the proceedings anew against the wishes of the accused, the Magistrate's action is not without jurisdiction⁶. In such a case no question of prejudice to the accused arises⁷.

Even though in the first instance the accused may demand a re-examination of witnesses he can change his mind and say that he wishes only certain witnesses to be examined⁸. But there is nothing in this section which prohibits the Magistrate from exercising his discretion of examining all the witnesses again, merely because the accused has exercised his right under this proviso⁹.

The proviso does not apply unless the accused asks for a re-hearing¹⁰ and where a trial is impeached on the ground that a re-hearing was refused, it is insufficient to make a general allegation of such refusal, without any specific allegation as to the date when and the person to whom the application was made, and the order thereon¹¹.

The mere fact that at the time of the framing of the charge the accused stated that he did not wish the witnesses to be recalled should not deter the Magistrate's successor from acting under this section¹² and if a case is remanded for further inquiry, and in the meanwhile there is a change of Magistrates the new Magistrate is bound to accede to the accused's request under this proviso notwithstanding that the remand had been made only for recording further evidence¹³.

If the accused or his pleader in applying for a transfer undertakes not to exercise his right under this proviso and he repudiates such undertaking, the Magistrate to whom

3 (98) 25 Cal 663 (868) 2 Cal W N 465 *Gomer Sirda v Queen Empress* (The right of accused to recall some witnesses is not lost by his having previously made an application for the attendance of witnesses)

(03) 1903 Pun Re No 3 Cr, p 8 (9 10) *Amir Khan v Emperor* (Magistrate not asking the accused whether he wants the witnesses to be recalled is an irregularity curable by S 537)

(18) 5 AIR 1918 Low Bur 63 (63) 9 Low Bur Rul 92 19 Cri L Jour 321, *Hnin Yin v Than Pe*

(25) 12 AIR 1925 All 245 (245) 25 Cri L Jour 651, *Basanti v Emperor* (Case under U P Municipalities Act)

(21) 8 AIR 1921 All 35 (36) 22 Cri L Jour 668, *Chajju v Emperor* (Order of acquittal passed after refusal is void in law)

[See also (39) 25 AIR 1939 Oudh 212 (213) 39 Cri L Jour 851 14 Luck 172 *Sheo Ram v Emperor*]

4 (38) 25 AIR 1938 Mad 724 (725) 39 Cri L Jour 932 *In re Pamamuni Reddi*

(37) 1937 Mad W N 1245 (1247) *Nadeem Sahib v Emperor*

5 (36) 23 AIR 1936 Nag 153 (154) 37 Cri L Jour 983 1LR (1936) Nag 92, *Tukaram v Emperor*

6 (38) 25 AIR 1938 Oudh 218 (221) 39 Cri L Jour 859 14 Luck 156, *Gur Dayal v Sheo Dularey*

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(30) 17 AIR 1930 Nag 59 (60) 31 Cri L Jour 282 *Emperor v J B Sane*

7 (38) 25 AIR 1938 Oudh 218 (221) 39 Cri L Jour 859 14 Luck 156 *Gur Dayal v Sheo Dularey*

8 (41) 28 AIR 1941 Mad 825 (825) 1 L R (1942) Mad 410 43 Cri L Jour 218 197 Ind Cas 583 *In re Palayan*

9 (41) 28 AIR 1941 Mad 825 (825) 1 L R (1942) Mad 410 43 Cri L Jour 218 197 Ind Cas 583 *In re Palayan*

10 (18) 5 AIR 1918 All 279 (281 282) 40 All 307 19 Cri L Jour 378 *Ram Dass v Emperor*

(20) 7 AIR 1920 Pat 693 (694) 22 Cri L Jour 89, *Rupa Singh v Emperor*

11 (23) 10 AIR 1923 Cal 320 (320) 23 Cri L Jour 509, *Ans Mandal v Girish Chandra*

12 (12) 14 Cri L Jour 175 (176) 19 Ind Cas 175 1912 Upp Bur Rul 151, *Nga Po Tein v Emperor*.

13. (27) 14 AIR 1927 Pat 6 (6) 27 Cri L Jour 1125, *Daroga Singh v Emperor*

the case is transferred is bound to consider the accused's application for re-summoning and re-hearing the witnesses and is not controlled by any directions in this regard by the Court transferring the case to him¹⁴

The accused's right is to have the witnesses re-summoned and re-heard and not merely that their former statements be read out to him¹⁵. He cannot be asked to pay the expenses of re-summoning the witnesses¹⁶

The right conferred by this proviso is a valuable one and is as fundamental as the right to be heard in one's own defence and the right to cross-examine. The accused can of course waive the right if he wants, but if he does not want to waive it, then he can insist that the witnesses be re-summoned and re-heard. That is the force of the word "demand"¹⁷

The extent of the right of the accused is only to have the witnesses re-called and re-examined¹⁸. He is not entitled to demand a re-trial as such¹⁹. It has been held that the accused is not entitled under the proviso to claim a re-hearing on the ground that "his pleader's arguments were not heard by the previous Magistrate"²⁰. Where, after a charge is framed in the trial of a warrant case the case comes before a new Magistrate and the witnesses are re-summoned and re-heard as required by the accused, he is not entitled to have the prosecution witnesses re-called again for further cross-examination²¹. Where the Magistrate has not exercised his option of re-summoning the witnesses and recommencing the inquiry or trial, it is open to an accused who has demanded the re-summoning and re-hearing of witnesses under this proviso, to ask that the evidence of any particular witness should not be taken afresh²². Where witnesses for prosecution are re-summoned for examination at the instance of the accused under this proviso, the order in which they should be examined in chief rests with the prosecution²³

14 (18) 5 AIR 1918 All 279 (291) 40 All 807 19 Cri L Jour 378, *Ram Das v Emperor* (Obiter)
(18) 5 AIR 1918 Nag 22 (26) 19 Cri L Jour 857, *Janglal v Emperor* (Expression of intention by counsel in High Court not to claim *de novo* trial)

[See also (80) 17 AIR 1930 Lah 163 (170) 31 Cri L Jour 237, *Gowardhan Dass v Abbas Ali* (Doubtful if Magistrate can impose condition while ordering transfer)]

15 (20) 7 AIR 1920 Lah 344 (344) 22 Cri L Jour 119, *Mangal Singh v Emperor*

(18) 5 AIR 1918 Low Bur 63 (63) 9 Low Bur Rul 92 19 Cri L Jour 321 *Hsin Yin v Than Pe*
[See also (45) 32 AIR 1945 Nag 207 (208) 1 L R (1945) Nag 605 222 Ind Cas 310, *Nathu Balajee v Emperor* (Merely allowing witness to be cross-examined is not enough)]

(45) 32 AIR 1945 Nag 127 (129) 1 L R (1945) Nag 419 222 Ind Cas 31, *Mahamudkhan v Emperor*. (Further cross-examination or a reading of, or a summary of the previous evidence will not do)]

16 (15) 2 AIR 1915 Low Bur 107 (107) 15 Cri L Jour 687, *Elias v Ezra Kiel*

(35) 22 AIR 1935 Rang 108 (108) 13 Rang 297 36 Cri L Jour 353, *Maung Chit Tay v Maung Tan Nyun* (Magistrate should, under discretion conferred by S 544 order the expenses of witnesses to be paid by the Government)

Also see S 544 Note 1

17 (45) 32 AIR 1945 Nag 207 (208) 1 L R (1945) Nag 605 222 IC 310 *Nathu Balajee v Emperor*
re

v Emperor

a Prasad v

Emperor (But it is submitted that the question as to the ground on which the accused applies for

examination of

witness not wanted by accused is only irregularity which will not vitiate proceedings in absence of prejudice to accused)

This section in no way affects the provisions of s 33 of the Evidence Act and if a *de novo* trial is conducted but one of the witnesses cannot be re-summoned because he is dead his evidence may nevertheless be admitted under s 33 of the Evidence Act²⁴

8 Application for re hearing when to be made — The time when the accused may apply under proviso (a) is when the second Magistrate commences his proceedings that is when the case is called on with the Magistrate on the Bench and the accused in the dock and the representatives for the prosecution and for the defence (if the accused are defended) are present in the Court for the hearing of the case¹

The option given to the accused can be exercised by him only once² An accused who has asked for a re hearing of the witnesses can change his mind and leave the Court free to exercise its statutory option to act upon the evidence already recorded³

9 Who can demand de novo trial — The proviso is entirely in the interests of the accused and it is for him to say who is to be re-summoned and re heard. The complainant has no privilege under s 350 and cannot demand a re hearing¹

10 Proviso, if applicable to inquiries — This proviso is limited to criminal trials and is not applicable to inquiries¹ Thus it does not apply to inquiries preparatory to a commitment² or to proceedings in warrant cases before a charge is framed such

24 (27) 14 AIR 1937 Lah 332 (333) 8 Lah 570 28 Cri L Jour 451 *Lekhal v Emperor* (Disapproving of AIR 1922 Lah 49 3 Lah 115 23 Cri L Jour 330)

Note 8

1 (98) 25 Cal 863 (865) 2 Cal W N 465 *Gomer Sirda v Queen Empress*
 (29) 9 AIR 1909 Lah 49 (54) 3 Lah 115 23 Cri L Jour 330 *Sahib Din v Emperor*
 [See (37) 24 AIR 1937 Bom 55 (56) 38 Cri L Jour 200 1 L R (1937) Bom 211 *Dagdu Gound Set v Punja Vedu*]
 2 (80) 17 AIR 1930 Nag 59 (60) 31 Cri L Jour 282 *Emperor v J B Sane*

(23) 12 AIR 1925 Mad 317 (317) 26 Cri L Jour 596 *In re Vudigalapudis Gadu*
 [But see (30) 17 AIR 1930 Nag 59 (60) 31 Cri L Jour 282 *Emperor v J B Sane*]

Note 9

1 (38) 25 AIR 1938 Oudh 218 (220) 39 Cri L Jour 858 14 Luck 156 *Gur Dayal v Sheo Dularey* (Though he can put before the Magistrate reasons why the proceedings should be recommenced—Obiter)
 (25) 12 AIR 1925 Mad 317 (317) 26 Cri L Jour 526 *In re Vudigalapudigadu* (Complainant cannot insist on the accused to have a *de novo* trial.)
 (26) 13 AIR 1926 Mad 815 (816) 27 Cri L Jour 659 *In re Arulay* (If the accused declines to act under sub-cl (1) (a) the complainant must suffer any disadvantage following upon the Magistrate's choosing to proceed on the evidence recorded.)

Note 10

1 (44) 31 AIR 1944 Bom 14 (14) 45 Cri L Jour 287 210 Ind Cas 516 (DD) *Ramchandra Narlar v Emperor*
 (36) 23 AIR 1936 Nag 153 (154) 37 Cri L Jour 983 1 L R (1936) Nag 92 *Tukaram v Emperor*
 (36) 23 AIR 1936 Nag 220 (221) 38 Cri L Jour 15 1 L R (1937) Nag 135 *Emperor v Ganpal*
 (23) 10 AIR 1923 Cal 483 (484) 24 Cri L Jour 569 *Sadak Resa v Satiendra Nath Roy* (Does not apply to inquiries under s 145)
 (20) 7 AIR 1920 Mad 337 (342 344) 43 Mad 511 21 Cri L Jour 402 (FB) *Venkatannayya v Emperor* (Section 117 (2) Cr P C does attract proviso (a) to s 350 and the latter applies to case under s 107 Cr P C)
 (24) 11 AIR 1924 Pat 746 (787) 25 Cri L Jour 89 *Sonds Singh v Govind Singh* (Does not apply to inquiries under s 145 Cr P C)
 (31) 18 AIR 1931 Mad 488 (489) 54 Mad 512 32 Cr L J 635 *Lakshmi Reddy v Muni Reddy* (Obiter)
 [See (42) 29 AIR 1942 Mad 221 (221) 43 Cri L Jour 278 197 Ind Cas 799 *In re Kumaraswamy Kalunga Rayar*]

Also see s 145 Note 39

2 (38) 42 Cal W N 224 (224) *Ashutosh Sen v Emperor* (The Magistrate has however got a discretion to exercise whether he will act on the evidence recorded by his predecessor or he will re-summon any of the witnesses before he frames a charge against the accused.)

the case is transferred is bound to consider the accused's application for re-summoning and re-hearing the witnesses and is not controlled by any directions in this regard by the Court transferring the case to him¹⁴

The accused's right is to have the witnesses re-summoned and *re heard* and not merely that their former statements be read out to him¹⁵ He cannot be asked to pay the expenses of re-summoning the witnesses¹⁶

The right conferred by this proviso is a valuable one and is as fundamental as the right to be heard in one's own defence and the right to cross-examine. The accused can of course waive the right if he wants but if he does not want to waive it then he can insist that the witnesses be re-summoned and re-heard. That is the force of the word *demand*¹⁷

The extent of the right of the accused is only to have the *witnesses re called and re examined*¹⁸ He is not entitled to demand a re-trial as such¹⁹ It has been held that the accused is not entitled under the proviso to claim a re-hearing on the ground that his *pleader's arguments* were not heard by the previous Magistrate²⁰ Where after a charge is framed in the trial of a warrant case the case comes before a new Magistrate and the witnesses are re-summoned and re-heard as required by the accused he is not entitled to have the prosecution witnesses re-called *again* for further cross-examination²¹ Where the Magistrate has not exercised his option of re-summoning the witnesses and recommencing the inquiry or trial it is open to an accused who has demanded the re-summoning and re-hearing of witnesses under this proviso to ask that the evidence of any particular witness should not be taken afresh²² Where witnesses for prosecution are re-summoned for examination at the instance of the accused under this proviso the order in which they should be examined in chief rests with the prosecution²³

14 (18) 5 AIR 1918 All 278 (281) 40 All 307 19 Cr L Jour 378 *Ram Das v Emperor* (Obster)
(18) 5 AIR 1918 Nag 22 (26) 19 Cr L Jour 657 *Jangulal v Emperor* (Expression of intent on by counsel in High Court not to claim *de novo* trial)
[See also (30) 17 AIR 1930 Lah 168 (170) 31 Cr L Jour 257 *Gowardham Dass v Abbas Ali* (Doubtful if Magistrate can impose condition on whole order of transfer)]

15 (20) 7 AIR 1920 Lah 344 (344) 22 Cr L Jour 119 *Mangal Singh v Emperor*
(18) 5 AIR 1918 Low Bur 63 (63) 9 Low Bur 92 19 Cr L Jour 891 *Hnin Yin v Tian Pe*
[See also (45) 32 AIR 1945 Nag 207 (208) 1 LR (1945) Nag 605 222 Ind Cas 310 *Nathu Dalajee v Emperor* (Merely allowing witness to be cross-examined is not enough)
(45) 32 AIR 1945 Nag 127 (129) 1 LR (1945) Nag 419 222 Ind Cas 31 *Mahamudkhan v Emperor* (Further cross-examination on or a reading of or a summary of the previous evidence will not do)]

16 (15) 2 AIR 1915 Low Bur 107 (107) 15 Cr L Jour 687 *Elias v Esa Kisel*
(30) 22 AIR 1935 Rang 108 (109) 13 Rang 297 36 Cr L Jour 903 *Maung Chit Tay v Maung Tun Nyu* (Magistrate should under direction conferred by S 544 order the expenses of witnesses to be paid by the Government)
Also see S 544 Note 1

17 (45) 32 AIR 1945 Nag 207 (208) 1 LR (1945) Nag 605 222 IC 310 *Nathu Dalajee v Emperor*
18 (38) 25 AIR 1933 Oudh 218 (221) 39 Cr L Jour 658 14 Luck 158 *Gur Dajal v Sheo Dularay*
(36) 23 AIR 1936 Nag 153 (154) 37 Cr L Jour 933 1 LR (1936) Nag 90 *Tukaram v Emperor*
(33) 20 AIR 1933 Mad 841 (842) 35 Cr L Jour 79 *Ramanna v Emperor*
19 (36) 23 AIR 1936 Nag 153 (154) 37 Cr L Jour 933 1 LR (1936) Nag 90 *Tukaram v Emperor*
(35) 22 AIR 1935 Mad 318 (319) 35 Cr L Jour 1965 *Mudda Veerappa v Emperor*
20 (35) 22 AIR 1935 Mad 318 (319) 35 Cr L Jour 1965 *Mudda Veerappa v Emperor*
21 (35) 22 AIR 1935 Mad 318 (319) 35 Cr L Jour 1965 *Mudda Veerappa v Emperor*
22 (35) 22 AIR 1935 Mad 318 (319) 35 Cr L Jour 1965 *Mudda Veerappa v Emperor*
23 (35) 22 AIR 1935 Mad 318 (319) 35 Cr L Jour 1965 *Mudda Veerappa v Emperor*
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(33) 20 AIR 1933 Mad 841 (842) 35 Cr L Jour 79 *In re Ramanna*
22 (35) 22 AIR 1935 Mad 318 (319) 36 Cr L Jour 1265 *Veerappa v Emperor* (But examination of witness not wanted by accused is only irregularity which will not vitiate proceedings in absence of prejudice to accused)

23 (31) 21 AIR 1934 Nag 209 (211) 35 Cr L Jour 41 *Ibrahim v Emperor*

This section in no way affects the provisions of s 33 of the Evidence Act, and if a *de novo* trial is conducted but one of the witnesses cannot be re-summoned because he is dead his evidence may nevertheless be admitted under s 33 of the Evidence Act²⁴

8. Application for re-hearing when to be made.—The time when the accused may apply under proviso (a) is when the second Magistrate commences his proceedings that is when the case is called on, with the Magistrate on the Bench and the accused in the dock and the representatives for the prosecution and for the defence (if the accused are defended) are present in the Court for the hearing of the case¹

The option given to the accused can be exercised by him only once² An accused who has asked for a re-hearing of the witnesses can change his mind and leave the Court free to exercise its statutory option to act upon the evidence already recorded³

9 Who can demand de novo trial—The proviso is entirely in the interests of the accused and it is for him to say who is to be re-summoned and re-heard. The complainant has no privilege under s 350 and cannot demand a re-hearing¹

10 Proviso, if applicable to inquiries—This proviso is limited to criminal trials and is not applicable to inquiries¹ Thus it does not apply to inquiries preparatory to a commitment or to proceedings in warrant cases before a charge is framed such

24 (27) 14 AIR 1927 Lah 332 (333) 6 Lah 570 26 Cri L Jour 451 *Lohal v Emperor* (Disapproving of AIR 1922 Lah 49 3 Lah 115 23 Cri L Jour 330)

Note 8

1 (98) 25 Cal 663 (865) 2 Cal W N 465 *Gomer Sirda v Queen Empress*
(22) 9 AIR 1922 Lah 49 (54) 3 Lah 115 23 Cri L Jour 330 *Sahib Din v Emperor*
[See (37) 24 AIR 1937 Bom 55 (56) 36 Cri L Jour 250 1 L R (1937) Bom 211, *Dagdu Govind Set v Funga Vedu*]

2 (30) 17 AIR 1930 Nag 59 (60) 31 Cri L Jour 282 *Emperor v J B Sane*
3 (36) 25 AIR 1938 Nag 288 (289) 39 Cri L Jour 615 1 L R (1939) Nag 79 *Moti Shankarlal v Keshrichand* (Accused claiming *de novo* trial before second Magistrate but waiving it before the third Magistrate—Third Magistrate can act on the evidence recorded by the first Magistrate)
(26) 13 AIR 1926 Mad 615 (816) 27 Cri L Jour 659 *In re Arulay*
(25) 12 AIR 1925 Mad 317 (317) 26 Cri L Jour 526 *In re Vudigalapudai Gadu*
[But see (30) 17 AIR 1930 Nag 59 (60) 31 Cri L Jour 282 *Emperor v J B Sane*]

Note 9

1 (38) 25 AIR 1938 Oudh 218 (220) 39 Cri L Jour 858 14 Luck 156 *Gur Dayal v Sheo Dularey* (Though he can put before the Magistrate reasons why the proceedings should be recommenced—Obiter)
(25) 12 AIR 1925 Mad 317 (317) 26 Cri L Jour 526 *In re Vudigalapudigadu* (Complainant cannot insist on the accused to have a *de novo* trial.)
(26) 13 AIR 1926 Mad 815 (816) 27 Cri L Jour 659 *In re Arulay* (If the accused declines to act under sub-cl (1) (a) the complainant must suffer any disadvantage following upon the Magistrate's choosing to proceed on the evidence recorded)

Note 10

1 (44) 31 AIR 1944 Bom 14 (14) 45 Cri L Jour 287 210 Ind Cas 516 (DB) *Ramchandra Narhar v Emperor*
(36) 23 AIR 1936 Nag 153 (154) 37 Cri L Jour 963 1 L R (1936) Nag 92 *Tukaram v Emperor*
(36) 23 AIR 1936 Nag 270 (221) 38 Cri L Jour 15 1 L R (1937) Nag 135 *Emperor v Ganpat*
(23) 10 AIR 1923 Cal 483 (484) 24 Cri L Jour 569, *Sadak Pesa v Sachindra Nath Roy* (Does not apply to inquiries under s 145)
(20) 7 AIR 1920 Mad 337 (342 344) 43 Mad 511 21 Cri L Jour 402 (FB) *Venkatachennayya v Emperor* (Section 117 (2) Cr P C, does attract proviso (a) to s 350 and the latter applies to case under s 107, Cr P C)
(24) 11 AIR 1924 Pat 786 (787) 25 Cri L Jour 89 *Sondi Singh v Gorind Singh* (Does not apply to inquiries under s 145 Cr P C)
(31) 18 AIR 1931 Mad 488 (489) 54 Mad 510 32 Cr L J 635 *Lakshmi Peddy v Muns Reddy* (Obiter)
[See (42) 29 AIR 1942 Mad 221 (221) 43 Cri L Jour 278 197 Ind Cas 793, *In re Kumaraswamy Kalinga Nayyar*]

Also see s 145 Note 39

2 (38) 42 Cal W N 224 (224) *Asitosh Sen v Emperor* (The Magistrate has however got a discretion to exercise whether he will act on the evidence recorded by his predecessor, or he will re-summon any of the witnesses before he frames a charge against the accused.)

proceedings being held to amount only to inquiries³ The Lahore High Court, however, in the undermentioned case,⁴ seems to hold the view that the proviso is available to an accused even in proceedings prior to the framing of a charge. The Sind Judicial Commissioners Court has also held that a trial within the meaning of the proviso does not commence with the framing of the charge in warrant cases but commences when the accused appears or is brought before the Court under S 252 and that, therefore, the proviso applies even to cases where a charge has not been framed⁵ The Bombay High Court has also held that trial includes the proceedings before the charge is framed⁶

As to whether proceedings under Chapter VIII of the Code are enquiries or trials within the meaning of this section, there is a difference of opinion. In a Full Bench case of the Madras High Court Ayling J. was of opinion that they were only enquiries while Wallis J. was of the opinion that they were trials⁷ It was also held in an earlier Calcutta case that there was so much similarity in substance between enquiries into offences and inquiries for taking security that the proviso should be equally applicable to both⁸ Whether or not the proviso to S 350 applies *suo vigore* to proceedings under Chapter VIII, it has been definitely held that the proviso is, nevertheless, applicable by virtue of the provisions of S 117 sub s (2)⁹

10a Witnesses examined on commission—Applicability of proviso —
The object of re-summoning witnesses who have already been examined is that the Magistrate may see their demeanour in the witness box. A demand for re-summoning cannot therefore be made in the case of a witness who has never been summoned but whose evidence has only been taken on commission¹ The words 're summoned and re heard' in

- (80) 17 AIR 1930 Cal 666 (668) 32 Cr L Jour 243 *Panchanan Sirkar v Emperor*
(99) 9 Cr L Jour 146 (146 147) 1 Ind Cas 54 32 Mad 218 *Palanianda v Emperor*
3 (68) 25 AIR 1938 Mad 742 (743) 39 Cr L Jour 828 *In re Harichandra Reddy*
(66) 23 AIR 1936 Nag 153 (155) 37 Cr L Jour 983 1LR (1936) Nag 62 *Tukaram v Emperor* (If no charge has been framed at all accused is not entitled to a fresh examination of the witnesses)
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v Emperor
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the charge is framed by the committing Magistrate in a warrant case when the accused is called upon to plead to a charge. In a summons-case the trial may be said to begin when the accused is called upon to plead to a charge.

- 4 (22) 9 AIR 1920 Lah 49 (54) 3 Lah 115 23 Cr L Jour 330 *Sahib Din v Emperor* (Accused has a right to demand that the witnesses shall be re-summoned and re heard in case of summary trials and also in summons-cases)
5 (34) 21 AIR 1934 Snd 106 (110) 28 Snd L R 239 35 Cr L Jour 1261 *Lalsing v Emperor*
6 (44) 31 AIR 1944 Bom 14 (15) 45 Cr L Jour 287 210 Ind Cas 516 (DB) *Ramchandra Narhar v Emperor*
(37) 21 AIR 1937 Bom 55 (56) 38 Cr L Jour 250 1 L R (1937) Bom 211 *Dagdu Govind Set v Punja v Edu* (Case under sub-section (1))
7 (20) 7 AIR 1920 Mad 337 (341) 43 Mad 511 21 Cr L Jour 402 (FB), *Venkatachennayya v Emperor*
8 (79) 4 Cal L Rep 452 (454) *Buroda Kant Roy v Korimuddin Moonshee*
9 (37) 24 AIR 1937 All 438 (439) 38 Cr L J 804 *Mahtab Singh v Emperor* (Enquiry under S 110)
(37) 20 Nag L Jour 117 (118) *Govinda v Emperor*
(20) 7 AIR 1920 Mad 337 (342 344) 43 Mad 511 21 Cr L Jour 402 (FB) *Venkatachennayya v Emperor*
(25) 12 AIR 1925 Oudh 228 (229) 27 Oudh Cas 323 25 Cr L Jour 1380 *Baij Nath v Emperor*
Also see S 117, Note 5

Note 10a

- 1 (40) 27 AIR 1940 Sind 193 (193 194) 1 L R (1940) Kar 493 42 Cr L Jour 80 191 Ind Cas 127, *Sukhramdas Hyranand v Emperor* (Magistrate cannot be said to have exercised discretion wrongly in refusing to compel attendance of such witness)
(40) 27 AIR 1940 Pesh 17 (17) 41 Cr L Jour 681 *Roshan Lal v Emperor* (Interrogatories issued and answered — Subsequent trial *de novo* under S 350—Fresh interrogatories need not be issued—Nor can interrogatories already answered be excluded from evidence)

proviso (a) presuppose that the witnesses have been already summoned and heard²

Where interrogatories had been asked to such a witness and answered by him, in a subsequent *de novo* trial it is not necessary to issue fresh interrogatories and the answers to the interrogatories already made can be considered as evidence against the accused³

10b Proviso, if applies to maintenance proceedings. — The proviso applies only in the case of trials of persons accused of offences alleged to have been committed by them. A person against whom proceeding under Chap XXXVI of the Code is taken not being an accused person the proviso does not apply to such a proceeding¹ See also Note 5 on Section 498

11. Duty of Magistrate under proviso (a) — This section does not require that the Magistrate shall ask the accused if he wishes to exercise the right¹ though it would be desirable and proper that the accused should be informed of his rights under the proviso² But the failure to do so is only an irregularity which is curable by Section 537³

12 Re commence the inquiry or trial — It may be right to describe a fresh inquiry as a *de novo trial* when a Magistrate *suo motu* decides to re commence the trial but when proviso (a) is brought into force there does not seem to be any question of '*de novo trial*' the right given to the accused being only to have witnesses re heard¹ When the accused exercises this right, the proceedings which had taken place before are not completely wiped out and it is not necessary for the accused to renew every application which he had made before he claimed the right² So also the re summoning of witnesses is not tantamount to recommencing the inquiry and even if the Magistrate, when he re summoned the witnesses, contemplated re commencing the enquiry, he is not precluded from

(37) 24 AIR 1937 Pesh 67 (68) 38 Cri L Jour 748 *Kaura Ram v Emperor* (Words 're summoned and re heard' in proviso (a) presuppose that witnesses have already been summoned and heard.—Government expert examined on commission need not be re-examined on *de novo* trial of case)

2 (37) 24 AIR 1937 Pesh 67 (68) 38 Cri L Jour 748, *Kaura Ram v Emperor*

3 (40) 27 AIR 1940 Pesh 17 (17) 41 Cri L Jour 681 *Roshan Lal v Emperor*

Note 10b

1 (37) 24 AIR 1937 Rang 536 (537) 39 Cri L Jour 205 *U Kun Zaw v Ma Aye Khin* (The use of the word 'conviction' in proviso (b) makes it doubly clear that the section applies only in case of trials of persons accused of offences)

Note 11

1 (39) 26 AIR 1939 Rang 249 (250) 1939 Rang L R 570 40 Cri L Jour 829 *Chinnayar v Maung Mya Thi* (Duty is cast on the accused to demand a new trial if they desire it and not upon the Magistrate to offer it)

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Note 12

1 (41) 28 AIR 1941 Sind 160 (161, 167) 1 L R (1941) Kar 171 43 Cri L Jour 82 196 Ind Cas 844 *Ucoojan v Bachayo* (The effect of an accused demanding that the witnesses should be re-summoned

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changing his mind before he actually re commences the enquiry.³

Whether the Magistrate acts *suo motu* and grants a *de novo* trial or accedes to the demand of the accused, his duty is to re summon and re hear the witnesses and not merely to allow *further cross examination*⁴ The word "re heard" means that the witnesses should be heard afresh from the start, i e, they should be examined afresh in chief and then cross examined, if the accused so desires⁵ The object in granting a re hearing is to enable the Magistrate who hears the case to judge of the credibility of the witnesses by their demeanour⁶ This object is lost if the witnesses are not examined again but only cross examined⁷ Failure to examine the witnesses in chief amounts to an illegality which vitiates the trial and the mere fact that the accused acquiesces in the procedure adopted by the Magistrate does not estop him from raising the plea of illegality of the trial⁸ Where the Magistrate permitted the re hearing of witnesses but the prosecution declined to examine them again, and the accused without raising any objection only cross examined those witnesses, it was held that the provisions of S 350 were not complied with and it was impossible to say that the accused were not prejudiced⁹ It has, however, been held by the Oudh Chief Court that where the evidence of the witness who is only cross-examined before the second Magistrate has been discarded in arriving at the conclusion, there can be no prejudice to the accused caused by the omission of the prosecution to examine the witness and that the trial is not vitiated¹⁰ The undermentioned decision¹¹ lays down that non compliance with the demand to have witnesses re summoned and re heard will not prejudice the accused when the witnesses are further cross examined by the Magistrate who decided the case (But there is a conflict of decisions as to whether non compliance with accused's demand for re hearing under proviso (a) is a curable irregularity see Note 7) Merely reading their depositions to the witnesses¹² or exhibiting them¹³ is not re hearing them

When a superior Court directs an inquiry by a Magistrate other than the one who originally heard the case, the provisions of S 350 debar it from directing that the case should be proceeded with from a particular stage¹⁴ Where such a direction was made, and on the case going back it was found that the original Magistrate had been transferred, it was held that the directions did not apply to his successor¹⁵ The same may be said of

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14 (01) 29 Cal 531 (597), *Dhcoprakash Singh v W D Rawlins*

15 (98) 25 Cal 863 (864) 2 Cal W N 465, *Gomer Sirda v Queen Empress*.

transfers the operation of S 350 cannot be checked by any restrictions in the order of transfer.¹⁶ As to instances where the High Court has ordered re inquiry from a particular stage where the accused undertakes not to ask for a *re trial*, see the undermentioned cases.¹⁷ The right of the Magistrate under subs (1) to re commence the proceedings applies not only to trials but also to cases where the stage of trial has not been reached.¹⁸ It has been held that when a *de novo* trial is held the prosecution is not bound to examine all the witnesses who were examined at the original trial and that it is open to the prosecution to dispense with the evidence of any witness whom it regards as unreliable.¹⁹

13 From what stage inquiry may be re-commenced — When a Magistrate succeeding another elects to conduct a *de novo* trial, he cannot summarily dismiss the complaint under S 203, it being no longer a question of deciding whether or not proceedings should be taken on the complaint.¹ Nor can he refer the matter to the police under S 202. The inquiry which he can re commence is the inquiry as defined in S 4 which does not include a reference to the police.²

It has been held by the High Court of Madras that a Magistrate who re commences an inquiry or trial does not thereby modify its nature or the stage at which it has arrived. Thus where the proceedings re commenced are only an *inquiry*, they are re commenced as an *inquiry*, and where they have developed into a *trial* stage they are re commenced as a *trial*, i.e., a proceeding in which a charge has been framed, in other words, a charge once framed is not wiped out or cancelled by a *de novo* trial.³ A similar view has also been taken by the Allahabad High Court in a recent decision.⁴ The Chief Court of Oudh has held that whatever might be the interpretation as regards cases falling under the first sub section proper, this principle will apply to cases of re hearing under proviso (a) and that a charge once framed is not wiped out by granting such a re hearing.⁵ But the same Court has held in a subsequent case that if the Magistrate frames a new charge the accused cannot have any cause for grievance, inasmuch as under S 227 (1) a Court can alter or add to any charge at any time before judgment is pronounced.⁶ The Chief Court

16 (30) 17 AIR 1930 Mad 933 (984) 32 Cri L Jour 226 *Ramaswami Thevar v M Subban*

17 (04) 1 Cri L Jour 46 (49) 8 Cal WN 77, *Kishore Gir v Ram Narayan Gir*

(25) 12 AIR 1925 Cal 172 (173) 26 Cri L Jour 313 *Nirmal Kumar Singh v Commissioner of Income tax Bengal*

(33) 20 AIR 1933 Nag 269 (270) 34 Cri L Jour 1172 *Krishna Murari Lal v Emperor* (Case transferred by High Court—Order made under S 561A that the proceedings must commence from examination of accused)

18 (36) 23 AIR 1936 Nag 220 (221) 38 Cri L Jour 15 1 L R (1937) Nag 135 *Emperor v Ganpat*

19 (38) 25 AIR 1938 Oudh 212 (212) 39 Cri L Jour 854 14 Luck 172, *Sheo Ram v Emperor*. (But

Note 13

1 (94) 7 C P L R Cr 36 (37) *Bahram v Baldeo*

2 (86) 9 Mad 282 (282) 2 Weir 243, *Sadagopachariar v Raghavachariar* (Enquiry under S 202 is made before evidence for the complainant is taken and process issued)

3 (15) 2 A 1 R 1915 Mad 23 (24) 15 Cri L Jour 673 35 Mad 585 *Sriramulu v Krishna Row*

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[See however (34) 21 AIR 1931 Mad 475 (475) 35 Cri L Jour 1363 57 Mad 1019 *Ramalingam v Emperor* (Grant of *de novo* trial has the effect of wiping out the prior proceedings)]

4 (35) 22 AIR 1935 All 834 (836) 36 Cri L Jour 912 *Razi Hussain v Emperor*

5 (33) 20 AIR 1933 Oudh 86 (88) 8 Luck 286 34 Cri L Jour 124, *Kunwar Sen v Emperor*

6 (38) 25 AIR 1938 Oudh 247 (248) 39 Cri L Jour 849, *Gajju v Emperor*. (The accused is not prejudiced especially when he himself applies for a *de novo* trial before the subsequent Magistrate.)

Where a number of accused persons are proceeded against some of whom are discharged, and thereafter the proceedings are transferred to the file of another Magistrate, the order of discharge is not thereby cancelled¹²

14. Case coming again before original Magistrate. — When a Magistrate is transferred and a case which was pending before him is taken up by his successor and the trial started afresh, the proceedings, which had already been taken before the transferred Magistrate are wiped out and such Magistrate has no jurisdiction on the case coming back to his file to proceed with the trial from the point where he himself had left it¹ But where the second Magistrate has not ordered a new trial, the original Magistrate to whom the case comes back is not bound to grant a *de novo* trial. To such a case this section does not apply as the Magistrate is not "another Magistrate"² See also Note 2

7 (03) 1903 Pun Re No 14 Cr, p 35 (39, 39) 1903 Pun L R No 175, *Crown v Nathu*
8 (36) 23 AIR 1936 Nag 153 (156) I L R (1936) Nag 92 87 Cri L Jour 983, *Tickaram v Emperor*
(But where the Magistrate does not order a *de novo* trial but rehears the case at the request of the
accused the charge framed previously is not wiped out.)
(94) 7 C P L R Cr 36 (39), *Baliram v Baldeo* (When the witnesses have been examined again it will
be open to the Magistrate dealing with the case to frame a charge or to discharge the accused as he may
think fit)
[Compare (31) 19 A I R 1936 Nag 39 (40) 27 Nag L R 13 32 Cri L Jour 603 *Sheoraisa v Dani*
(AIR 1936 Nag 39 (40) 27 Nag L R 13 32 Cri L Jour 603)]

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framed a charge does not make the order of the compensation or discharge illegal)

12 (33) 1 Bom L A 781 (783) Queen Empress v Palmer

Also see § 528, Note 6.

Note 14

1 (27) 14 AIR 1927 Mad 81 (82) 29 Cri L Jour 23 *Sriranga Chettiar v Subramania Asari*
(36) 23 AIR 1936 Nag 220 (221) 38 Cri L Jour 15 1 I L R (1937) Nag 135, *Emperor v Ganpat* (Even though the case may not have proceeded before the succeeding Magistrate beyond merely ordering *de nota* trial)
(25) 12 AIR 1925 Mad 174 (174) 26 Cri L Jour 510 *Sardar Khan Sahib v Athaulla* (The case will have to be tried *de nota*)

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14a. Transfer of a case from a Bench of Magistrates to a Magistrate.

— Where under Rule 6 of the rules framed by the Bengal Government under S 16, on a difference of opinion between an even number of Honorary Magistrates, a case was referred back to the Sub divisional Officer, it was held that the provisions of this section applied and the Sub divisional Officer could continue the case from the stage at which it was when the transfer to him was made¹ The Madras High Court has held that where a case is partly tried by a first class Bench under its summary powers and then is transferred to a second class Magistrate having no summary powers, the latter can try it only by means of a complete *de novo* trial and that this section has no application to the trial by the second class Magistrate subsequent to the transfer of the case to his file²

15. Proviso (b) — Prejudice to the accused. — A judgment arrived at by a Magistrate upon evidence not wholly recorded by himself is considered by the framers of Code to be of such infirmity that it is liable to be set aside without an appeal, provided that the accused has been actually prejudiced thereby³

It does not matter whether the accused did or did not object to the procedure, nor is it necessary to consider whether or not he had a reasonable opportunity of entering a protest thereto, the real question is whether he was prejudiced by the course adopted⁴ If he was, the conviction will be set aside,⁵ if he was not, the High Court will refuse to interfere⁶ See also Note 7

In a case of defamation it was held that though the Magistrate's deciding the case upon evidence recorded by his predecessor was not without jurisdiction, still it was difficult to see how a Magistrate could adequately decide such a case without having had the complainant examined before him⁶

Under this proviso a District Magistrate can set aside convictions by Magistrates subordinate to him This would include first class Magistrates even though no appeal lies to the District Magistrate from convictions by the former, for, as pointed out in the undermentioned cases⁶ which discussed the meaning of the words "inferior" and "subordinate" occurring in Ss 435 and 437, S 17 makes all Magistrates in the district subordinate to the District Magistrate.

Note 14a

1. ('16) 5 AIR 1918 Cal 304 (305) • 19 Cri L Jour 312, *Chand Tarafdar v Shamsher Fakir*
2. ('32) 19 AIR 1932 Mad 505 (507) 55 Mad 79 • 33 Cri L Jour 653, *Nannier v Dasaher* (The reason is that a case cannot be tried partly according to the summary procedure and partly according to the ordinary procedure)

Note 15

1. ('75) 23 Sat W R Cr 59 (60), *Queen v. Bughoonath Das*
- (12) 13 Cri L Jour 218 (220) : 39 Cal 781 • 14 Ind Cas 314, *Kudrutullah v Emperor* (Prejudice must be shown)

See also the undermentioned case⁷

16 Sub-section (2) — It is a general principle of law that evidence taken by one Magistrate is not evidence in a trial before another, unless some provision of law expressly makes it so. There is nothing in S 346 enabling a Magistrate to whom the case is referred to act on the evidence recorded by the referring Magistrate¹ and sub-s (2) of S 350 expressly makes the provisions of the section inapplicable to proceedings stayed under S 346². Hence it follows that a Magistrate hearing a case sent to him under S 346, must hear the same *de novo* and cannot act on evidence already recorded by the Magistrate who transferred the case³.

Under S 349 it is in the discretion of the superior Magistrate to whom a case is referred to act or not to act upon evidence already recorded by the subordinate Magistrate⁴. The addition of the words 'or in which proceedings have been submitted to a superior Magistrate under S 349' to the sub-section in 1923 makes it clear that nothing in this section will apply to cases submitted under S 349. The discretion, therefore, that the superior Magistrate has under S 349, is uncontrolled by the proviso to S 350 and he cannot, therefore, be compelled to hold a *de novo* trial⁵.

17 Sub-section (3) — Transfer of cases — The earlier view was that the provisions of this section did not apply where a change of Magistrates had occurred by a transfer or *withdrawal of a case* from the file of one Magistrate to that of another¹. But latterly it was recognized that the section applied even to such transfers or withdrawals².

7 (34) 9 Bom 100 (103) *Queen Empress v Parya Gopal* (Under S 650 District Magistrate is empowered by the Code to set aside the convictions recorded by first class Magistrate)

Note 16

1 (23) 10 AIR 1923 Mad 327 (327) 24 Cri L Jour 413, *In re China Venku Naidu*
 (38) 20 AIR 1933 Sind 191 (191) 27 Sind L R 266 34 Cri L Jour 749, *Sher Khan v Emperor*
 2 (04) 1 Cri L Jour 1056 (1057) 17 C P L R Cr 159 *Emperor v Gokal*
 3 (38) 25 AIR 1938 Cal 415 (416) 39 Cri L Jour 606 *Sashti Gopal v Haridas Bagdi*
 See Note 5 on S 346

4 (92) 2 Weir 428 (429) *In re Raghava Naiko*
 5 (38) 25 AIR 1938 Cal 415 (416) 39 Cri L Jour 606 *Sashti Gopal v Haridas Bagdi*
 (26) 16 AIR 1926 Sind 43 (48) 18 Sind L R 216 26 Cri L Jour 1363 *Emperor v Dodo*
 Also see Note 12 on S 349

Note 17

1 (05) 2 Cri L Jour 320 (323) 1 Nag L R 137, *Ladya v Emperor*
 (90) 12 All 66 (68) 1890 All W N 7, *Queen Empress v Radhe*

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(97 01) 1 Upp Bur Rul 87 (87) *Queen Empress v Nga Po Min*
 (75) 24 Suth W R Cr 53 (54) *Queen v Khan Mahomed*
 (07) 6 Cri L Jour 434 (438) 12 Cal W N 140, *Deputy Legal Remembrancer v Upendra Kumar Ghose*
 (00) 12 C R L R 68 (68) *Emperor v Karam*

trial — Con-

(03) 6 Oudh Cas 192 (193) *Puran v King Emperor*
 2 (09) 9 Cri L Jour 146 (146) 32 Mad 210 1 Ind Cas 51 *Palaniandi Goundan v Emperor*
 (08) 7 Cri L Jour 220 (223) 35 Cal 457 12 Cal W N 416 7 Cal L Jour 489 *Mohesh Chandra Saha v Emperor*

achi v Emperor-

The introduction of sub-s (3) gives effect to the latter view.³

This sub-section is applicable to a case where a case has been sent from one Magistrate to another for retrial, even if it is only from a particular point in the trial and as a result of the order of the Sessions Court.⁴

It has been pointed out that, though S 350 is applicable to cases transferred or withdrawn from the file of one Magistrate to that of another, it is desirable that the second Magistrate should commence the hearing *de novo*.⁵

350A. No order or judgment of a Bench of Magistrates shall be

invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under sections 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.

Synopsis

- 1 Scope of the section
- 2 "Duly constituted under sections 15 and 16"
- 3 "And the Magistrates constituting the same have been present . . . throughout the proceedings" See Note 4.
- 4 Non-compliance with the section — Effect of.
- 5 Transfer of a case from a Bench of Magistrates to a Magistrate See Note 14a on S 350

NOTE to the Synopsis See the Notes indicated for the following topics :

Absence of some Magistrates but remaining enough to form the quorum See Note 2.

Absence of quorum—Effect See Note 2

Judgment by Magistrate who had not heard See Note 1

1. Scope of the section.—Before the introduction of this section into the Code by the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923, it was uniformly held that where a judgment was delivered by the necessary quorum of Magistrates who had been present throughout the trial, the judgment would be perfectly valid though some other Magistrates had also been present at the earlier stages of the trial,¹ but there was a difference of opinion on the question whether a judgment delivered by a Bench of Magistrates some of whom had not heard the whole of the evidence could be considered to be a valid judgment. According to one view the fundamental principle of law is that no person who has not heard the whole of the evidence is competent to pass or take part in passing the judgment in the case, and that a judgment so passed is a nullity.² Another view was

(18) 5 AIR 1918 Nag 142 (143) : 20 Cri L Jour 41, *Akbar Ali v Emperor*

(29) 29 Cri L Jour 229 (229) : 107 Ind Cas 160 (Pat), *Chhanu Prasad Singh v Emperor*.

3. (30) 17 AIR 1930 Mad 983 (984) : 32 Cri L Jour 226, *Ramaswami Thevan v M Subban*.

4 (41) 28 AIR 1941 Sind 144 (145, 146) : 1 L R (1941) Kar 167 : 42 Cri L Jour 837 : 196 Ind Cas 275 (DB), *Varumal Seemal v. Emperor*.

5 (19) 6 AIR 1919 Low Bur 50 (51) : 20 Cri L Jour 496, *M. Rahman v. Abdul Samad*

Section 350A — Note 1

Emperor (Where no

ina v Swaminatha

See also the undermentioned case"

16 Sub section (2) — It is a general principle of law that evidence taken by one Magistrate is not evidence in a trial before another unless some provision of law expressly makes it so. There is nothing in S 346 enabling a Magistrate to whom the case is referred to act on the evidence recorded by the referring Magistrate¹ and sub s (2) of S 350 expressly makes the provisions of the section inapplicable to proceedings stayed under S 346². Hence it follows that a Magistrate bearing a case sent to him under S 346 must hear the same *de novo* and cannot act on evidence already recorded by the Magistrate who transferred the case³.

Under S 349 it is in the discretion of the superior Magistrate to whom a case is referred to act or not to act upon evidence already recorded by the subordinate Magistrate⁴. The addition of the words "or in which proceedings have been submitted to a superior Magistrate under S 349" to the subsection in 1923 makes it clear that nothing in this section will apply to cases submitted under S 349. The discretion therefore that the superior Magistrate has under S 349 is uncontrolled by the proviso to S 350 and he cannot therefore be compelled to hold a *de novo* trial⁵.

17 Sub section (3) — Transfer of cases — The earlier view was that the provisions of this section did not apply where a change of Magistrates had occurred by a transfer or *withdrawal of a case* from the file of one Magistrate to that of another¹. But latterly it was recognized that the section applied even to such transfers or withdrawals².

7 (34) 9 Bom 100 (103) *Queen Empress v Parya Gopal* (Under S 350 District Magistrate is empowered by the Code to set aside the convictions recorded by first class Magistrate)

Note 15

1 (23) 10 AIR 1893 Mad 327 (327) 24 Cri L Jour 413 *In re China Venku Naidu*
 (33) 20 AIR 1833 Sind 191 (191) 27 Snd L R 266 34 Cri L Jour 749 *Sher Khan v Emperor*
 2 (04) 1 Cri L Jour 1056 (1057) 17 C P L R Cr 159 *Emperor v Gokal*
 3 (68) 25 AIR 1836 Cal 415 (416) 36 Cri L Jour 606 *Sashit Gopal v Haridas Bagdi*
 See Note 5 on S 346

4 (82) 2 Weir 428 (429) *In re Raghava Naidu*
 5 (89) 25 AIR 1938 Cal 415 (416) 39 Cri L Jour 608 *Sashit Gopal v Haridas Bagdi*
 (26) 13 AIR 1828 Snd 48 (48) 18 Sind L R 218 26 Cri L Jour 1363 *Emperor v Doda*
 Also see Note 12 on S 349

Note 17

1 (00) 2 Cri L Jour 820 (823) 1 Nag L R 187 *Ladya v Emperor*
 (90) 12 All 68 (68) 1890 All W N 7 *Queen Empress v Radhe*

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(97 01) 1 Upp Bar Ral 87 (87) *Queen Empress v Nga Po Min*
 (75) 24 Suth W R Cr 53 (54) *Queen v Kian Mahomed*
 (07) 6 Cr L Jour 434 (439) 12 Cal W N 140 *Deputy Legal Remembrancer v Upendra Kumar Ghose*
 (02) 13 C P L R 66 (68) *Emperor v Kasu*

trial — Con

v Emperor

Goundan v Emperor
 489 Mohesh Chandra Saha

v Emperor

(19) 6 AIR 1919 Low Bar 50 (50) 20 Cri L Jour 495 *Gaiga Chetty v Emperor*

The introduction of sub-s (3) gives effect to the latter view.³

This sub-section is applicable to a case where a case has been sent from one Magistrate to another for retrial, even if it is only from a particular point in the trial and as a result of the order of the Sessions Court.⁴

It has been pointed out that, though S 350 is applicable to cases transferred or withdrawn from the file of one Magistrate to that of another, it is desirable that the second Magistrate should commence the hearing *de novo*.⁵

350A. No order or judgment of a Bench of Magistrates shall be

invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under sections 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.

Synopsis

- 1 Scope of the section.
- 2 "Duly constituted under sections 15 and 16"
- 3 "And the Magistrates constituting the same have been present . . . throughout the proceedings." See Note 4.
- 4 Non-compliance with the section — Effect of.
- 5 Transfer of a case from a Bench of Magistrates to a Magistrate See Note 14a on S 350

NOTE to the Synopsis See the Notes indicated for the following topics :

Absence of some Magistrates but remaining enough to form the quorum See Note 2.

Absence of quorum—Effect See Note 2.

Judgment by Magistrate who had not heard See Note 1

1. Scope of the section.—Before the introduction of this section into the Code by the Code of Criminal Procedure (Amendment) Act, 18 (XVIII) of 1923, it was uniformly held that where a judgment was delivered by the necessary quorum of Magistrates who had been present throughout the trial, the judgment would be perfectly valid though some other Magistrates had also been present at the earlier stages of the trial,¹ but there was a difference of opinion on the question whether a judgment delivered by a Bench of Magistrates some of whom had not heard the whole of the evidence could be considered to be a valid judgment. According to one view the fundamental principle of law is that no person who has not heard the whole of the evidence is competent to pass or take part in passing the judgment in the case, and that a judgment so passed is a nullity.² Another view was

(1913), *Perumal Seemal v. Emperor*.

5 (1919) 6 AIR 1919 Low Bur 50 (51). 20 Cr L Jour 496, *M. Rahman v. Abdul Samad*

Section 350A — Note 1

(1905) 20 Cr L Jour 105 (106), *Devi v. Nasur v. Bhokani Sahoo*

(1922) 9 AIR 1922 Lah 137 (138) : 22 Cr L Jour 511, *Abdul Ghani v. Emperor*.

that the only question in each case was whether the accused was prejudiced by the course adopted.³ In this view it was held that a Government Notification under S 16, clause (c), which provided that "if any case is adjourned and the members at the adjourned sessions are not the same as sat at the first hearing of the case, the provisions of S 350 of the Criminal Procedure Code will be held to apply to the case," was not *ultra vires*.⁴ A third view was that such a Government Notification was *ultra vires* of the powers of the Local Government under S 16, clause (c).⁵

The present section now makes it clear that no change in the constitution of the Bench during the progress of a trial will affect the validity of the judgment passed, provided —

firstly, that the Bench by which the judgment is passed is duly constituted, and
secondly, that the Magistrates constituting the same (i.e., the Bench which passed the judgment) have been present on the Bench throughout the proceedings

See also Note 4

2 "Duly constituted under sections 15 and 16"—A Bench of Magistrates will be "duly constituted under ss 15 and 16" if—

- (1) the individuals sitting as a Bench have all been authorized by the Provincial Government under S 15 to sit together as a Bench, and
- (2) the number of such individuals is not less than the *quorum* fixed by rules framed by the Provincial Government under S 16, clause (c)

Suppose that A, B, C, D and E are all authorized under rules framed under S 15 to sit together as a Bench and under the rules framed under S 16, clause (c) the *quorum* for a valid Bench is declared to be two. If now A, B and C sit together to hear a case, but C is absent during subsequent hearings thereof and A and B finally deliver judgment in the case, the judgment is perfectly valid notwithstanding the change in the personnel of the Bench in the course of the trial, inasmuch as A and B form a duly "constituted" Bench (i.e. they form the necessary *quorum*) and they have been present throughout the proceedings.¹ In *Chitleshwar Dube v Emperor*,² Niamatullah J., however, took the view

(95) 18 Mad 394 (394) 2 Weir 17, *Queen Empress v Basappa*

(91) 2 Weir 13 (13) *In re Renganathan*

(21) 8 AIR 1921 Bom 44 (45) 22 Cri L Jour 615 *Gangappa Irappa v Emperor* (Decided on the particular Government notification)

(78) 3 Cal 754 (755), *Sufferuddin v Ibrahim*

(20) 9 AIR 1922 Oudh 21 (22) 25 Oudh Cas 182 23 Cri L Jour 696 *Sultan v Shamsher* (One Magistrate)

objection was taken at the trial it was not wholly illegal)]

4 (18) 5 AIR 1918 All 56 (58) 41 All 116 19 Cri L Jour 1001 *Mathura v Emperor*

[See (14) 1 AIR 1914 Oudh 345 (346) 17 Oudh Cas 142 15 Cri L Jour 516, *Indar Dat v Emperor*]

5 (93) 20 Cal 870 (874) *Hardwar Singh v Khaga Ojha*

Note 2

1 (33) 20 AIR 1933 All 355 (355) 34 Cri L Jour 701 55 All 459 *Mathura v Emperor*

(30) 19 AIR 1932 Nag 95 (96) 28 Nag L R 190 33 Cri L Jour 559 *Nago v Shankar* (Magistrate absent at two hearings assisting in and signing judgment—Held such judgment was illegal)

[See also (98) 21 Mad 246 (249) 2 Weir 17, *Karuppanna Nadan v Chairman, Madura Municipality* (Bench of seven Magistrates began a case and five of them convicted the accused—Held conviction not invalidated by absence of two Magistrates)]

2 (32) 19 AIR 1932 All 127 (127) 33 Cri L Jour 200

that all the Magistrates who began to hear the case must be present at all the hearings irrespective of the *quorum* in order to render the ultimate judgment valid. This view was dissented from by a Bench of the same High Court in *Dasrath Rai v Emperor*,³ but Sulaiman C J in the latter case, observed as follows: "It is not easy to see how the constitution of the Bench can be changed and at the same time the Magistrates constituting the Bench be present on the Bench throughout the proceedings." In making this observation his Lordship does not appear to have laid the necessary emphasis on the words "duly constituted" used in the section. A Bench may be constituted by several Magistrates appointed under S 15 and there may be a change in the constitution of such Bench. But if the *duly constituted* Bench under S 16, *i.e.* the *quorum* fixed, passes the judgment it would be valid provided the Magistrates constituting such *quorum* have been present on the Bench throughout the proceedings.

A Bench which consists of a number of Magistrates, which is less than the *quorum* fixed is not a *duly constituted Bench*⁴ and evidence recorded by it is not recorded by a Court.⁵ See also the case cited below.⁶

3 And the Magistrates constituting the same have been present throughout the proceedings" — See Note 4

4. Non-compliance with the section — Effect of. — Where some of the Magistrates constituting the Bench who pass the judgment or order have not been present throughout the proceedings, the judgment or order is invalid as contravening the provisions of this section.¹ A contrary view has however, been held in the undermentioned cases² to

- 3 (34) 21 AIR 1934 All 144 (146, 147) 56 All 599 36 Cri L Jour 38
4 (26) 13 AIR 1926 Sind 192 (192) 20 Sind L R 134 27 Cri L Jour 542 *Emperor v Gulu*
(02) 16 Mad 410 (414) 2 Weir 14 *Queen Empress v Muthia* (Quorum of three — Judgment by two — Illegal)
(19) 6 AIR 1919 Mad 274 (274) 20 Cri L Jour 823, *In re Bapiraju*
5 (20) 13 AIR 1926 Sind 192 (192) 20 Sind L R 134 27 Cri L Jour 542 *Emperor v Gulu*
6 (20) 7 AIR 1920 Bom 300 (301) 21 Cri L Jour 369 44 Bom 400 *Mohidin Karim v Emperor*
(Rules requiring that trial must be completed by the same Magistrates by whom it was begun — Trial continued and finished by two of the three Magistrates who constituted the Bench in the first instance is a trial held in contravention of the rules and hence is void)

Note 4

- 1 (34) 21 AIR 1934 Oudh 65 (86) 35 Cri L Jour 417, *Rameshwar Datt Singh v Bharath Singh*
(Evidence heard on several occasions by only one member of the Bench and only one member signing depositions on several hearings — Trial held wholly illegal)
(32) 19 AIR 1932 All 191 (192) 54 All 413 33 Cri L Jour 885 *Ram Khelauan v Sheo Nandan*
(One Magistrate absent during examination of witnesses but taking part in decision along with two others who had been present during whole trial — Invalid)
(32) 19 AIR 1932 All 127 (127) 33 Cri L Jour 200 *Chiteshwar Dube v Emperor* (Presence of all the Magistrates constituting the Bench is necessary for a valid trial)
(26) 13 AIR 1926 Lah 304 (304) 27 Cri L Jour 463 7 Lah 192 *Danwari v Emperor* (Quorum of two — Only one present throughout proceedings — Trial held bad as contravening S 350A)
(32) 19 AIR 1932 Nag 95 (96) 28 Nag L R 190 33 Cri L Jour 559 *Nago v Shankar* (Bench of three Magistrates — One absent in delivering judgment and

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Emperor (Trial in contravention of rule requiring that it must be completed before same Magistrate is void)]

- 2 (34) 21 AIR 1934 All 144 (147) 56 All 599 36 Cri L Jour 39 *Dasrath Rai v Emperor*
(24) 11 AIR 1924 All 674 (675) *Debi Prasad v Emperor* (Only one Magistrate trying the case — Irregularity, if any, held cured under S 579 (e))
(35) 22 AIR 1935 All 814 (815) 36 Cri L Jour 907, *Emperor v Jafar Khan* (Where it appears that the Magistrates who had not been present at all hearings was present on the date when the judgment was delivered and that he inadvertently signed it and that he had taken no real part, it cannot be said that any failure of justice has taken place.)
[See also (43) 30 AIR 1943 All 20 (20) ILR (1943) All 23 44 Cri L Jour 203 - 204 Ind Cas 323, *Har Narain v Emperor* (Section 350A does not say in what circumstances a judgment shall be invalid. It says that in certain circumstances it shall be invalid — refers only to a case where

the effect that this section is, in terms, a saving clause which does not directly prohibit or declare invalid the trial of a case in the absence of the conditions specified, but only indirectly or by implication assumes such trial to be irregular, and that non compliance with the terms of the section is only irregularity curable by S 537.

5. Transfer of a case from a Bench of Magistrates to a Magistrate — See Note 14a on Section 350

351.* (1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place in the course of an inquiry under Chapter XVIII or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard

1 Scope of the section — The following conditions are necessary for the application of the section —

(1) An offence must appear to have been committed on the evidence in the case before the Court,

(2) such offence must be one of which the Court can take cognizance and

(3) the person who appears to have committed the offence must be present in Court¹

This section does not by itself confer any power of taking cognizance of the offence disclosed in the evidence. It only prescribes the procedure to be followed when an offence of which the Court can take cognizance is disclosed on the evidence in the case

The ordinary procedure where any person is to be proceeded against for any offence judicially is to issue a process against him. This section is an exception to this general rule and enables the Court to at once, detain the offender in custody without issuing any such process

As to the principle on which cognizance is taken in such cases see Notes 3 5 and 10 on Section 190

There is however, nothing in the Code which states that a Magistrate is bound at any stage of a trial, to stop the proceedings arrest any person against whom he thinks there is a chance of getting a conviction, and start the original trial *de novo*.² As to the considerations to be borne in mind in exercising the discretion under this section, see the undermentioned cases³

* 1882 S 351, 1872 S 104 1861 S 206

tution of a Bench has been changed during the time when the trial was pending. The section makes a provision that its terms will apply if the members of the particular Bench have been constant throughout. But it is not intended to affect the other sections of the Code for instance S 350 which may be declared applicable under Rules under S 16 to such cases. Hence the mere fact that some of the Magistrates constituting the Bench by which the judgment is delivered were not present throughout the proceedings does not invalidate the judgment)

Section 351 — Note 1

1 { 42 } 29 AIR 1942 Sind 161 (162) ILR (1942) Kar 323 44 Cri L Jour 137 204 Ind Cas 31 (DB).
Mir Fateh Khan v Emperor

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against a discharged co accused after examining and cross examining him as a prosecution witness and thus gathering from his own mouth the evidence against him, is contrary to the traditions of justice in Criminal Courts)

inquiry

A Court of Session is not a criminal Court within the meaning of this section and by virtue of S 193 a Court of Session cannot commence proceedings against a person unless he has been duly committed to the sessions⁴ (See S. 190, Note 5)

352.* The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to or be or remain in, the room or building used by the Court

Synopsis

- | | |
|---|------------------------------------|
| 1a Courts to be open | 3 Exclusion of police officer |
| 1 Evidence of pardanashin lady See S 503 Note 6 | 4 Holding Court in a private place |
| 2 Trial in jail | 5 Trial in camera |

NOTE to the Synopsis See the Notes indicated for the following topics

Grounds for exclusion See Note 3

Private place turned into court room—Ss 441 and 448 Penal Code inapplicable See Note 4

1a Courts to be open — It is a fundamental principle of law and procedure that every Court of Justice should be open to every subject of the King As was observed by their Lordships of the Privy Council in *McPherson v McPherson*¹

Publicity is the authentic hall mark of judicial as distinct from administrative procedure The actual presence of the public is never of course necessary Where Courts are held in remote parts of the Province as they frequently must be there may be no members of the public available to attend But even so the Court must be open to any who may present themselves for admission

The proviso to this section however permits the presiding Judge or Magistrate to hold a trial in camera if he thinks fit see Note 5

1 Evidence of pardanashin lady — See Section 503 Note 6

2 Trial in jail — Trial in jail is not illegal when there is nothing to show that admittance was refused to anyone who desired it¹ It is within the discretion of the Magistrate to hold a trial at a place other than the court house But where he decides to hold the trial in the jail premises he should pass a formal order directing that the trial should

* 1882 S 352, 1872 S 187, 1851 S 279

(89) 1889 Rat 477 (477-478) *Queen Empress v Bhogilal* (In absence of exceptional circumstances a Court ought not to suddenly transfer a witness from the witness box to the dock and proceed against him along with the other accused as such a course is likely to discourage the witnesses who follow from telling the truth)

4 (49) 29 AIR 1942 Snd 161 (162) 11LR (1942) Kar 393 41 Cr L Jour 137 204 1st Cas 31 (DB) *Mir Fateh Khan v Emperor*

Section 352 — Note 1a

1 (36) 23 AIR 1936 PC 248 (250) 161 1st Cas 260 1936 AC 177 105 LJ PC 41 (PC) [See also (43) 30 AIR 1943 Lah 14 (18) 11LR (1943) Lah 791 41 Cr L Jour 181 204 1st Cas 293 *Hacamat Ras v Emperor* (A court-room is a public place and unless the proceedings are held in camera or the Court for some other valid reason issues a prohibition beforehand any person can enter it without any permit and remain there so long as he does not misbehave.)]

Note 2

1 (17) 4 AIR 1917 Lah 311 (312) 18 Cr L Jour 852 (853) *Sahas Singh v Emperor* (Nor the prisoners were unable to communicate with their friends or counsel.)

deposition of a medical witness and his report and the report of a chemical examiner are admissible in evidence without the medical officer or the chemical examiner being called. Similarly, under the Extradition Act, 1870, the deposition or statements on oath taken in a foreign State may, if duly authenticated, be received in evidence.³ These provisions, however, are all exceptions to the general rule of evidence that all evidence should be direct (see s 60, Evidence Act) and have no bearing on this section.

3 "All evidence" — The words 'all evidence' will include the evidence for the defence as well as evidence for the prosecution.¹ See also Note 1.

As to whether the name, parentage, age, residence and profession given in the heading of the deposition form part of the deposition, see the undermentioned cases.²

4 "Shall be taken in the presence of the accused" — The section is imperative that all evidence shall be taken in the presence of the accused, or in certain circumstances, in the presence of his pleader. It is not sufficient under the section to read out to a witness his previous deposition in a former case and ask him if the statements made therein are true¹ nor is it sufficient to read out to the accused the deposition of the

(70) 1870 Pun Re No 3 Cr p 4 (8) *Crown v Ghazee* (Do)

(30) 17 AIR 1930 Cal 228 (229) 81 Cri L Jour 916 *Tafis Pramank v Emperor* (Do)

(1900) 1900 Pun Re No 9 Cr p 21 (23) 1900 Pun L R p 69 *Hashim v Empress*.

(72/92) 1872 1897 Low Bur Ral 157 (158) *Ram Loochun v Queen Empress*.

(20) 7 AIR 1920 Nag 170 (171) 16 Nag L R 30 21 Cri L Jour 486 *Mt Ajodhs v Emperor* (Section 82 (2) Evidence Act)

See also the following cases under S 33 of the Evidence Act

(19) 8 AIR 1919 All 351 (351) 20 Cri L Jour 625 *Debi Singh v Emperor* (Statement of deceased plaintiff examined as witness that the receipt filed by defendant accused was forgery is admissible in evidence in criminal prosecution of accused)

(29) 15 AIR 1926 All 140 (141) 50 All 113 107 Ind Cas 243 *Narsingh Das v Gokul Prasad* (Statement of witness in previous suit — Witness living — Parties to the suit different — Statement not admissible)

(87) 1887 Rat 347 (348 349) *Queen Empress v Dhablutar*

(73) 20 Suth W R Cr 69 (69, 70) *Queen v Mowjan*

(74) 21 Suth W R Cr 12 (12) *Queen v Etuaree Dharee*

(13) 14 Cri L Jour 70 (71) 18 Ind Cas 406 (Cal) *Ibrahim v Emperor*

(29) 16 AIR 1929 Cal 822 (824) 31 Cri L Jour 809 *Emperor v C A Mathews*

(14) 1 AIR 1914 Lah 159 (161) 15 Cri L Jour 62, *Daim v Emperor*

(27) 14 AIR 1927 Lah 332 (333) 8 Lah 576 28 Cri L Jour 451 *Lahal v Emperor*

(33) 20 AIR 1933 Lah 561 (567) 34 Cri L Jour 735 *Dewan Singh v Emperor*

3 (11) 12 Cri L Jour 505 (507, 518) 12 Ind Cas 273 33 Cal 164 *In re Rudolph Stallmann* (Where records of a German Court have been authenticated in the manner prescribed by Ss 14 and 15 English Extradition Act which are applicable in this country such records are admissible)

Note 3

1 (13) 14 Cri L Jour 287 (288) 19 Ind Cas 719 1912 Upp Bur Ral 159 *Nga Po Shein v Emperor*

2 (04) 26 All 108 (118) 31 Ind App 38 8 Cal W N 241 6 Bom L R 233 8 Sar 583 (PC) *Magbulan v Ahmad Husain* (No)

(24) 11 AIR 1924 Cal 508 (500) 80 Ind Cas 357 *Lakshan Chandra v Tokim Dhal* (No)

(28) 15 AIR 1928 Pat 420 (424) 7 Pat 361 29 Cri L Jour 804 *Chotan Singh v Emperor* (Yes)

Note 4

1 (70) 2 N W P H C R 100 (100), *Queen v Halundar Doss*.

complainant taken in the absence of the accused² So also, merely recording a statement that what the witness has to say is contained in a document which is filed as an exhibit is not enough³ The examination of the witness must actually be made in the presence of the accused It does not matter how often the same offence is the subject of a trial, every accused has a right to have the whole of the evidence given and recorded in his presence just as if the witness had never before given his testimony on the charge⁴ A contravention of the provisions of this section is not a mere error, omission or irregularity and cannot be cured by s 537⁵ In cross cases and cases which are intimately connected with each

(1906) 4 Cr L Jour 89 (91, 92) 8 Bom L R 539 *Emperor v Ghanasham*

(1905) 1895 Rat 792 (793), *Empress v. Salu* (Testimony, however, of a medical witness, especially in a case of murder ought, when he is present, to be taken fully and not in the way stated above)

(1904) 1 Beng L R O Cr 37 (38) *Queen v Raj Krishna* (This mode of taking evidence deprives the Court and jury of the opportunity of observing the demeanour of witnesses)

(1864) 1864 Suth W R Gap Cr 1 (1), *Queen v Sheik Kyamut*

(1861) 1 Suth W R Cr 14 (14), *Queen v Radhy*

(1864) 1864 Suth W R Gap Cr 38 (38), *Queen v Kanye Sheekh*

(1868) 10 Suth W R Cr 56 (56), *In re Munger Bhooyan*

(1923) 10 AIR 1923 Cal 196 (197) 50 Cal 223 24 Cr L Jour 193, *Moskur Ali v Emperor*.

(1925) 12 AIR 1925 Lah 19 (20) • 5 Lah 396 27 Cr L Jour 170, *Lal Singh v. Emperor*.

(1926) 18 AIR 1926 Lah 378 (379) 27 Cr L Jour 555 *Ahman v Emperor*.

(1933) 20 AIR 1933 Lah 231 (232) 34 Cr L Jour 637, *Sukhdev Raj v Emperor*

(1909) 22 Mad 455 (456) 1 Weir 739, *Queen-Empress v. Ayyalamu*.

(1909) 2 Weir 360 (361), *In re Duganna*

(1868) 2 Weir 755 (755)

(192) 5 C P L R Cr 33 (35), *Empress v Rampiare*

(1924) 11 AIR 1924 Lah 17 (18, 19) 4 Lah 382 25 Cr L Jour 377, *John Thomas v. Emperor*

(1922) 1872-1892 Low Bur Rul 399 (399), *Nga Po Tum v Empress*

(1917) 4 AIR 1917 Low Bur 112 (113) 17 Cr L Jour 512 (513), *Nga Tha Ku v Emperor*.

(1926) 15 AIR 1926 Rang 284 (285) 30 Cr L Jour 736, *Abdul Gaffar v. Gouind Prasad*

(1866) 6 Suth W R Cr 7 (7), *Queen v Kishen Dayal*.

[See also (192) 17 Suth W R Cr 5 (5) • 8 Beng L R App 63, *Queen v Wasira*]

Also see S 512, Note 2

(1925) 12 AIR 1925 Lah 19 (20) • 5 Lah 396 : 27 Cr L Jour 170, *Lal Singh v Emperor*.

[See also (1923) 10 AIR 1923 Mad 32 (33) 46 Mad 117 • 23 Cr L Jour 748 : 69 Ind Cas 636 (DB), *In re K K Umar Raja* (De novo trial—Deposition of witnesses examined in the previous trial exhibited without witnesses being examined afresh—Held, proceedings were vitiated and consent of accused

which the charge depends as if no previous trial of other persons for participation in these occurrences had ever taken place)

[See (186) 1866 Pun Re No 65 Cr, p 70 (70), *Crown v. Topun Mull* (Evidence cannot be taken by proxy)]

5 (191) 23 AIR 1911 Oudh 20 (21) • 16 Luck 353 : 41 Cr L Jour 816 190 Ind Cas 71, *Dens Madho v. Emperor*

other, a Court has no right to consider at all the evidence given in one case for the purpose of reaching its conclusions in the other. The two cases should be tried separately and determined on evidence recorded in each.⁶ Where, however, more than one similar

(Committal quashed)

- (67) 3 Mad H O R App xxxiv (xxxiv)
 (25) 12 AIR 1925 Nag 457 (458) 26 Cr L Jour 1289 *Narayan v Chandrabhaga* (An order under S 145, Cr P C is wholly illegal if based on evidence recorded behind the back of a party at a time when he was not a party to the proceedings at all)
 (27) 14 AIR 1927 Oudh 353 (353) 28 Cr L Jour 756 *Chhotela v King Emperor*
 (34) 21 AIR 1934 Mad 691 (690) 53 Mad 285 36 Cr L Jour 319, *Belligowder v Emperor* (Commitment based on evidence recorded in absence of accused is illegal)
 (90) 2 Weir 259 (260) *In re Chinnappan* (Do)
 (35) 22 AIR 1935 Oudh 488 (488) 11 Luck 343 36 Cr L Jour 1193 *Bishnath v Emperor* (Prosecution on witnesses examined in-chief when accused was absent—Their cross-examination conducted in his presence—Case proved in cross-examination—Still trial is illegal)
 [See (74) 21 Suth W R Cr 56 (57) *Queen v Lukhun Santhal*
 (72) 1872 Rat 86 (66) *Reg v Jetha Ganesh*]
 [See also (66) 3 Cr L Jour 42 (48) 7 Bom L R 979, *Emperor v Ningappa*
 (76) 2 Cal 23 (29 30) 25 Suth W R Cr 57 *Queen v Bholanath Sen* (Depositions of some of defence witnesses taken out of Court and put on record—Illegal)
 (81) 7 Cal 65 (68 69) 8 Cal L Rep 352 4 Shome L R 103 *Empress v Chandra Nath Sirkar* (In a case of several co-prisoners each prisoner was convicted chiefly upon what was said by his co-prisoners during his absence from Court—Conviction illegal)
 (24) 11 AIR 1924 Lah 17 (18 19) 4 Lah 882 25 Cr L Jour 877 *John Thomas Lyme v Emperor* (Examination of witnesses—Procedure—Previous deposition read out—Illegality)
 (24) 11 AIR 1924 Lah 104 (108 107) 4 Lah 376 25 Cr L Jour 68 *Allu v Emperor* (When evidence in a case is treated as evidence in the counter-case, the procedure is illegal and not curable under S 537)
 (27) 14 AIR 1927 Lah 781 (782) 28 Cr L Jour 771, *Thakar Singh v Emperor* (Do)
 (28) 15 AIR 1928 Lah 880 (381) 29 Cr L Jour 282 *Hayat v Emperor*]
 6 (41) 28 AIR 1941 Oudh 20 (21) 16 Luck 353 41 Cr L Jour 816 190 Ind Cas 71 *Dem Madho v Emperor* (Use of evidence not part of the record is by itself proof of prejudice to accused—Use in one case of evidence produced in another case is not mere irregularity but illegality)
 (33) 20 AIR 1933 Mad 867 (369) 56 Mad 159 34 Cr L Jour 175 (FB) *In re Mounagurusami Naicker* (If the Judge considers himself unable to detach himself from extraneous considerations, transfer may be necessary to deliver the Judge from embarrassment)
 (40) 27 AIR 1940 Lah 466 (467) ILR (1941) Lah 66 42 Cr L Jour 151 191 Ind Cas 332 *Kair Maharaj v Emperor* (Cross-cases heard by one set of assessors and decided by same judgment—Evidence in one case imported into another case—Procedure is illegal)
 (38) 25 AIR 1938 Oudh 249 (249) 39 Cr L Jour 929 *Sargu v Emperor* (In cross cases the procedure of treating the prosecution evidence in one case as defence evidence in the other and vice versa, is not warranted by any provisions of the Code and makes the trial illegal—The defect is not cured even if the counsel for the accused in both the cases has applied for adopting such a procedure and the Government pleader has consented to it)
 (37) 24 AIR 1937 Rang 100 (100) 38 Cr L Jour 611 *Maung Pa v Emperor* (Cross-cases—Evidence for prosecution copied word for word in other case for defence and vice versa—Trial is vitiated)
 (28) 15 AIR 1928 All 593 (593) 50 All 457 30 Cr L Jour 337 *Sukhai Ahir v Emperor* (But if the reception of evidence required to enable the point to be decided in second case is merely a formal repetition of evidence which has already been given and heard by same tribunal and it is directed to the same issue or issues of fact its vain repetition may be reasonably waived)
 (83) 13 Cal L R 275 (278 279 280) *Chakouri Lal v Moti Kurri*
 (24) 11 AIR 1924 Cal 818 (814) 25 Cr L Jour 941 *Gairulla Akanda v Sardar Akanda* (Cross-cases)
 (1900) 1900 Pun Re No 26 Cr P 56 (56 57) *Rampal v Empress* (Do)
 (24) 11 AIR 1924 Lah 104 (105, 106) 4 Lah 376 25 Cr L Jour 68 *Allu v Emperor* (Do—Such procedure not curable by S 537)

cases are consolidated and evidence is recorded in one and used in the other with the consent of the accused, there is no contravention of this section but only a contravention of the rule as to direct evidence which is curable under S 537⁷ See also Note 30 on S 537. See also the cases cited below⁸

5 * When his personal attendance is dispensed with — See Note 2 and Notes on Section 540A

6 Evidence in criminal cases — General — See the undermentioned cases¹

- (25) 12 AIR 1925 Lah 149 (150) 25 Cri L Jour 551, *Muhammat v Emperor* (Cross cases)
 (28) 15 AIR 1928 Lah 380 (381) 29 Cri L Jour 282 *Hajat v Emperor* (Do)
 (33) 1933 Mad W N 243 (244) *Krishnan Pannadas v Suryanarayana Asari* (Do)
 (20) 7 AIR 1920 Low Bur 90 (90) 22 Cri L Jour 707, *M A Marissa v Emperor* (Cross-complaints—Prosecution evidence in one cannot be treated as defence evidence in other)
 (16) 3 AIR 1916 Cal 912 (913) 17 Cri L Jour 439 *Superintendent and Remembrancer of Legal*

[See (21) 8 AIR 1921 Low Bur 51 (55) 11 Low Bur Rul 73 23 Cri L Jour 49, *H V Eusooif v Emperor* (Simultaneous trial of two separate cases is an illegality not curable under S 537)]

[But see (38) 25 AIR 1938 Oudh 253 (255 256) 40 Cri L Jour 1 *Taqi Mahomed v Md Jan* (Witness a answer about his statement in cross-case recorded—Statement in cross case not brought on record—Procedure adopted at request of accused—Held, there could be no prejudice and irregularity cured by S 537)]

- 7 (26) 13 AIR 1926 Bom 231 (232) 50 Bom 174 27 Cri L Jour 1335 *Emperor v Harjivan Valji*
 (30) 17 AIR 1930 Mad 505 (506) 53 Mad 775 31 Cri L Jour 1191, *Krishnayya Naidu v Emperor*
 (26) 15 AIR 1928 All 593 (593 594) 50 All 457 30 Cri L Jour 437, *Sukhai Ahir v Emperor*
 (Where parties consented to treat the evidence in one case as evidence in the other and no injustice followed from it the trial is not bad)

Also see S 493 Note II

- 8 (29) 16 AIR 1929 Mad 906 (909) 53 Mad 69 31 Cri L Jour 1006 126 Ind Cas 489 (DB) *Veera Koratan v Emperor* (Practice of tendering important eye witnesses cited by prosecution for cross examination should not be encouraged)

- (40) 27 AIR 1940 Cal 59 (59) 41 Cri L Jour 247 *Mrs W Waugh v Emperor* (Counter-cases — Magistrate is not entitled to use evidence given in one case in other case)

- (35) 22 AIR 1935 Cal 549 (550) 36 Cri L Jour 1339 *Khatish Chandra v Nanuram Maklania*

- (16) 3 AIR 1916 Cal 912 (913) 17 Cri L Jour 439 *Superintendent and Remembrancer of Legal Affairs Bengal v Mon Mohan Roy* (Connected criminal appeals—It is irregular to make cross references in one case to evidence in other case)

- (26) 15 AIR 1928 Lah 34 (35) 29 Cri L Jour 521 *Mahomed Khan v Emperor* (Separate charges—Evidence must be separately recorded)

- (67) 14 Cal 358 (359 360) *Bachu Mullik v Sia Ram Singh* (Cross cases arising out of same facts — Exam ning as witnesses in one case accused in other case—Course irregular but irregularly curable under S 537)

- (15) 2 AIR 1915 Bom 14 (15) 16 Cri L Jour 538 *Dasabhai v Emperor* (Trial of cross-complaints — Evidence in one case considered in the other—Illegal)

- (87) 9 All 609 (611) 1897 All W N 143 *Queen Empress v Nandram* (Depositions in prior trial arising out of same facts read out with consent of accused and witnesses cross-examined — Held that though course was irregular irregularity was cured under S 537)

- (16) 3 AIR 1916 Low Bur 20 (20) 17 Cri L Jour 503 *Ram Sarup v Emperor* (Two persons separately tried for same offence — Examination of one of them in the case against the other is irregular as it is likely to prejudice the Magistrate against him)

- (24) 11 AIR 1924 Lah 223 (229) 24 Cri L Jour 415 *Narain Singh v Emperor* (Several cases tried separately—Common witnesses not examined separately but their evidence taken in one case read out to them in others with consent of accused and admitted as correct—Held procedure though irregular did not prejudice accused and did not
 , of trial)

I (2~) 15 AIR 1928 Lah 69 (69)
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 enough)

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Singh
 document

(Merely recording state-
 as an exhibit is not

(25) 12 AIR 1925 Lah 19 (20)

1737

(17)

354.* In inquiries and trials (other than summary trials) under this

Manner of record Code by or before a Magistrate (other than a Presidency
ing evidence outside Magistrate) or Sessions Judge, the evidence of the witnesses
Presidency towns shall be recorded in the following manner.

1 Other than summary trials* — See Note 3 on Section 350

2 'Other than a Presidency Magistrate' — As to the manner in which the evidence of the witnesses is to be recorded by or before a Presidency Magistrate see Section 362

3 "In the following manner." — The words *in the following manner* refer to the manner as provided in §§ 355 to 361¹ If a person is before the Court as a witness his evidence must be recorded only as the law directs, viz under the provisions of the following sections²

355.† (1) In summons cases tried before a Magistrate other than

Record in summons cases and in trials of certain offences by first and second class Magistrates a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of section 260, clauses (b) to (m), both inclusive, when tried by a Magistrate of the first or second class and in all proceedings under section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record

* 1882 S 354 1872 S 332 1861 — Nil
† 1882 S 355, 1872 S 333, 1861 S 267

(28) 15 AIR 1928 Lah 152 (153) 29 Cri L Jour 200 *Sirajud Din v Emperor* (Recording of evidence piecemeal not proper)

(17) 4 AIR 1917 Oudh 200 (200) 19 Oudh Cas 239 18 Cri L Jour 105 *Daldeo Prasad v Emperor* (Medical witness statement of — Recording of statement in commitment proceedings — Careless mode of recording condemned)

(19) 6 AIR 1919 Cal 862 (871) 19 Cri L Jour 753 *Venkataratnam v Corporation of Calcutta* (Expert evidence — Evidence not allowed unless the relevant passages

Conviction and sentence on evidence

(Evidence can never be taken by

proxy)

must analyse evidence in respect of each accused)

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(26) 13 AIR 1926 Bom 245 (245) 27 Cri L Jour 1289 *In re Mangru Telu* (Local inquiry—Procedure at — Questioning persons without recording their evidence or allowing their cross-examination is bad)

(87) 1887 Pun Re No 41 Cr p 95 (99) *Hassan Khan v Empress* (Examination of pardanashin ladies as witnesses — Procedure)

Section 354 — Note 3

1 (26) 13 AIR 1926 Pat 58 (59) 26 Cri L Jour 1475 *Emperor v Phagunia* (S 360)

2 (67) 8 Suth W R Cr 11 (12) *Queen v Ploolchand*

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record

Synopsis

- 1 Legislative changes
- 2 Scope of the section
- 3 Sub section (1) of section 260, clauses (b) to (m)
- 4 'Shall make a memorandum of the substance of the evidence'
- 5 Each witness'
- 6 Signed by the Magistrate'
- 7 Reasons for inability to record as required

NOTE to the Synop is See the Notes indicated for the following topics

Different modes of procedure in taking evidence under the Code See Note 2	Memo of evidence — Not vague but full See Note 4
Inapplicability to summary trials See Note 3	Notes of evidence in summary trials — If part of record See Note 3
Language of memo of evidence See Note 4	Omission to sign vitiates trial See Note 6
Memo of evidence need not be read over See Note 4	

1 Legislative changes

Difference between the Codes of 1861 and 1872 —

The provisions of the corresponding section in the Code of 1861 applied only to summons cases. The Code of 1872 extended the provisions also to cases of the kind referred to in Section 222 of that Code (now Section 260)

Difference between the Codes of 1872 and 1882 —

The words otherwise than at a summary trial after the words "Magistrate of the first or second class, occurring in the Code of 1872 were omitted in S 355 of the Code of 1882, as they were thought to be redundant since those words already occurred in S 354

Difference between the Codes of 1882 and 1898 —

- (1) The words 'clauses (b) to (m)' were substituted for "clauses (b) to (h), in consequence of offences added in Section 260"
- (2) The provisions of this section have been extended also to proceedings under S 514

2 Scope of the section — There are three different kinds of procedure prescribed by the Code in the matter of recording of evidence in the trial of cases

- (1) In summary trials (Ss 260 to 265) *no evidence* need be recorded by the Magistrate¹
- (2) In *regular* trials of summons cases by a Magistrate other than a Presidency Magistrate and of cases of offences mentioned in S 260, clauses (b) to (m), and in proceedings under S 514 the Magistrate shall make a memorandum of the substance of the evidence of each witness as his examination proceeds (S 355). In such cases, however, under S 358 it is open to the Magistrate, if he thinks fit, to take down the evidence of the witnesses in the manner provided by S 356 or Section 257
- (3) In *regular trials* of cases not falling within this section, the procedure prescribed by Ss 356 to 365 should be followed

Section 355 — Note 2

3 must be read

(Section 355 has no application to summary trial of a case under Chap. XXII of the Code)
 (34) 21 AIR 1934 Bom 157 (158) 54 Bom 299 35 Cri L Jour 841, *In re Tippanna Koutya taddar* (Do)

3. Sub-section (1) of section 260, clauses (b) to (m). — Section 354 makes it clear that this and the following sections do not apply to *summary trials*¹ Thus, it does not apply to cases of the offences specified in subs (1) of S 260, clauses (b) to (m), if tried *summarily*, and therefore in such cases the Magistrate is not bound to make any memorandum of the substance of the evidence of each witness. Even if he makes such a memorandum, the notes do not form part of the record² But, if the Magistrate does not try the offences under the provisions of S 260 but tries them in the ordinary course, he is required under this section to make a memorandum of the evidence³ The High Court of Calcutta has, however, held that such memorandum, if taken, would form part of the record and cannot be destroyed by the Magistrate⁴ An offence of theft under ss 379, 380 and 381, Penal Code, where the value of the property stolen does not exceed Rs 50, is one falling under S 260, Cl (d), and when tried regularly, is governed by this section⁵ But a charge of theft under the said sections combined with a charge of previous conviction for a similar offence has been held to be a *different offence* not falling within clause (d) Neither a summary procedure nor this section will apply to such a case⁶

4. "Shall make a memorandum of the substance of the evidence" — This section requires only a memorandum to be made of the *substance* of the evidence given. Such a memorandum should not, however, be inadequate or vague,¹ but must be full²

The Code is silent as to the *language* in which such a memorandum is to be recorded, consequently, if a subordinate Magistrate, not authorized to take down evidence in English, records the memorandum of the substance of such evidence in English, there is nothing illegal in it³

The memorandum under this section need not be read over to the witnesses inasmuch as it is not *evidence proper*. Section 360 does not apply to such cases⁴

5. "Each witness" — The direction of the section that the Magistrate must make "a memorandum of the substance of the evidence of each witness," is not complied

Note 3

- 1 (40) 27 AIR 1940 Pat 272 (274) 41 Cri L Jour 283, *Mohsin Sheikh v Emperor*
 - (36) 23 AIR 1936 All 319 (319) 37 Cri L Jour 710, *Hafiz Mohd v Emperor*.
 - (05) 2 Cri L Jour 375 (376) 3 Low Bur Rul 3 *Kuchi v Emperor*
 - (27) 14 AIR 1927 Bom 426 (427, 428) 28 Cri L Jour 537, *Chimanlal Manoharlal v Emperor* (Section 355 does not apply to offences coming under S 261, Cl (b))
 - (27) 14 AIR 1927 All 124 (124, 125) 49 All 261 28 Cri L Jour 97, *Mantoo Tewari v Emperor* (The provisions of ss 263 and 264 in cases in which these sections are applicable, are not controlled by S 355)
 - [But see (22) 9 AIR 1922 Pat 5 (7) 23 Cri L Jour 114, *Balkesar Singh v Emperor*. (Submitted not correct)]
 - 2 (27) 14 AIR 1927 All 124 (124) 49 All 261 28 Cri L Jour 97, *Mantoo v Emperor*.
 - 3 (36) 23 AIR 1936 All 319 (319) 37 Cri L Jour 710, *Hafiz Mohd v Emperor*
 - 4 (21) *Nath* "with
 - 5 (36) "peror.
- (A Magistrate trying summary case in ordinary way is not required to record the evidence in the language of the Court or have it so recorded)
- (23) 10 AIR 1923 All 432 (433) *Emperor v Bulakhu*
 - 6 (80) 2 Weir 432 (432, 433) *High Court Proceedings 25th October 1880 No 2110*
 - (78) Weir 3rd Edition 921 (921) 2 Weir 324

Note 4

1. (82) 5 All 224 (226) 1882 All W N 240, *Larasti v Ram Bial*
- 2 (24) 11 AIR 1924 Cal 541 (541) 24 Cri L Jour 688, *Ganoda Dassya v Srīmantha Ghosh*
3. (96) 19 Mad 269 (270) 2 Weir 433 6 Mad L Jour 131, *Queen-Empress v Gopal Goundan*. (Even if it is irregular, S 537 applies)
- 4 (23) 10 AIR 1923 Pat 157 (157) 23 Cri L Jour 120, *Mohammad Ishaq v Emperor*
- (91) 2 Weir 433 (433), *High Court Proceedings, 31st October 1894, No 2078*

with by a mere statement that a witness deposed exactly as another¹ See also S 356

6 "Signed by the Magistrate" — It was held in the undermentioned case¹ that an omission by the Magistrate to sign the memorandum of the substance of the evidence recorded by him vitiated the trial. But in view of the decision of the Privy Council in *Abdul Rahman v Emperor*² the failure of the Magistrate merely to sign the memorandum cannot be regarded as sufficient by itself to vitiate the conviction³

7 Reasons for inability to record as required — Sub section (3) requires that the Magistrate must make a memorandum of the substance of the evidence with his own hand unless he records valid reasons for not doing so. He is not entitled to attend to other work during the hearing of the case and to plead that other work as the reason for his inability to comply with this requirement¹

356.* (1) In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates), and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate or Sessions Judge

(2) When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record

(2A) When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record

(3) In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes, and such memorandum shall be written and signed by

* 1882 S 356 1872 S 334 1851 S 195

Note 5

1 (75) 94 Suth W R Cr 76 (7) *Queen v Pussick Das*.

Note 6

1 (27) 9 AIR 1932 Pat 5 (7) 23 Cr L Jour 114 *Balkesar Singh v Emperor* (The decision holds that S 355 applies to summary trials — This is wrong — See Note 3)

2 (77) 14 AIR 1927 PC 44 (47) 54 IA 96 23 Cr L Jour 209 5 Rang 53 (PC)

3 (40) 27 AIR 1940 Pat 272 (274) 41 Cr L Jour 283 *Mohan Sheikh v Emperor* (Even otherwise in a case governed by S 263 the Magistrate need not record the evidence of witnesses inasmuch as S 263 must be read as an exception to the general provision contained in S 355 (1))

Note 7

1 (37) 24 AIR 1937 Oadh 126 (127) 33 Cr L Jour 150 *Emperor v Jagmohan Singh*. (The irregularity is clearly of much more than a technical nature.)

the Magistrate or Sessions Judge with his own hand, and shall form part of the record

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

Synopsis

- | | |
|---|-------------------------|
| 1 Legislative changes | 7 Language of the Court |
| 2 Scope of the section. | 8 'Shall be signed' |
| 3 "In all other trials" See Note 2 | 9 Record of oath |
| 4 Proceedings for security for good behaviour | 9a Sub section (2) |
| 5 Record of evidence—Sub-section (1) | 10 Sub section (2A) |
| 6 Evidence of each witness shall be taken | 11 Sub section (3) |
| | 12 Sub section (4) |

NOTE to the Synopsis See the Notes indicated for the following topics

- | | |
|---|--|
| Attestation in presence of the accused See Note 8 | Refusal to sign—No offence See Note 8 |
| Deposition destroyed—Value of memo See Note 5 | Signature by presiding Judge and not all Judge—See Note 8 |
| Desirability of shorthand notes in sessions See Note 11 | Signature of deponent See Note 8 |
| Irregularity in memorandum of evidence See Note 11 | Sub-section (3) is supplementary to sub-section (1) and does not override it See Note 11 |
| Provision mandatory See Note 5 | Vernacular record more reliable than notes See Note 5 |
| Record in different language—Effect See Note 5 | |

1 Legislative changes — Change made in 1923—Sub s (2A) was newly added, by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1923

2 Scope of the section — Section 355 provides for the manner in which evidence is to be recorded in certain specified cases. This section provides for the manner of recording of evidence in all *other trials* before Magistrates and Courts of Session and in all inquiries under chapters XII¹ and XVIII. This section applies only to cases to which the provisions of S 355 do not apply²

3 In all other trials. — See Note 9

4 Proceedings for security for good behaviour — An inquiry in a proceeding for demanding security for good behaviour should, under the provisions of S 117 be conducted and evidence recorded as in warrant cases. The manner in which evidence is to be recorded in warrant cases is that prescribed by this section and consequently evidence in inquiries under S 117 on an order for security for good behaviour, should be taken in the manner prescribed by this section¹

Section 356 — Note 2

- 1 (32) 19 AIR 1932 Snd 145 (146) 26 Snd L R 353 34 Cri L Jour 216 *Natho Khan v Emperor* (94) 21 Cal 727 (730) *Bathoo Lal v Do n Lal* (Inquiry under S 147)
 (03) 30 Cal 508 (514) 7 Cal W N 404, *Surjya Kanta v Hem Chander* (Section 145 Cr P C)
 (25) 12 AIR 1925 Cal 822 (826) 52 Cal 721 26 Cri L Jour 1191 (TD) *Narendra Chandra v Sabarab's Bhuiya* (Inquiry under S 145—Also the question whether S 360 applies to inquiry under S 145 referred to Full Bench in this case answered in affirmative)
 (25) 12 AIR 1925 Oudh 286 (286) 26 Cri L Jour 70 *Mohammad Ayub v Sarfaraz Ahmad* (Section 145 Cr P C)
 (73) 20 Suth W R Cr 14 (14) *Ahetronony Das v Sreenath Sarkar* (Do)
 (15) 2 AIR 1915 Cal 664 (665) 16 Cri L Jour 192 (192) 42 Cal 381 *Sadananda Mandal v Krista Mandal*
 (28) 15 AIR 1928 Oudh 112 (112) 29 Cri L Jour 70 *Su iran Singh v Emperor*
 Also see S 145 Note 39

- 2 (36) 23 AIR 1936 All 319 (319) 37 Cri L Jour 710 *Hafiz Md Rafiq Ahmad v Emperor*

Note 4

- 1 (25) 12 A I R 1925 Cal 720 (721) 52 Cal 632 26 Cri L Jour 1240 *Sanatan Bhattacharya v. Emperor* (Case under S 360 accepting the principle stated above)

5 Record of evidence — Sub section (1) — Under this section the entire evidence must be recorded fully¹ (that is) by the Magistrate himself or by somebody else under his direction and in his presence in the language of the Court. This provision is mandatory and an omission to record the evidence in the manner provided is a material irregularity sufficient to set aside the proceedings². But where evidence is recorded but not in the language of the Court the defect is merely an irregularity and not an illegality which would vitiate the trial. The essence of the rule contained in sub s (1) is the taking down in writing of the evidence of each witness and not the taking down in writing of the same in the language of the Court as is shown by the provisions of s 357 under which if the Provincial Government so directs the evidence may be taken down in the mother tongue of the Judge or in English³. So where the error is only one of procedure and does not go to the root of the trial and neither causes prejudice to the accused nor occasions a failure of justice, it is cured by s 357⁴.

Generally speaking where evidence is given by a witness in his own language the vernacular record is always more reliable and entitled to greater weight than the memorandum which the Judge makes in English.⁵ Where however, the deposition taken down in the language of the Court is destroyed and the memorandum in English made by the Magistrate under subs (3) is very full and careful a conviction based on such a memorandum is not invalid.⁶

6 Evidence of each witness shall be taken — Taking down evidence means taking down the statement of a witness *in full as he deposes*¹ Therefore where a Magistrate in recording the evidence of a medical witness, instead of taking down his

Note 5

- 1 (22) 9 AIR 1922 Pat 40 (41) 23 Cri L Jour 219 *Luch n Lal v Emperor* (In this case under S 302,

2

Mandal (Case under S 143 Cr P C)

(90) 1890 All W N 164 (16) *Matai Lal v Anant Rai*

(19) 6 AIR 1919 All 64 (64) 21 Cr L Jour 29 *Udit Narain v Enpero*

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

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4. Results

Ch XII)

Cs. P. G. — Many kinds of administrative statutory rules.

consider the gravity of the irregularity or omission and

to the accused.)

(3rd) 19 AIR 1932 S nd 145 (146) 26 S nd L R 353 34

Also see S 145 Note 39

5 (23) 10 AIR 19'3 Lab 167 (189) 24 Cr L Jour 62a

6 (83) 1883 All W N 296 (996) *Fujirens v. Ashiq Husa*

Note 6
1. (44) 91. ATP 30/11 Reg 220 (2003). IEP 10/15 Reg 523

Yaku beay, Emperor (The statements should be taken

of the cross-examination is defeated when a Judge records

in a single statement)

statements simply recorded that the injuries on the accused were fully detailed in the medical certificate, the procedure is improper² The evidence of each witness must be taken as the examination proceeds and this requirement is not complied with by a mere record that a witness 'deposes as the last witness did³ or "corroborates another witness"⁴

The practice of recording evidence piecemeal and not at a stretch is highly irregular⁵

The record of the deposition of each witness in the Sessions Court must be a faithful record of what the witness states in *that Court* and it is improper while so recording the deposition to base it on the deposition as recorded by the committing Court⁶

7 Language of the Court — The language of the Court is that determined by the Provincial Government under S 558

8 "Shall be signed" — The presiding officer of the Court must sign the deposition of the witness examined by him The object is to ensure the accuracy of the record¹

Where the Court is composed of more than one Judge it is not necessary that all the Judges should sign the deposition It is enough if the presiding Judge signs it²

There is no provision of law which makes it obligatory on the Court to attest the deposition in the *presence of the accused*, though it is desirable that the depositions should be taken and attested in the presence of the accused and a few apt words written on the face of the deposition to make it apparent that this has been done³ See S 509 which makes such a thing obligatory for the purpose of that section

The signature of the *deponent* is not made compulsory though it is desirable that such signatures also should be obtained A refusal to sign a deposition however is not an offence under S 180 of the Penal Code⁴

9 Record of oath — There is nothing in the Code or elsewhere which requires a Court examining a witness to record the fact that the oath was administered to him Where the record does not show that the oath was administered to a witness the reasonable presumption in the absence of any suggestion to the contrary would be that proper procedure was followed and the oath duly administered¹

9a Sub section (2) — Sub section (2) must be read subject to S 357 So where evidence is recorded in English as per directions of the Provincial Government under

2 (28) 15 AIR 1908 Lah 69 (69) 28 Cr L Jour 969 *Bhag Singh v Emperor*

3 (1863) 1 Bom H C R Cr 91 (92) *Reg v Byha*

(64) 1864 Suth W R Gap Cr 18 (18) *Queen v Muttee Nuskyo*

4 (1900 (2) 1900 02 Low Bur Rul 238 (241) *Chit Tun v The Crown*

(93 1900) 1893 1900 Low Bur Rul 606 (627) *Nga Ngjun Bju v Queen Empress*

5 (15) 2 AIR 1915 Cal 558 (560) 16 Cr L Jour 424 (429) 42 Cal 313 *H Meredith v Sanjibani Dass*

rahu v Emperor (Examination

Emperor (Prosecution evidence

recorded piecemeal)

6 (44) 31 AIR 1944 Nag 320 (323) 11LR (1945) Nag 533 46 Cr L Jour 601 219 Ind Cas 337 *Annu beg M k m beg v Emperor*

Note 8

1 (08) 15 AIR 1928 Lah 125 (127) 29 Cr L Jour 212, *Taj Moh ammad v Emperor*

(91) Oudh Sel Cas No 192 p 248 (249) *Queen Empress v Nanhu* (Mere intalling is not signing)

2 (28) 15 AIR 1908 Lah 125 (127) 29 Cr L Jour 212 *Taj Mohamud v Emperor*

3 (68) 10 All 174 (178) 1898 All W N 11, *Queen Empress v Pohp Singh* (Case under S 509 Cr P C)

4 (71) 1 We r 112 (113) *High Court Proceedings 9th January 1871 No 40*

Note 9

1 (14) 15 Cr L Jour 19 (20) 35 All 575 22 Ind Cas 163 *Syed Ahmed v Emperor*

S 357 there is no occasion to call in aid the provisions of sub s (2) of this section to justify the recording of evidence in English and hence the requirement of that sub section as to an authenticated translation of the evidence in the language of the Court cannot come into operation¹

10 Sub section (2A) — This sub section was newly added in 1923. The reason is thus stated in the Statement of Objects and Reasons

Section 356 does not provide for evidence being taken down in any other language than that of the Court or if the language of the Court is not English in English. The result is a certain loss of accuracy whenever evidence is given in a third language as it has to be translated into and taken down in the language of the Court or in English. The object of the amendment is to secure greater accuracy and to avoid waste of time in translation¹

11 Sub section (3) — The provisions of this sub section apply only to cases in which the evidence recorded under sub s (1) is not recorded in the Magistrate's own hand¹. It is supplementary to the provisions in sub s (1) and cannot override the provisions therein². Where therefore there is only a memorandum in English and such a memorandum is not made as the examination of each witness is proceeding and it is not signed by the Judge the irregularity is so serious that the conviction will be quashed³. But where the evidence is recorded in the language of the Court and the Magistrate does not make a memorandum in English the failure is only an irregularity which is curable by Section 537⁴.

The Calcutta High Court has suggested in the undermentioned case⁶ that provisions should be made for recording full and accurate shorthand notes of proceedings at sessions trials.

12 Sub section (4) — The Magistrate or the Sessions Judge when he does not himself take down the evidence in writing is bound under sub s (3) to make a memorandum of the substance of the evidence and this must be written and signed by the Magistrate with his own hand unless he is prevented from doing so in which case he must, under sub s (4) record the reason of his inability to make it. Pressure of other work is not a valid reason within the meaning of this sub section¹.

Note 9a

1 (43) 30 A I R 1943 Cal 30 (35) ILR (1940) 2 Cal 136 41 Cri L Jour 386 205 Ind Cas 459 (D B) *Nabi Pasool v Emperor* (Under S 357 Provincial Government empowering Court of Session to record evidence in English—S 356 (2) does not come into operation)

Note 10

1 Statement of Objects and Reasons 1921

Note 11

1 (15) 2 AIR 1915 Cal 664 (665) 16 Cri L Jour 192 (192) 40 Cal 391 *Sadananda Mandal v Krista Mandal*

2 (15) 2 AIR 1915 Cal 664 (665) 16 Cri L Jour 192 (192) 40 Cal 391 *Sadananda Mandal v Krista Mandal*

Emperor (Evidence not recorded in Magistrate's own hand—But all evidence taken in presence and hearing and under personal direction and superintendence of Magistrate and read over to accused in presence of his pleader and admitted to be correct — Held, failure to make memorandum under sub-s (3) only an irregularity))

5 (24) 11 AIR 1924 Cal 257 (288) 25 Cri L Jour 817 (FB) *Emperor v Barendra*
Also see S 271 Note 11

Note 12

1 (37) 24 AIR 1937 Oudh 106 (127) 38 Cri L Jour 150 *Emperor v Jagmohan*. (Held that Magistrate having failed to pay undivided attention to case trial was vitiated)

357.* (1) The *[Provincial Government] may direct that in any Language of record district or part of a district, or in proceedings before any of evidence Court of Session, or before any Magistrate or class of Magistrates the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so and shall cause the evidence to be taken down in writing from his dictation in open Court

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record

Provided that the *[Provincial Government] may direct the Sessions Judge or Magistrate to take down the evidence in the English language or in the language of the Court, although such language is not his mother-tongue

a Substituted by A O for Local Government

1 Scope of the section — This section applies only to evidence taken under S 356¹ The authority conferred under this section is personal to the particular officer on whom it is conferred and is in force only while he is in the district or part of the district in which it is conferred² But where such an officer is transferred to another district and he takes down depositions in his own handwriting without authority for that district and commits the accused, the commitment although irregular, is not invalid unless the accused is prejudiced thereby³

Where a Sessions Judge without recording any reasons as to his inability to take down the evidence in his own hand dictates the evidence in open Court to a stenographer who takes it down in shorthand and subsequently transcribes it into a typed record in English and that typed record is signed by the Judge and forms part of the record and not the shorthand notes the procedure constitutes an irregularity so vital as to vitiate the trial⁴

358.† In cases of the kind mentioned in section 355, the Magistrate Option to Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in section 356, or, if within the local limits of the jurisdiction of such Magistrate the *[Provincial Government] has made the order referred to in section 357, in the manner provided in the same section

a Substituted by A O for Local Government

1 'If he thinks fit' — Even in cases of the kind specified in S 355 the Magistrate may take down the evidence in the manner mentioned in S 356 if he thinks fit to do so as for example where it appears that a witness is giving false evidence and that it is likely to be necessary to start criminal proceedings against him

* 1882 S 357	1872 S 335,	1861 S 196
† 1882 S 358	1872 S 336	1861 S 268

Section 357 — Note 1

1. (96) 19 Mad 269 (270) 2 Weir 433 6 Mad Lr Jour 134 *Queen v Gopal Goundan*
2. (69) 2 Weir 434 (434) *H O Proceedings 20th November 1869 No 2330*
- (83) 2 Weir 434 (435) *In re Chathanadajil Kulu Nayar*
3. (83) 2 Weir 434 (435) *In re Chathanadajil Kulu Nayar*
4. (43) 80 AIR 1913 Pesh 21 (22) 44 Cri Lr Jour 399 205 Ind Cas 134 (DB) *Salim Dux Mahomed v Emperor*

Mode of record n, evi
dence under section 356
or section 357

359. (1) Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer

1 Scope of the section — This section prescribes the mode of recording evidence under ss 356 and 357. It directs that the evidence shall ordinarily be taken down in the form of a *narrative*. In doing so, the Judge should adhere, as far as possible, to the words actually used either in the question or in the answer given by the witness. The provisions of law cannot be said to be complied with by recording a *paraphrase* of the evidence given by the witness¹. The ordinary, proper and convenient way of recording the evidence is to take it down in the first person *exactly* as spoken by the witness².

The Judge is not bound to make *verbatim* record of any particular question and answer. It is left to the discretion of the Judge, if either side specially requests him to do so.

A Judge may also himself question the witness and record his question and answer under S 165 of the Evidence Act, but this power should be exercised with discretion and within limits as it is unfair to the accused to anticipate or break the thread of his cross-examination³.

2 Recording of questions disallowed. — Sections 356 to 360 do not require that when a Magistrate disallows questions in cross examination he must make a note of this on the record. It has been held that if the Magistrate notes on the record each question that is disallowed the procedure defeats its own object which is to get on with the case, but when a question disallowed is important, or there is a reasonable doubt whether it should not be allowed, it may be useful for the Magistrate to note the question and his reasons for disallowing it. This is, however, entirely a matter for the discretion of the Magistrate⁴. A contrary view has, however, been taken in the undermentioned cases⁵ to the effect that if a question is disallowed on the ground of irrelevancy or on other grounds, the deposition should show what the question is and the reason for disallowing it.

360.† (1) As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected

* 1882 S 359, 1872 S 338, 1861 S 198

† 1882 S 360, 1872 S 339, 1861 S 198

Section 359 — Note 1

1 (65) 2 Cri L Jour 133 (142) 11 Bar L R S, *Nga Sau v Emperor* (But the Court is not bound to

* words in which a witness

evidence in third person causes awkwardness, confusion and waste of time) *Jalar Khan* (Recording of

(83) 1883 All W N 12 (12), *Empress v Balwant Singh*

3 (65) 2 Cri L Jour 133 (143, 144) 11 Bar L R S, *Nga Sau v Emperor*

Note 2

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

Synopsis

1. Legislative changes.
2. Scope and applicability of the section.
3. Shall be read over to the witness — Sub-section (1)
4. In the presence of the accused or of his pleader.

5. "As the evidence of each witness is completed."
6. "And shall, if necessary, be corrected"
7. Shall be interpreted to the witness
8. Non-compliance with the section—Effect of
9. Revision.

NOTE to the Synopsis See the Notes indicated for the following topics:

Accused not entitled to suggest corrections See Notes 2 and 4
 Applicability to Defence of India Act, 1915 See Note 2
 Applicability to Chapters VIII and XII. See Note 4
 Failure to read over See Note 8
 Handing over deposition—Insufficient See Note 3
 Interpretation to accused See Note 7
 Interpretation without reading over See Note 7
 Not to be read over as each sentence is recorded See Note 5
 Presence and not hearing See Note 4

Prosecution of witness for perjury See Note 8
 Reading over after all witnesses are examined See Note 5.
 Reading deposition before vakil of one of several accused See Note 4
 Reading over during examination of another witness See Note 3
 Read over after cross examination on another day. See Note 5
 Record of 'read over'. See Notes 3 and 8
 Section, if mandatory See Notes 2, 3, 7 and 8
 Swearing interpreters See Note 7 and S 543

1. Legislative changes — There was no difference between the corresponding sections of the Codes of 1861 and 1872

Difference between the Codes of 1872, 1882 and 1898 —

- (1) The words "or of his agent, when his personal attendance is dispensed with and he appears by agent" were replaced in the 1882 Code by the words "or of his pleader"
- (2) Section 339 of the Code of 1872, provided that the witness "may require his evidence to be interpreted to him" The Code of 1882 and the present Code provide that the evidence "shall be interpreted to him"

2. Scope and applicability of the section. — Sections 356 and 357 prescribe the manner of taking evidence in the cases mentioned therein. This section enacts the procedure to be followed after the evidence is *completed*. The evidence should be *read over* to the witness or *interpreted* to him if it has been taken down in a language which the witness does not understand. Such reading over or interpretation should be done in the *presence of the accused or of his pleader* if the accused appears by pleader.

The object of the provision is to obtain an accurate record from the witness of what he really means to say and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down¹. It is not to enable the *accused* or his advocate

Section 360 — Note 2

¹ (27) 14 AIR 1927 P C 44 (47). 5 Rang 53. 54 Ind App 96: 28 Cri L Jour 259 (PC), *Abdu'l Rahman v. Emperor*.

to suggest corrections² See also Note 4

3 Shall be read over to the witness — Sub section (1) — Under s 199 of the Code of 1861 it was necessary that a memorandum should be signed and attached to the deposition of each witness to the effect that the evidence was read over to him and that he acknowledged the same to be correct¹ This provision has not been enacted in the present Code It is therefore not imperative though desirable under the present Code that a record be made by the Magistrate that the deposition was read over to the witness in the presence of the accused²

It was held in the undermentioned cases³ that the section is mandatory and not merely directory and the evidence of a witness must be read over to him in the presence of the accused or of his pleader though it may take a considerable time to do so The view that this section is mandatory cannot however be said to be correct after the decision of their Lordships of the Privy Council in *Abdul Rahman v Emperor*⁴ in which it has been held that the provisions of this section are not absolutely prohibitory and that a non compliance with the section is curable under s 537 when it is unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned It is not a sufficient compliance with the section to merely hand over to the witness his deposition so that he may read it over himself⁵ It was held in the under-

[See (40) 27 AIR 1940 Nag 410 (413) 41 Cr L Jour 687 1840 Nag L Jour 165 (170) 188 Ind Cas 885 (889) *Sheeshankar Dhondaji v Emperor* (This section is intended to protect the accused as well as the witnesses)]

[See also (26) 13 AIR 1926 Rang 53 (61) 27 Cr L Jour 669 *Abdul Rahman v Emperor* (25) 12 AIR 1925 Pat 379 (379) 4 Pat 231 26 Cr L Jour 932 *Bhagwat Singh v Emperor* (71) 1871 Bat 54 (54) *Reg v Bal Erishna*]

2 (27) 14 AIR 1927 P C 44 (47) 54 Ind App 96 5 Rang 53 28 Cr L Jour 259 (PC) *Abdul Rahman v Emperor*

The following cases holding that the object is to give the accused an opportunity of checking the correctness of the deposition must be taken to be no longer law

(12) 13 Cr L Jour 568 (572) 15 Ind Cas 985 1 Upper Burul 123 *Nga San Myin v Emperor*
(24) 11 AIR 1874 Cal 889 (890 891) 52 Cal 159 26 Cr L Jour 201 *Hiralal Ghosh v Emperor*

Note 3

1 (70) 18 Suth W R Cr 1 (7) 4 Beng L R App 1 *In re Mahesh Chunder*

(67) 8 Suth W R Cr 63 (64) *Queen v Issur Raut*

(70) 2 N W P H C R 132 (137) *Queen v Lekhraj*

(71) 16 Suth W R Cr 61 (61) *Queen v Mudin Mundle* (Memorandum was a sufficient proof until the contrary was shown that the deponent understood all that was written down)

(70) 13 Suth W R Cr 17 (18) *Queen v Hossain Sirdar*

[See also (69) 12 Suth W R Cr 44 (45) 3 Beng L R App Cr 59 *Queen v Radhoo*]

2 (25) 12 AIR 1925 Pat 723 (725) 26 Cr L Jour 927 *Rameshar Singh v Emperor*

(27) 14 AIR 1927 Pat 100 (102) 28 Cr L Jour 77 *Argu v Kurni v Emperor*

(25) 12 AIR 1925 Pat 378 (380) 4 Pat 231 26 Cr L Jour 932 *Bhagwat Singh v Emperor*

3 (26) 13 AIR 1926 Cal 157 (158) 27 Cr L Jour 375 *Abdul Mallick v Emperor*

(24) 11 AIR 1924 Cal 889 (889 891) 52 Cal 159 26 Cr L Jour 201, *Hiralal Ghosh v Emperor*

(21) 8 AIR 1921 Pat 149 (150) 22 Cr L Jour 563 *Barkhmdo Singh v Emperor*

(09) 10 Cr L Jour 581 (583) 36 Cal 905 4 Ind Cas 416 *Jyotish Chandra v Emperor*

(70) 14 Suth W R Cr 13 (14) *Queen v Parbutty Churn*

(25) 12 AIR 1925 Mad 1206 (1206) 49 Mad 71 26 Cr L Jour 1567, *In re Kuppa Mudaliar* (Non compliance was held an illegal ty)

(25) 12 AIR 1925 Pat 378 (379) 4 Pat 231 26 Cr L Jour 932 *Bhagwat Singh v Emperor*

(29) 16 AIR 1929 Mad 862 (863) 52 Mad 995 31 Cr L Jour 273 *Damodara v Emperor*

4 (27) 14 AIR 1927 P C 44 (49) 54 Ind App 96 28 Cr L Jour 259 5 Rang 53 (P C)

Also see Note 8 on this section and Note 6 on s 537

5 (27) 14 AIR 1927 P C 44 (46) 54 Ind App 96 5 Rang 53 29 Cr L Jour 259 (PC) *Abdul Rahman v Emperor* (Though it may be allowed if the Magistrate's pronouncement is defective or the witness is deaf)

(25) 12 AIR 1925 Cal 1120 (1120) 26 Cr L Jour 951 *Sahorah Molla v Emperor*

(25) 12 AIR 1925 Cal 762 (763) 52 Cal 431 26 Cr L Jour 1178 *Mid Yasin v Emperor*

(14) 1 AIR 1914 Cal 769 (790) 42 Cal 240 15 Cr L Jour 4-3 *Emperor v Jogendra*

(25) 12 AIR 1925 Pat 723 (725) 26 Cr L Jour 927, *Rameshar Singh v Emperor*

mentioned cases¹ that it would not be a compliance with the section if the evidence is read over to the witness while another witness is being examined, the reason being that the accused cannot at one and the same time listen to the evidence that is being read over and to the evidence of a fresh witness that is being recorded. On this question their Lordships of the Privy Council have held in *Abdul Rahman v. Emperor*⁷ above cited, that although it will be a better course if depositions other than mere formal ones were read over so that the accused or his pleader could hear them and give his undivided attention to them, yet it would be no violation of the provisions of this section if the deposition of one witness is read over while other stages of the case are proceeding, as "the primary object is to fix the witness and to enable him to protect himself against any inaccuracy in the words taken down from his lips"

4. In the presence of the accused or of his pleader.—The evidence must be read over in the presence of the accused, if he is in attendance, or of his pleader. Where, however, there are several accused in the case, the evidence of a witness read over in the presence of the pleader of one only of such accused is not inadmissible in a case of perjury against such witness, merely because it was not read over in the presence of all the other accused or their pleaders¹

It is only where the accused "appears by a pleader" that a reading over of the evidence in the presence of such pleader is sufficient² The words "if he appears by a pleader" cannot be restricted to cases in which a pleader is allowed to represent one accused whose personal attendance has been dispensed with. The natural meaning of the words is that if an accused person has engaged a pleader, who is in attendance, the reading over of the deposition in his presence will be a full compliance with the provisions of this section³

The evidence must be read over only in the presence of the accused or of his pleader. It is not necessary that it should be within their hearing. The reason is that the accused is only entitled to be sure that the evidence has been read over, and that the witness has had an opportunity of correcting the written words. But he is not necessarily entitled to the opportunity of suggesting corrections.⁴

Does this section apply to proceedings under chap XII of the Code? It has been held by a Full Bench of the High Court of Calcutta that the persons proceeded against under that chapter are not "accused" persons, but that the first clause of this section should be read as meaning that the evidence is to be read over in the presence of the accused if there is one and that, therefore, the evidence should be read over to the witness in such

(27) 28 Cr L Jour 651 (651) : 103 Ind Cas 107 (Lab), *Kesar Singh v. Sultan-ul Mulik*.

(25) 12 AIR 1925 Cal 729 (732) : 26 Cr L Jour 1009, *Jessaral v. Emperor*.

[But see (26) 13 AIR 1926 Pat 233 (233) : 5 Pat 63 : 27 Cr L Jour 484, *Jagna Dhanul v. Emperor* (In view of the Privy Council decision in AIR 1927 P C 44 : 54 Ind App 96 : 5 Rang 53 : 28 Cr L Jour 259, this case cannot be taken as laying down correct law)]

6 (25) 12 AIR 1925 Cal 831 (832) : 52 Cal 499 : 26 Cr L Jour 1213, *Dargahi v. Emperor*.

(25) 12 AIR 1925 Cal 933 (933) : 26 Cr L Jour 1267, *Manik v. Emperor*.

(26) 13 AIR 1926 Cal 423 (423) : 26 Cr L Jour 1016, *Adiladdi v. Emperor*

(94) 2 Weir 435 (435), *In re Singiri Eradu*.

(95) 2 Cr L Jour 133 (143) : 11 Bur L B 8, *Nga Saw v. Emperor*.

(11) 12 Cr L Jour 44 (45) : 9 Ind Cas 262 (Mad), *In re Muthu Kumara Reddy*

7. (27) 14 AIR 1927 P C 44 (48) : 54 Ind App 96 : 5 Rang 53 : 28 Cr L Jour 259 (PC).

Note 4

1. (09) 10 Cr L Jour 160 (151, 155) : 36 Cal 808 : 2 Ind Cas 697, *Rakhai v. Emperor*.

2. (26) 13 AIR 1926 Cal 528 (528) : 27 Cr L Jour 509, *Kasim Ali v. Sarada Kripa*.

3. (28) 15 AIR 1928 Cal 27 (32) : 29 Cr L Jour 49, *Harj Narayan Chandra v. Emperor*.

4. (27) 14 AIR 1927 P C 44 (48) : 54 Ind App 96 : 5 Rang 53 : 28 Cr L Jour 259 (PC), *Abdul Rahman v. Emperor*

(27) 14 AIR 1927 Pat 100 (102) : 23 Cr L Jour 77, *Arjun Kurmi v. Emperor*.

proceeding though not in the presence of the persons proceeded against⁵ The High Court of Patna has come to the same conclusion⁶

5 "As the evidence of each witness . . . is completed."—The evidence of each witness must be read over to him *immediately* after it is completed. The section is not complied with if the deposition is read over at the end of the day after all the witnesses are examined¹ Where a Magistrate examined a number of witnesses and asked them to be in a room and then had the depositions read over to them, it was held that the procedure was illegal and not merely irregular² Again, the section is not complied with if the evidence is read out as each *sentence* of it is being recorded. It must be read out only after it is *completed*³ But where the evidence is read over to a witness some days after his examination in chief but immediately after his *cross examination*, it was held that this section was sufficiently complied with⁴

6 "And shall, if necessary, be corrected."—Before a deposition is closed, a witness should be given an opportunity of explaining and correcting any contradictions which it may contain¹

7 Shall be interpreted to the witness—Under the Codes of 1861 and 1872, when the evidence was taken down in a language different from that in which it was given, the witness *might* require that his evidence should be interpreted to him¹ Under this Code it is *obligatory* on the Court in all such cases, whether the witness requires it or not, to interpret his evidence to him. It is, however, not necessary to first read out the deposition to the witness in the language in which it is taken and then to interpret it to him. It is sufficient if it is merely interpreted to him²

Should the evidence in such cases be interpreted to the accused? In *Abdul Rahman v King Emperor*³ their Lordships of the Privy Council observed as follows:

¹ The distinction between s. 360 and s. 361 is very marked. Under the latter section, if evidence is given in a language not understood by the accused or his pleader,

(40) 27 AIR 1910 Nag 410 (413) 1940 Nag L Jour 165 (169) . 41 Cri L Jour 697 : 188 Ind Cas 885 (887), *Sheoshankar Dhondbag v Emperor*

Also see Note 2

longer law)

6 (22) 9 AIR 1922 Pat 371 (371); 23 Cri L Jour 125, *Ram Narain v. Dhonras Gope*

Also see S 145, Note 39

Note 5

1 (26) 13 AIR 1926 Cal 157 (159); 27 Cri L Jour 375, *Abdul Mullick v Emperor*.

(26) 13 AIR 1926 Cal 563 (564) . 53 Cal 129 : 27 Cri L Jour 688, *Samsirah Hani v. Emperor*. (Read over during mid-day interval)

2 (25) 12 AIR 1925 Mad 1206 (1206) . 49 Mad 71 : 26 Cri L Jour 1587, *In re Kuppa Mudaliar*. (This view, however, requires reconsideration in the light of the Privy Council decision in AIR 1927 PC 41 . 54 Ind App 95 : 5 Rang 53 28 Cri L Jour 259, holding that a non compliance with this section is only an irregularity curable under S. 537 — See Note 8)

3 (21) 22 Cri L Jour 669 (671); 63 Ind Cas 461 (463) (Lab), *Wadhawa Singh v. Emperor*

4 (29) 16 AIR 1929 Cal 390 (391) : 31 Cri L Jour 373, *Kamini Kumar v. Emperor*. (Evidence is ordinarily completed after examination-in-chief, cross-examination, and if necessary, re-examination)

(18) 5 AIR 1918 Pat 449 (450) : 19 Cri L Jour 169, *Ramdhar Singh v Emperor*

[But see (26) 13 AIR 1926 Pat 59 (60) . 26 Cri L Jour 1475, *Emperor v Phaguna Dhuian*. (Which seems to suggest that it should be read over at the end of the examination-in-chief)]

Note 6

1.

2.

3.

it is to be interpreted into their language, while under the former section, when it is read over, it is to be interpreted to the *witness* in his own language, but there is no provision for its being interpreted to the *accused*. Thus, if the depositions are taken down in English, and the language of the accused is Hindi, and the language of a witness is Burmese, . . . the depositions will have to be *taken* by getting the witness's answers in Burmese, having them interpreted to the Court so that they may be taken down in English, and further interpreted to the accused, so that he may understand them, in Hindi. When, however, the deposition comes to be read over, as it will be, in English, it will be interpreted to the *witness* in Burmese, but not to the accused in Hindi, and if the accused knew neither English nor Burmese, he will be none the wiser."

As to whether a sworn interpreter is necessary for interpreting the evidence to the witness, see S 543, Note 1

8. Non-compliance with the section—Effect of. — It has now been settled by the Privy Council that non compliance with the strict provisions of this section is only an irregularity which is cured by S 537 of the Code in the absence of prejudice¹. Thus, a failure to read over the evidence to the witness would not necessarily vitiate the trial of the accused².

There is a conflict of opinion as to whether the *witness* can be prosecuted on the basis of evidence, the procedure regarding which has not been followed as laid down in this section. On the one hand, it has been held that non compliance with the section renders the evidence *inadmissible* under the Evidence Act, that no *other* evidence can be admitted by virtue of the provisions of S 91 thereof, and that, therefore, a conviction on such

Note 8

1. (27) 14 AIR 1927 P C 44 (49) 54 Ind App 96 5 Rang 53 23 Cri L Jour 259 (PC) *Abdul Rahman v Emperor*

sustainable)

(27) 14 AIR 1927 P C 44 (49) 54 Ind App 96 5 Rang 53 23 Cri L Jour 259 (PC) *Abdul Rahman v Emperor*

See also the following cases which have taken the view expressed by the Privy Council

(27) 14 AIR 1927 All 755 (755) 23 Cri L Jour 606, *Sher Mohammad Khan v Bihari*

(26) 13 AIR 1926 Rang 53 (81, 63) 27 Cri L Jour 669, *Abdul Rahman v. Emperor*

(24) 11 AIR 1924 Pat 786 (787) 25 Cri L Jour 89, *Sondt Singh v Govind Singh* (Omission to read over the evidence to the witness)

751, *Fatlar Bap v Emperor*.

1276, *Abdur Rahim v Emperor* (Case remanded for

(25) 12 AIR 1925 Pat 414 (419) 4 Pat 488 26 Cri L Jour 811, *Mohiuddin v Emperor*

The following cases cannot be considered to be good law after the Privy Council case (AIR 1927

evidence cannot be sustained³ A contrary view has on the other hand been taken in the undermentioned cases⁴ to the effect that non compliance with the section does not render the evidence inadmissible but only prevents a presumption being raised as to its correctness under S 80 of the Evidence Act In view of the decision of the Privy Council in *Abdul Rahman v King Emperor*⁵ that non compliance with the section is not fatal to the conviction it is submitted that the latter view is correct See S 476 Note 11

Where the accuracy of the deposition was challenged and it was clear that a relevant statement of a witness was omitted from the record which was not read over to the witness it was held that the conviction should be quashed⁶

The absence of a memorandum subjoined to a deposition and stating the fact of compliance with the section does not of itself prove that the provisions of this section have not been complied with⁷

As to the witness's liability to be proceeded against for perjury see S 103 of the Penal Code and S 476 Note 11

9 Revision—The question whether a deposition was read over to the witness in accordance with this section is one of fact and cannot be raised for the first time in revision before the High Court¹

361. * (i) Whenever any evidence is given in a language not under-

Interpretation of evidence to accused or his pleader	stood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him
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* 1882 S 361 1872 S 340 1861 S 200

3 (46) 33 AIR 1946 Nag 39 (40) 1 L R (1945) Nag 788 *Hari Ram v Emperor* (The omission to read over the deposit on to the witness is not a mere irregularity but it renders the record inadmissible in proof of the deposition and it would be judicially inquired into to prosecute the witness for perjury)

(19) 8 AIR 1919 Mad 45 (47) 42 Mad 561 20 Cri L Jour 379 *In re Nalluri Cheneiah*

(28) 16 AIR 1929 Lah 125 (129) 29 Cri L Jour 212 *Taj Mohammad v Emperor* (Not read over to witness)

(14) 1 AIR 1914 Cal 789 (790) 42 Cal 240 15 Cri L Jour 483 *Emperor v Jogendra Nath Ghose* (Handing over deposition to be read by witness*)

(09) 10 Cri L Jour 591 (583) 36 Cal 935 4 Ind Cas 416 *Jyotish Chandra v Emperor*

(12) 13 Cri L Jour 569 (571) 15 Ind Cas 985 1 Upp Bur Rul 123 *Nga San Myin v Emperor* (Read over but not in the presence of the accused)

(21) 8 AIR 1921 Pat 149 (150) 22 Cri L Jour 568 *Barkhmedo Singh v Emperor* (Not read over in the presence of accused or pleader)

(18) 5 AIR 1918 Low Bur 129 (130) 18 Cri L Jour 966 *Kadir Palani v Emperor* (Do)

(08) 8 Cri L Jour 116 (118 119) 12 Cal W N 845 *Mohendra Nath v Emperor* (Do)

(75) 23 Soth W R Cr 28 (29) *Queen v Mungul Dass*

(28) 15 AIR 1918 Cal 271 (271) *Choye uddin Paramanik v Emperor* (Trial under S 211 Penal Code)

4 (40) 27 AIR 1940 Nag 410 (413) 41 Cri L Jour 697 183 Ind Cas 895 (898) *Sheshankar Dhondbay v Emperor* (Statement not read over and not interpreted in the presence of accused—Statement is not inadmissible as no prejudice caused—AIR 1927 P C 44 54 Ind App 96 5 Rang 53 28 Cri L Jour 239 followed)

. the

(11) 12 Cri L Jour 44 (45) 9 Ind Cas 263 (Mad) *In re Muthukumara Reddy* (Read over while another witness was being examined.)

5 (27) 14 AIR 1927 I C 44 (44) 54 Ind App 96 5 Rang 53 23 Cri L Jour 239 (P C)

6 (26) 13 AIR 1916 Rang 8 (9) 3 Rang 612 27 Cri L Jour 837 *Mayer v Emperor*

7 (25) 12 AIR 1905 Pat 3 8 (300) 4 Pat 231 26 Cri L Jour 937 *Lhajwal v Emperor*
Note 9

1 (25) 12 AIR 1925 Pat 414 (419 421) 4 Pat 469 26 Cri L Jour 811 *Mohiuddin v Emperor*.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary

1 Legislative changes (*Omitted*)

2 Distinction between this section and Section 360 — See Note 7 on Sect on 360

3 "Evidence," meaning of — The word 'evidence' in sub s (1) means oral evidence Documents are separately mentioned in sub s (3)

4 Interpretation to accused and his pleader — It has been held in the undermentioned case¹ that subsections (1) and (2) are not mutually exclusive and that even where the accused appears by a pleader it is necessary to interpret the evidence to the accused The non compliance with this requirement is however, only an irregularity which can be cured under s 537²

5 Interpreters — See Section 543

6 Interpretation of documents — Sub section (3) gives effect to the under mentioned case¹ decided under s 200 of the Code of 1861 which did not contain a provision similar to sub s (3)

362.* (1) In every case * [tried by a Presidency Magistrate in which an appeal lies, such Magistrate] shall either take down the evidence of the witnesses with his own hand or cause it to be taken down in writing from his dictation All evidence so taken down shall be signed by the Magistrate and shall form part of the record

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer

^b(2A) In every case referred to in sub section (1), the Magistrate shall make a memorandum of the substance of the examination of the accused Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record

(3) Sentences * [unless they are sentences of imprisonment ordered to run concurrently] passed under section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence

* 1882 S 362 1872 Ss 335 and 338, 1861 Ss 196 and 198

Section 361 — Note 4

1 (30) 17 AIR 1930 Mad 186 (186) 31 Cr L Jour 827 *Erappa v Emperor*

2 (30) 17 AIR 1930 Mad 186 (186) 31 Cr L Jour 827 *Erappa v Emperor*

[See (75) 24 Suth W R Cr 50 (51) *Queen v Bhobun Mohun Bey* (Evidence of Civil Surgeon given in English not interpreted to accused was held an irregularity of small importance)]

Note 6

1 (71) 15 Suth W R Cr 25 (27) 7 Beng L R 63 *Queen v Ameeroddeen* (This is so only in cases where a document is put in for purpose of merely giving formal proof of that which is an incontestable fact)

^d(4) In cases other than those specified in sub-section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge

- a The words tried by a such Magistrate in subs (1) were substituted for the words "in which a Presidency Magistrate imposes a fine exceeding two hundred rupees or imprisonment for a term exceeding six months he" by the Code of Criminal Procedure (Amendment) Act, 18 [VIII] of 1923
- b Sub-section (2) was inserted *ibid*
- c These words were inserted *ibid*
- d Sub-section (4) was added *ibid*

Synopsis

- 1 Scope of the section
- 2 Record of evidence in appealable cases
- 3 Record of evidence in non-appealable cases
- 4 Mode of recording evidence
- 5 Memorandum of the substance of the examination of the accused

- 6 Framing of charges by Presidency Magistrates
- 7 Sentence of imprisonment — Meaning of. See Notes on Section 411
- 8 Sentences on conviction for several offences at the same trial
- 9 Right of parties to get copies of depositions

NOTE to the Synopsis See the Notes indicated for the following topics

- Compared with Ss 263 and 264 See Note 2
- Duty to record all material facts See Note 2
- Inapplicability to references of cases under S 110 See Note 1
- Legislative changes See Notes 2, 3 5 and 6
- Narrative in indirect form See Note 4
- Petty cases or morning cases See Note 3

- Refusal of copies and S 45 of the Specific Relief Act See Note 9
- Section 364 and subs (2A) of this section See Note 5
- Section 370 — Effect See Note 5
- Section 411 See Note 2
- Section 251 See Note 6
- Select Committees of 1916 and 1922 See Note 2

1 Scope of the section — This section enacts that in appealable cases Presidency Magistrates should take down the evidence of witnesses in their own hand, or cause it to be taken down, in open Court to their dictation. They are also required to make a memorandum of the substance of the examination of the accused in such cases. In other cases, i.e., non appealable cases, they need not record any evidence, or even frame a charge.

This section does not apply to cases under S 110, where it becomes necessary to make a reference to the High Court, in regard to the sentence of imprisonment¹

An offence under the Companies Act which is punishable with fine and imprisonment may be tried summarily under this section, unless the Magistrate imposes an appealable sentence, notwithstanding the provisions of S 273 (2) of that Act²

2. Record of evidence in appealable cases — In cases coming under S 262, subs (1), i.e., in appealable cases, the Magistrate is bound to record the evidence with his own hand or cause it to be taken down in writing from his dictation in open Court. In doing so, it is the duty of the Magistrate to take note of all the material facts, whether they appear in the examination in chief or in the course of cross examination¹

Before the amendment of 1923, sub s. (1) applied to cases in which the Magistrate imposed a fine of Rs 200, or imprisonment for a period exceeding six months. The taking of evidence precedes the sentence, and it is on the evidence given that the sentence is based. Therefore, the language was clearly faulty as it is unreasonable to suppose that the Magistrate should make up his mind as to the sentence he would pass, before the

Section 362 — Note 1

- 1 (193) 10 Cri L Jour 122 (123) 2 Ind Cas 651 (Cal), *Emperor v Nepal Sahay* (Evidence of reputation)
- 2 (144) 31 AIR 1944 Bom 129 (130) 1 L R (1944) Bom 3-2 : 45 Cri L Jour 631 : 212 Ind Cas 409 (FD), *Shamdasani v H P Mody*

Note 2

1. (19) 6 AIR 1919 Cal 606 (700, 701) 46 Cal 411 : 20 Cri L Jour 24, *Ah Foeny Chinaman Emperor*

evidence was recorded² This defect of language was noticed, and in regard to it, the Select Committee of 1916 observed

"We think that the opening words of sub s (1) of S 362 require amendment. As the section stands, it seems to imply that a Presidency Magistrate before he commences his enquiry must make up his mind as to the maximum limit of the sentence he will impose. We think that the sub section would read better as amended by us, compare the wording of Section 264."

The amendment made is that in cases in which an appeal lies, the Presidency Magistrate shall either record the evidence himself, or have it recorded. It is not clear how the defect of language noticed above has been remedied by the amendment. If the section as it stood before the amendment implied that the Magistrate should make up his mind as to the maximum limit of sentence he would pass, the same implication still continues, for, under S 411, only a sentence of imprisonment for more than six months and a fine exceeding Rs 200 are appealable. In short, to make up his mind to award an appealable sentence is to make up his mind as to the maximum limit of the sentence he would pass. In regard to this criticism, the Select Committee in 1922, observed

"We are inclined to agree with those critics who point out that the re draft proposed in sub s (1) of S 362 does not get rid of the difficulty that a Magistrate has to make up his mind as to the sentence he will impose before he begins trying the case. We cannot see how this difficulty can be got rid of, but we think that the amendment proposed has the advantage of bringing the language of this section into conformity with the language of Ss 263 and 264 and we would, therefore, retain this sub clause."

Apart from the uniformity of the language, it is not clear what "advantage" is gained by using language similar to that in Ss 263 and 264. It must in this connection be noted, that the language in S 264 is appropriate and presents no difficulties similar to those in S 362 (1), for a judgment does usually precede the sentence. It is the language in S 263 that presents difficulties similar to those in S 362 (1) and in regard to it, it was observed

"It may be difficult for a Magistrate to determine at the initial stage whether he will or will not pass an appealable sentence. In such a case the course he has to adopt is to make a memorandum of the evidence of each witness as the examination of the witness proceeds. If, on the other hand, even at the initial stage he can make up his mind that in any event the sentence to be passed by him will not be appealable, he need not record the evidence."³

Where the Magistrate finds that he has tried a case without recording the evidence and that a longer sentence than six months ought to be passed, his course is to record the evidence afresh⁴. This happens generally in cases where after he has convicted the accused, he is informed for the first time that the accused is an old criminal with many previous convictions. In such cases it has been held that though the prosecution should not inform the Magistrate about previous convictions, they may indicate to the Magistrate that they think that the case is one in which it is desirable that the evidence should be recorded, so as to avoid recording of evidence afresh⁵.

3. Record of evidence in non-appealable cases—Sub section (4) was newly introduced in 1923. The section as it stood before 1923 having provided the procedure to be adopted in appealable cases only, there was uncertainty as to the procedure to be followed in non appealable cases¹. It was held by the High Court of Calcutta in the undermentioned

² ('06) 33 Cal 1036 (1038, 1039). ⁴ Cal L Jour 408 - 4 Cri L Jour 368, *Shank Babu v Emperor*

³ ('21) 8 AIR 1921 Cal 165 (165, 166). 48 Cal 280. 22 Cri L Jour 462, *Satish v Manmatha* (Evidence recorded becomes part of record and must not be destroyed)

⁴ ('35) 22 AIR 1935 Bom 37 (38). 36 Cri L Jour 527, *Emperor v Ahmad Ibrahim*

⁵ ('35) 22 AIR 1935 Bom 37 (38). 38 Cri L Jour 527, *Emperor v Ahmad Ibrahim*

case² that it was left to the discretion of the Magistrate to record or not, evidence in such cases and that the High Court felt unable to prescribe a procedure which the law did not render obligatory. In another case³ the same High Court remarked that though the Magistrate was not bound to record evidence in such cases it was desirable that he should keep some record of the statements made by witnesses or that their judgments should indicate what the statements were so that the High Court may judge as a Court of revision of the propriety or legality of the orders passed by them. A similar view was expressed in the undermentioned cases also⁴.

In *Emperor v. Harischandra*⁵ the High Court of Bombay held that the Magistrate had a discretion to take evidence or not in such cases, but that such discretion had to be exercised reasonably and not arbitrarily it was observed.

'But the discretion like all discretionary powers should be exercised judicially, in a reasonable spirit and not arbitrarily. For instance, in cases of petty offences, such as nuisances or what are called in police parlance 'morning cases,' there may be no necessity to record any evidence. But in a case of this kind, where an educated man holding a comparatively respectable status in life is charged with an offence reflecting on his character and serious allegations are levelled against him, there ought to have been some record of evidence to enable him in a case of conviction to come up to this Court in revision and satisfy it that the conviction is wrong."

This view was adopted by the same High Court in the undermentioned cases⁶ which arose after the introduction of sub s (4) of this section. In *D Souza v. Emperor*,⁷ however, the said view was dissented from. Beaumont, C J. observed as follows.

Section 362 is perfectly plain it says that in cases which are not appealable, it shall not be necessary for a Presidency Magistrate to record the evidence. There is no distinction drawn between what the learned Judges refer to as 'morning cases' and any other cases. Nor is any distinction drawn between charges against people occupying a respectable status in life and people who occupy some other status. Nor in terms has any discretion been conferred upon the Magistrate. It is no doubt true that in one sense he has a discretion, because it is not illegal for him to record evidence if he likes to do so. But his right to refuse to record evidence is, in my opinion, absolute, and as long as the case falls within the cases excepted under s 362, sub s (4), the Magistrate is not bound to record the evidence, and this Court has no jurisdiction to require him to do what the Statute says it is not necessary for him to do. If he likes to record the evidence, that is another matter and probably if he was hearing a case which involved a question of serious consequence to the accused, and the accused asked him to make a record of those portions of the evidence on which he wished to rely on an application in revision, the Magistrate would, in a proper case, comply with that request. But in my opinion, the exercise of any such discretion would be *ex gratia*, and not subject to review in this Court."

The view expressed in *D'Souza's case* has been approved by a Full Bench of that High Court in the undermentioned case⁸.

2 (1941) 31 Cal 983 (1985) 8 Cal W N 839, *Emman v. Emperor*

3 (1941) 31 Cal 983 (1985) 8 Cal W N 839, *Emman v. Emperor*

4 (1941) 31 Cal 983 (1985) 8 Cal W N 839, *Emman v. Emperor* (Strict compliance is necessary even where accused is to be sent to Dharwar Juvenile Jail.)

(31) 18 AIR 1931 Bom 142 (143) 32 Cri L Jour 276, *Hansabai v. Mahomed Yakub* (Presidency Magistrates should record evidence as in summons-cases)

7. (32) 19 AIR 1932 Bom 160 (161) 56 Bom 209 33 Cri L Jour 401 (7 Cri L Jour 191 dissented from.)

8 (44) 31 AIR 1944 Bom 123 (130) 11LR (1944) Bom 392 45 Cri L Jour 631; 212 Ind Cas 402 (FB), *Shamlasini v. H P Mody* (Presidency Magistrate giving full reasons for trying case summarily

4 Mode of recording evidence — Under sub s. (2) it is required that the evidence shall ordinarily be recorded in the form of a narrative, but that the Magistrate may, in his discretion, take down any particular question or answer. But mere irregularities in the mode of recording evidence will not, unless failure of justice has been occasioned thereby, vitiate the trial. Thus, where a Presidency Magistrate recorded certain portions of the depositions of some of the witnesses which were of a more or less formal nature in the form of indirect narration as "P W 4 speaks to the identification by P W. 1 of some of the jewels," and "P W 3 proves his signature to the search lists," it was held that the trial was not vitiated, as this mode of recording evidence occasioned no failure of justice¹. But where in recording the examination in chief of two witnesses the Magistrate merely recorded the words "corroborates P W 1," it was held that what is required is not merely the opinion of the Magistrate regarding the evidence given by the witnesses but a correct record of the evidence given by them, that the Magistrate had failed to follow the directions given by this section so far as these witnesses were concerned and that the conviction could not be upheld².

5 Memorandum of the substance of the examination of the accused. — Sub section (2A) which was newly added in 1923 requires the Presidency Magistrates to record the substance of the examination of the accused in *appealable cases*. Simultaneous with the introduction of this sub section, sub s (4) of S 364 was amended so as to make the provisions of S 364 as to the recording of the examination of the accused inapplicable to Presidency Magistrates in appealable cases. Thus, in appealable cases Presidency Magistrates need only make a memorandum of the examination of the accused and are not required to take down the examination of the accused in the manner provided in S 364. As to why this new sub section was introduced, the Select Committee say:

"In order to meet difficulties that have arisen, we have introduced a sub s (2A) laying down that Presidency Magistrates, in cases subject to appeal, shall make a memorandum of the substance of the examination of the accused,"

There is no provision as to the mode of recording the examination of the accused in non appealable cases, which are now severely left alone confined to the protection that S 370, by its own terms, would afford. Thus in non appealable cases the only record of the examination of the accused is what is filled up under cl (f) of S 370. As to the manner of filling up of this column, however, S 370 is silent and it has been held that in a case where the accused, both at the time he took the plea and when he was examined, denied that he committed the offence, the entry 'denies' is sufficient³.

6. Framing of charges by Presidency Magistrates — Sub section (4) which has been newly added relieves Presidency Magistrates from the duty of framing charges in non appealable cases. But in appealable cases where charges have to be framed under S 254, the Presidency Magistrates are bound to frame charges¹. Thus to try an accused for an offence punishable under S 420/75 of the Penal Code, without framing a charge, is a defect of procedure, for S 254 applies to Presidency Magistrates and it is mandatory.

7 Sentence of imprisonment — Meaning of. — See Notes on S 411

8 Sentences on conviction for several offences at the same trial — Sub section (2) provides for cases where at the same trial sentences for conviction for

without recording evidence in full—High Court will not interfere though case may have taken several hearings extending over long period)

Note 4

1. (18) 5 AIR 1918 Mad 1197 (1196) 18 Cr L Jour 336, *In re Gulab Chand*

2. (39) 26 AIR 1939 Cal 623 (624) 41 Cr L Jour 40, *Ghulam Dastgir v Emperor* (It is for the appellate Court to decide whether the evidence contradicts or corroborates other evidence)

Note 5

1. (20) 16 AIR 1920 Cal 406 (406) 56 Cal 1067 • 30 Cr L Jour 536, *Sadagar v Emperor*.

Note 6

1. (32) 19 AIR 1932 Cal 865 (865) • 33 Cr L Jour 828, *Raghuraj Khahar v. Emperor*.

several offences are passed. The Select Committee observed "It is provided that when sentences in excess of one are passed which are ordered to run concurrently, it is the heaviest sentence that determines the applicability of s 362'¹ The one exception to the rule that sentences passed under s 35 are to be considered as one is the case when the sentences passed are sentences of imprisonment ordered to run concurrently

9. Right of parties to get copies of depositions. — Parties to criminal proceedings are entitled to get copies of depositions taken by Presidency Magistrates. Where on the dismissal of a complaint the complainant asked for copies of depositions, and they were refused, the High Court under s 45, Specific Relief Act, had those records sent for and kept with the Registrar so that the party might take copies of them¹

363. When a Sessions Judge or Magistrate has recorded the

Remarks respecting demeanour of witness, evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Synopsis

- 1 Remarks on demeanour of witness,
2 Remarks on substance of deposition of witness

NOTE to the Synopsis See the Notes indicated for the following topics.

Appellate Court's duty to consider facts independently. See Note 1.

Deemeanour when material. See Note 1

Attestation of Magistrate as to physical capacity of
witness to answer. See Note 1

Improbabilities and discrepancies. See Note 1

Demeanour not sure test See Note 1

Note as to credibility after whole evidence taken.
See Note 2

Demeanour of accomplice See Note 1

Note as to falsity of witness during examination —
Ground for transfer. See Note 2.

1. **Remarks on demeanour of witness** — A mere record of the deposition of a witness in a language different from that in which it was deposed and in a narrative form is but a very imperfect representation of what passes between a witness and a counsel, more especially in cross examination¹ It cannot give the look or the manner of the witness, his hesitation, his doubts, his variation of language, his confidence, or precipitancy, his calmness or consideration It has therefore been said that "it is, in short, or it may be, the dead body of the evidence without its spirit which is supplied when given openly or orally to the ear and to the eye of those who receive it"² This "spirit" which is "supplied . . . to the ear and to the eye" consists in the manner in which the evidence is given or, in the language of this section, "demeanour." whilst under examination" This demeanour may be such as is not calculated to inspire confidence,³ or it may be such as to lead to the inevitable conclusion that the witness is perjurying himself⁴ It is for this reason that when the credibility of a witness turns upon his manner and demeanour,⁵ or where the issue is

* 1852 • S 363 , 1872 S 341 : 1861 • S. 267.

Note 8

1 Statements of Objects and Reasons (1914)

Note 9

Section 363 — Note 1

1 (74) 21 Sath W R Cr 13 (14), *Queen v. Madhub Chander Gira Mohanti*.

2. *Peql 13* South W R Cr 3 (2 4) 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000 1001 1002 1003 1004 1005 1006 1007 1008 1009 1010 1011 1012 1013 1014 1015 1016 1017 1018 1019 1020 1021 1022 1023 1024 1025 1026 1027 1028 1029 1030 1031 1032 1033 1034 1035 1

4. It is entitled

... The P...

(But not where he is disbelieved on inherent probabilities of story)

simple and depends on the credit which attaches to one or other of conflicting witnesses⁶ or where the evidence is all oral and its credibility is a matter of opinion,⁷ the opinion of the Magistrate who heard and saw the witnesses is not lightly set aside and it may even be said that it is generally taken as conclusive. Thus, where a Sessions Judge of experience stated that the demeanour of the eye witnesses was evasive, that they inspired him with no confidence and no man could be convicted on their testimony, the appellate Court could not and would not accept the evidence of those eye witnesses as true, unless the appellate Court is assured in the most positive and convincing manner that the criticism of the Sessions Judge was not justified.⁸ The High Court was prepared to accept the evidence of a girl of six years who was the only eye witness to the murder as the Sessions Judge stated that "her evidence was given without hesitation and without the slightest suggestion of tutoring or anything of that sort".⁹ The demeanour of witnesses whilst under examination is thus very important on the question of credibility of oral evidence and hence the Magistrate or the Sessions Judge, as the case may be, is required by this section to record such remarks as he thinks material regarding the demeanour of the witnesses, so that the appellate Court might take these remarks into consideration in assessing the value to be attached to the oral evidence adduced in the case.

While the appellate Court should be guided by the remarks made by Magistrates about the demeanour of the witnesses, yet it is bound to, independently, consider the facts of the case.¹⁰ As a matter of fact, where the opinion of the lower Court is based not so much on the demeanour of the witness as on the inherent improbabilities of the story deposed to,¹¹ or the supposed discrepancies in the case as put forward by a party,¹² the appellate Court is in as good a position as the Magistrate, Sessions Judge or the trial Court to note the improbabilities or the discrepancies, and hence is not very much bound by the opinion of the trial Court.

Unsatisfactory demeanour, however, is not always a sure indication of falsehood. It has been said that it is dangerous to reject on the ground of unsatisfactory demeanour statements in themselves probable made under the sanction of an oath by witnesses of good reputation.¹³

Nor is good or satisfactory demeanour always a real test of truth. A good demeanour on the part of an accomplice cannot be sufficient corroboration of his evidence. Impressions as to demeanour of an accomplice "are too ephemeral in their character to take the place of corroboration in material particulars to make the testimony of an accomplice worthy of credit".¹⁴

The attestation of a Magistrate that at the time the deposition of a certain witness was taken, he was in such a weak state of mind that the Magistrate was unable to proceed

(27) 14 AIR 1927 Rang 200 (200) 103 Ind Cas 163, *Mia Lon Mia v S R M M R M Firm* (Where finding is based upon supposed discrepancies, Court of first appeal can give its own findings)

(17) 4 AIR 1917 All 35 (39) 39 Ind Cas 666 (671) 39 All 426, *Maulada Khan v Abdul Sattar* (But other circumstances may warrant appellate Court in differing from trial Court even on question of fact turning on credibility of witnesses whom the Court has not seen)

6 (15) 2 AIR 1915 P C 1 (2) 39 Bom 386 42 Ind App 110 29 Ind Cas 229 (P C) *Bombay Cotton Manufacturing Co v Motilal Shital*

7. (14) 1 AIR 1914 Lah 427 (431) 15 Cr L Jour 203 *Emperor v Bishen Singh*

8 (14) 1 AIR 1914 Lah 427 (429, 431) 15 Cr L Jour 203, *Emperor v Bishen Singh*

(04) 1 Cr L Jour 781 (787) 1904 Pun Re No 7 Cr, *Emperor v Chatlar Singh* (Indications of error in judgment of acquittal ought to be clearer and more palpable)

9 (21) 8 AIR 1921 Pat 109 (110, 111) 22 Cr L Jour 417 6 Pat L Jour 147, *Fatu Santal v Emperor*

10 ('98) 1898 Pun Re No 8 Cr, p 15 (18), *Moula Baksh v Empress* (Sessions Judge perplexed by difficulties and incongruities of case upholding conviction on ground that appellate Court should not interfere with finding of first Court unless it is clearly erroneous—*Held*, judgment of subordinate Judge

with his examination and that the witness could not answer more than two questions is *prima facie* proof of those facts and can be put before the jury.¹⁵

As to the latitude which the Courts can allow themselves in passing remarks on the witnesses appearing before them see S 361A, Note 7

2 Remarks on substance of deposition of witness — A Magistrate is not authorized under this section to record any remarks about the credibility or the substance of the deposition of the witness until the whole evidence has been taken.¹ The reason is that this will amount to *prejudging* the case and the parties are entitled to claim that he shall not do so until the case has been fully and finally presented to the Magistrate by the parties or their counsel after the entire evidence has been recorded.² Where a Magistrate while recording the evidence of a witness, made a note not only as to his demeanour but also that he had not spoken the truth, it was held that there was sufficient ground for transfer of the case to some other Magistrate.³

364.* (1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter⁴ [or the Chief Court of Oudh, or the Chief Court of Sind], the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English and such record shall be shown or read to him, or, if he does not understand the language in which it is

* Code of 1882 • S 364 — Same

Code of 1872 S 346

Examination of accused how recorded **346** Whenever an accused person is examined the whole of such examination including every question put to him and every answer given by him shall be recorded in full and shall be shown or read to him and he shall be at liberty to explain or add to his answers

When the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate or Sessions Judge, who shall certify under his own hand that it was taken in his presence and in his hearing and contains accurately the whole of the statement made by the accused person

In cases in which the examination of the accused person is not recorded by the Magistrate or

memorandum as above required he shall record his inability to do so

The accused person shall sign or attest by his mark such record

Code of 1861 S. 205

205. The examination of the accused person including every question put to him and every answer given by him shall be recorded in full and shall be shown or read to him, and he shall be at liberty to explain or add to his answers and when the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate who shall certify under his own hand that it was taken in his presence and in his hearing and contains accurately the whole of the statement made by the accused person

15 (69) 12 Soth W R Cr 51 (51) *Queen v Rasookoolah*

written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, ^b[* * *] as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language, and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263 ^a[or in the course of a trial held by a Presidency Magistrate]

- a In subs (1) the words or the Chief Court of Oudh were inserted by the Oudh Courts (Supplementary) Act 3^d [XXXII] of 1925. The words or the Chief Court of the Punjab and the words or the Chief Court of Lower Burma were repealed by the Repealing and Amending Act 18 [XVIII] of 1919 and 11 [XI] of 1923 respectively. The words or the Chief Court of Sind were inserted by the Sind Courts (Supplementary) Act 34 [XXXIV] of 1906 which Act came into force on the 15th of April 1940 [see S n 1 Government Gazette Notification (Home Department Political) No 1499 H/39 dated 28th March 1940]
- b The words unless he is a Presidency Magistrate were omitted by the Code of Criminal Procedure (Second Amendment) Act 87 [XXXII] of 1923
- c These words were substituted for the words of S 36^d subs (2A) by the Code of Criminal Procedure (Second Amendment) Act 37 [XXXVIII] of 1903. The words or S 362 subs (2A) were originally inserted by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1903

Synopsis

- | | |
|---|--|
| 1 Scope and applicability of the section | 6 The record shall be signed |
| 2 Record of examination should be full | 7 Shall certify under his own hand ^a |
| 3 Language of the record | 8 Sub section (3) |
| 4 Shall be shown or read to him or interpreted to him | 9 Sub section (4) |
| 5 To explain or add to his answers | 10 Non compliance with the section—Effect of Sec S 533 and Notes thereon |

NOTE to the Synopsis See the Notes indicated for the following topics

- | | |
|--|--|
| Examination in handwriting of Magistrate not needed See Note 8 | Refusal to sign by accused See Note 6 |
| Irrelevant questions and answers thereto See Note 2 | Section obligatory See Note 4 |
| Questions and answers to be recorded in full See Note 2 | Section 164 See Note 1 |
| Record of confessions in different language See Note 3 | Section 207 inquiry See Note 1 |
| Record of exact words See Notes 2 and 3 | Signature and not handwriting of certificate See Note 7 |
| | Signature not in immediate presence See Note 6 |
| | Whole examination to be conformable to truth according to accused See Note 5 |

1 Scope and applicability of the section — This section prescribes the manner in which the examination of an accused person (under S 342) is to be recorded ¹

Section 364 — Note 1

- 1 (02) 4 Bom L R 461 (46^o) *Emperor v Nagar Purohitam*
 (1900) 1900 All W N 183 (183) *Queen Empress v Jagannath* (Case under the Prisons Act)
 [See also (75) 23 Suth W R Cr 16 (16) *Queen v Jeloo*]

It is not applicable to the following cases

- (1) Where the person examined is not an accused person¹ e.g. a person examined under S. 302 of the Code²
- (2) Where the accused is not examined at all and a note is made by the Magistrate that the accused is unwilling to be examined and on that ground is not examined³
- (3) Where the accused is examined under S. 271 (summary trial)⁴ or in the course of a trial held by a Magistrate or Magistrate (see notes (4))

In virtue of sub-s. (2) of S. 364 a confession recorded under that section is to be recorded in the manner prescribed by this section⁵ See also the undermentioned cases⁷

2 Record of examination should be full — The whole examination of an accused person including every question put to him and every answer given by him must be recorded in full¹ As far as possible the record should be made in the exact words used by him² The section does not except even irrelevant questions from being taken down The Magistrate or Court is responsible for putting such questions, but if they are put they must be recorded as also the answers given³ Even where the accused gives an answer, but says that it should not be taken down in his statement the Magistrate should record it under this section⁴

- 2 (1)¹ 4 AIR 1917 Mad 916 (317 318) 17 Cri L Jour 195 39 Mad 977, *In re Ramaniyamma*
- 3 (00) 3 Cri L Jour 139 (140) 32 Cal 1085 10 Cal W N 51 *Sat Narain Tewari v Emperor*
- 4 (17) 4 AIR 1917 Sind 24 (21) 11 Sind L R 52 18 Cri L Jour 913 *Emperor v Dosu*
- 5 (36) 37 Cri L Jour 1098 (1100) 165 Ind Cas 154 (Cal) *Lanka Nath v Abdul Kadir* (Summary trials—Record of statements in English at close of prosecution case—This is sufficient)
- (35) 22 AIR 1935 Sind 193 (193) 36 Cri L Jour 144 *Dejimal v Emperor*
- 6 (45) 32 AIR 1915 Lah 105 (108) 1 L R (1915) Lah 290 47 Cal L Jour 4 220 Ind Cas 467 (F B), *Abdul Jahum v Emperor* (Sections 161 and 364 must be construed together Their effect is to prescribe the mode in which confessions are to be dealt with when made to a Magistrate during an investigation, and to render oral evidence of such confessions inadmissible)
- (44) 31 A I R 1944 Sind 113 (120) 1 L R (1943) Kar 371 45 Cri L Jour 701 213 Ind Cas 317 (DB), *Sharif Jio v Emperor* (When this is not done the confession is inadmissible)
- (40) 27 AIR 1910 Nag 186 (190) 1 L R (1910) Nag 232 41 Cri L Jour 757, *In re Dinanath Ganpat Rai* (Statements made by accused to Magistrate cannot be used against them unless they had been formally recorded as confessions under S. 164 read with S. 364)
- (17) 4 AIR 1917 Mad 316 (317) 17 Cri L Jour 195 39 Mad 977, *In re Ramaniyamma* (Inculpatory statements by person not treated as an accused nor subsequently tried for any offence is not a confession—Failure to record it in the manner prescribed in S. 364 does not preclude its being used in evidence)
- (83) 1883 All W N 243 (243) *Empress v Gayadhar*
- (87) 1887 Pan Re No 52 Cr, p 139 (141) *Buta v Empress*
- 7 (35) 22 AIR 1935 Oudh 416 (420) 36 Cri L Jour 927, *Sheo Prasad v Emperor* (Section does not apply where no evidence has as yet been produced against the accused)

Note 2

- 1 (31) 18 AIR 1931 Oudh 166 (170) 32 Cri L Jour 851 *Mata Din v Emperor*
- (21) 8 A I R 1921 Pat 109 (113 114) 6 Pat L Jour 147 22 Cri L Jour 417, *Fatu Simal v Emperor*
- (15) 2 A I R 1915 Lah 16 (45) 1915 Pan Re No 17 Cr 16 Cri L Jour 851 *Balmooland v Emperor*, (This matter however, is not of very great importance)
- (02) 4 Bom L R 461 (462) *Emperor v Nagar Purshotam*
- (69 70) 5 Mad H C R App iv (iv)
- (22) 9 A I R 1922 Mad 40 (41) 45 Mad 230 23 Cri L Jour 630, *Tangedupallis Pedda Obigadu v Pullasi Pedda*
- (34) 21 AIR 1934 Pat 651 (652) 36 Cri L Jour 447, *Ramsakhia v Emperor* (Incompleteness of record—Effect)

cially when a statement is made in answer to questions put by the Court under S. 312)

- 3 (71) 15 Seth W R Cr L 3 (3)
- 4 (32) 19 A I R 1932 Bom 279 (282) 56 Bom 434 33 Cri L Jour 613 *Wasudeo Balwant v Emperor*

3 Language of the record.—The examination of an accused person should be taken down in the language in which the person is examined, the object being to represent the very words and expressions used so as to ensure accuracy and prevent misrepresentation or misconstruction of what was said¹ If, however, such a record is *not practicable*, the law directs that the statement or confession shall be recorded in the language of the Court or in English²

As to the effect of non compliance with this rule with regard to the record of confessions, see Notes on § 533

4. "Shall be shown or read to him or . . . interpreted to him"—It is obligatory on the Court to show or read the record of the statements of an accused person to him or to have it interpreted to him if it is in a language not understood by him, so that he might be assured that his words have been correctly taken down and, if necessary, have it corrected¹

In the undermentioned case² the statement of the accused was not read over to him and his signature taken immediately after the close of the prosecution but when this was brought to the notice of the Magistrate the accused was given an opportunity of making a further statement although it was not asserted that the original statement was not correct. It was held that the trial could not be impeached as being illegal. See also Notes on S 312.

5 "To explain or add to his answers."—When the record of an examination of an accused person is shown or read over to him, he is entitled to explain or add to his answers,¹ so that the whole shall be made conformable to what the accused declares to be

Note 3

1 (37) 24 AIR 1937 Oudh 425 (426) 38 Cr L Jour 169, *Jagannath Sah v Emperor*
(25) 12 AIR 1925 Cal 575 (576) 52 Cal 403 26 Cr L Jour 761, *Emperor v Nani Mandal* (Examination under S 342)

(94) 21 Cal 642 (660), *Queen Empress v Sagal Samba* (Do)

(75) 24 South W R Cr 54 (55) *Queen v Moonsa Bibee* (Dc)

(93) 1893 Rat 633 (633), *Queen Empress v Surmal* (Do)

(190 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000 1001 1002 1003 1004 1005 1006 1007 1008 1009 1010 1011 1012 1013 1014 1015 1016 1017 1018 1019 1020 1021 1022 1023 1024 1025 1026 1027 1028 1029 1030 1031 1032 1033 1034 1035 1036 1037 1038 1039 10

13 v *Emperor*

в Комитет

(91) 1891 All W N 55 (56), *Queen Empress v Bachanna* (Confessions)

[See (80) 5 Cal 826 (829), *Empress v Vaimbalee*]

Note 4

NOTE 4

(Conviction)

11
Emperor
of accused

Note 5

[illegible]

was ordered by

the truth.² It is the statement as *finally declared* by him to be true that is to be accepted as representing his statement.³

6 The record shall be signed.—The record of the examination of an accused must be signed both by the accused and by the Magistrate or Judge making the record.

The signature of the accused person to a statement should be made in the immediate presence of the Magistrate himself. To take a signature in an adjoining room before a clerk and not in the Magistrate's immediate presence is not a proper compliance with the provisions of the section.⁴

As to the effect of refusal by the accused to sign see s 263 and notes thereon.

7 'Shall certify under his own hand'.—The certificate need not be in the handwriting of the Magistrate or Judge. It is sufficient if it is under his hand only, i.e. signed by him.⁵ When duly recorded the certificate is sufficient *prima facie* proof of such examination and it is to be presumed that the proceedings were regular.⁶

8 Sub section (3).—The examination need not be taken down in the Magistrate's own handwriting. It is enough if it is taken down in his presence and hearing.⁷ In such cases however the Magistrate is bound to make a memorandum of the examination in his own hand and annex it to the record.

9 Sub section (4).—Sub section (4) provides that this section shall not apply to two classes of cases—

(1) Cases coming under s 263 i.e. cases tried summarily.⁸

(2) Cases tried by a Presidency Magistrate.

Before the amendment of the Code in 1923 the procedure as to the recording of an examination of the accused applied to all Magistrates including Presidency Magistrates and it was held that it was obligatory upon the Presidency Magistrates to record the examination of the accused in the manner provided by the section, but that it was desirable that the Legislature should relieve the Presidency Magistrates altogether from this obligation.⁹ The amending Acts of 1923 gave effect to this view and omitted the words 'unless he is a Presidency Magistrate' in subs (3) and added the words 'or in the course of a trial held by a Presidency Magistrate' in subs (4) and subs (2A) to s 302, in order 'to

2 (1904) 4 Bom L R 461 (462) *Emperor v Nagar Purushotam*

3 (1929) 16 AIR 1929 Lab 382 (384) 10 Lab 223 29 Cri L Jour 769 *Fakir Singh v Emperor*
Note 6

4 (194) 1894 Rat 687 (687, 688), *Queen Empress v Bhika*
Note 7

5 *n v Goshito Lall Dutt* (Attestation at

(1864 66) 2 Bom H C R Cr 125 (125, 126), *Reg v Timms*

(69) 11 Suth W R Cr 39 (39) 7 Beng L R 67n, *Queen v Jaga Poly*
Note 8

6 (197) 21 Bom 495 (500) *Queen Empress v Visram Babaj*
(73) 20 Suth W R Cr 50 (50), *Queen v Lucky Narain Dutt*
Note 9

7 (1936) 37 Cri L Jour 1038 (1100) 165 Ind Cas 154 (Cal) *Banka Nath v Abdul Kadir* (Summary trial—Record of statements in English at close of prosecution case—Fact that vernacular statement is not put in till after conclusion of trial does not vitiate trial)

(27) 14 AIR 1927 Oudh 42 (43) 28 Cri L Jour 76 *Bhawani Bhat v Emperor* (Charge under s 379, Penal Code)

(27) 14 AIR 1927 Pat 369 (370) 6 Pat 504 28 Cri L Jour 1037, *Parsotham Das v Emperor* (Offences under s 121, Indian Railways Act)

8 (22) 9 AIR 1922 Bom 290 (291, 292) 46 Bom 411 23 Cri L Jour 45 *Emperor v Gulab Jan* (Summons case—Omission to examine accused as required by s 342 held vitiated conviction)

(21) 8 AIR 1921 Bom 374 (375 376) 45 Bom 672 22 Cri L Jour 17, *Fernandes v Emperor* (Words if any used in cl (f) do not control s 342)

prepared and delivered by the presiding officer in the absence of the other members of the Bench is not a proper judgment³

4 Judgment must be pronounced — The section specifically requires that every judgment ought to be *pronounced by Court* in accordance with the section¹ Till then it is inoperative as a judgment and is nothing more than the private expression of an opinion by the Judge which can be changed and altered² See also S 350 Note 6.

5 Substance of judgment to be explained — It is not obligatory on the Court to pronounce the *whole* of the judgment. It is enough if the substance of such judgment is explained. Where however, the prosecution or the defence requests the Court to read the whole of the judgment the presiding officer should comply with the request.

6 Effect of loss of records — Where a portion of the material records in a case is lost it is open to the Judge to re write the judgment from memory and from the materials before him and place it on the record¹

7 "In open Court" — The judgment should be ordinarily pronounced in *open Court*. Where however a judgment is pronounced by a Magistrate in his private house instead of in the usual court hall by reason of his illness the judgment is not necessarily illegal and will not be set aside in the absence of proof of prejudice¹

8 Time of pronouncing judgment — The judgment should be pronounced only after the closing of the case if pronounced before it is a nullity¹. But there should be no unreasonable delay in pronouncing the judgment after the closing of the case. Such delay is not only unjust to the accused as it prevents them from appealing against the sentence but is also opposed to the general principles of law²

9 Pronouncing predecessor's judgment — See Note 6 on Sect on 350

10 Presence of accused when pronouncing judgment—Sub section (2) — Where the accused was not required to attend to hear the judgment delivered and could not be so required as he had absconded before judgment it was held by the High Court of Lahore that the judgment pronounced in his absence was wholly illegal and should be

(80) 19 AIR 1930 All 582 (582) 34 Cr L Jour 112 *Ram Ratan v Emperor*
(24) 11 AIR 1904 Cal 192 (193) 25 Cr L Jour 192 *Jagat Bandhu v Jagaba idhu* (Order under Sect on 145)

(79) 1879 Pun Re No 20 Cr p 59 (60) *Empress v Sharif*
(17) 4 A I R 1917 Cal 316 (316) 36 Ind Cas 842 (843) 18 Cr L Jour 10 *Clandra Kishore v Emperor*

Amin Ali-

3 (28) 15 AIR 1908 Mad 1172 (1173) 52 Mad 237 29 Cr L Jour 973 *Ramakrishna v Subba Rao*.
Also see S 265 Note 2

Note 4

1 (42) 29 AIR 1942 Mad 668 (669) 44 Cr L Jour 5 203 Ind Cas 461 *In re Valavala Pattabhiramayya* (A pronouncement that is not in accord with the signed judgment is not a pronouncement of the judgment and has no validity)

(92) 14 All 242 (272) 1890 All W N 83 *Queen Empress v Hargobind*
2 (29) 16 AIR 1909 Lah 692 (694) 31 Cr L Jour 675 *Sikandar Lal v Emperor*
(92) 1892 All W N 157 (157) *Empress v Abdul Majid*
(13) 14 Cr L Jour 560 (563) 21 Ind Cas 162 (All) *Ramdhar Rai v Emperor*

Note 6

1 (15) 2 AIR 1915 Mad 1038 (1039) 14 Cr L Jour 595 (596) 38 Mad 498 *Kamalshamma v Emperor*

Note 7

1 (66) 1 Agra Cr 17 (18) *Government v Holasee Singh*

Note 8

1 (32) 1932 Mad W N 648 (649) *Srinivasachariar v Emperor*
2 (92) 5 C P L R Cr 24 (24) *Empress v Baldeo*

set aside¹ See also the undermentioned case² Where an accused person absconded before judgment and on his re-arrest, the Magistrate re-pronounced the judgment which he had pronounced in his absence, it was held that the defect was one which was cured under S 537³ It has been seen in Note 10 on S 205 that where the accused is convicted and the sentence is not one of fine only, the Court must, under sub s (2) of this section, direct the personal attendance of the accused for hearing the judgment

11 Sentence or release to be after judgment — A sentence in the case of conviction, or a direction to set the accused at liberty in the case of an acquittal can only follow the judgment and not precede it A breach of this rule is however, only an irregularity which can be cured under the provisions of s 537¹ The High Court of Patna has however, in the undermentioned case² held that pronouncing judgment before completing the judgment makes the sentence illegal The decision follows the view expressed in *Queen Empress v Har Gobind*,³ which has been explained in later decisions of the Allahabad High Court See Section 537, Note 12

367.* (1) Every such judgment shall, except as otherwise expressly

Language of judgment provided by this Code, be written by the presiding
Contents of judgment officer of the Court^a [or from the dictation of such
presiding officer] in the language of the Court, or in English, and shall
contain the point or points for determination, the decision thereon and
the reasons for the decision, and shall be dated and signed by the presiding
officer in open Court at the time of pronouncing it and^b [where it is not
written by the presiding officer with his own hand, every page of such
judgment shall be signed by him]

(2) It shall specify the offence (if any) of which, and the section of
the Indian Penal Code or other law under which, the accused is convicted,
and the punishment to which he is sentenced

^a 1882 S 367, 1872 Ss 255, 287, 461, 463 and 464,
1861 Ss 379, 380, 381, 429 and 430

Note 10

1 (27) 14 AIR 1927 Lah 870 (870) 28 Cri L Jour 971, *Abdullah v Emperor*

2 (1907) 10 B.L.R. 100 (100) 10 B.L.R. 100 (100) 10 B.L.R. 100 (100)

3 (87) 1887 Rat 325 (325) *Queen Empress v Ghotiram*

Note 11

1 (33) 20 AIR 1933 All 660 (660) 55 All 696 31 Cri L Jour 1036, *Dhondt Kandoo v Silaram*,
(Distinguishing 14 All 242)

v Thaver Issaji Dorae (Distinguishing 1 Bom L R 160)

(25) 12 AIR 1925 Lah 137 (137) 25 Cr. L J 705 *Ata Ahmad v Emperor* (Dissenting from 14 All 242)
(22) 9 AIR 1902 Mad 502 (503) 45 Mad 913 23 Cri L Jour 553 (FD) *Santharalinga Mudaliar v. Narayana Mudaliar*
(15) 2 AIR 1915 Mad 1034 (1039) 14 Cri L Jour 595 (596) 33 Mad 493, *Kamalshamma v Emperor*
(79) 2 Weir 434 (433) (A Magistrate passed sentence and then died before writing judgment — Held it was only an irregularity)

30 Cri L Jour

Harjit v P

Moria

Yad Khan

3 (92) 14 All 242 (242) 1902 All W N

(3) When the conviction is under the Indian Penal Code and it is Judgment in alternative doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed

Provided that, in trials by jury, the Court need not write a judgment but the Court of Session shall record the heads of the charge to the jury

“(6) For the purposes of this section, an order under section 118 or section 123, sub section (3), shall be deemed to be a judgment]

a Inserted by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1923

Synopsis

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| <ol style="list-style-type: none"> 1 Object and applicability of the section 1a Judgment — Meaning of 2 Language of judgment 3 Written by the presiding officer 4 Contents of judgment — General 5 Points for determination 6 “Decision thereon — Appreciation of evidence 7 Reasons for decision 8 Remarks in the judgment 9 Offence to be specified 10 “Punishment to which he is sentenced | <ol style="list-style-type: none"> 11 “Shall be dated and signed by the presiding officer at the time of pronouncing it” 12 Judgment in the alternative — Sub section (3) 13 Judgment in cases of acquittal 14 Judgment in capital cases—Sub section (5) 15 Trial by jury—Heads of charge to the jury — Proviso 16 Judgment not in conformity with section — Procedure in appeal 17 Sub section (6) 18 Effect of non compliance with the section See Note 12 on Section 537 |
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NOTE to the Synopsis See the Notes indicated for the following topics

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| <p>Accused's act on — Open to two constructions — Presumption of innocence to prevail See Note 6</p> <p>Alibi evidence See Note 6</p> <p>Bench of Magistrates — President of Bench in minority—Member of majority to write judgment See Note 3</p> <p>Circumstantial evidence — When sufficient See Note 6</p> <p>Discharge order—Not judgment See Note 1a</p> <p>Evidence—Only quality and weight material—And not number of witnesses See Note 6</p> <p>Evidence—Appreciation and effect — Difference in civil and criminal proceedings See Note 6</p> <p>Finding of guilty — Some sentence necessary See Note 10</p> <p>Guilt of accused — Onus on prosecution — To be proved in accordance with law See Note 6</p> <p>Heads of charge—To be written soon after delivery of charge to jury See Note 15</p> <p>Judge — Not to act on matters not made evidence on record See Note 6</p> | <p>Judgment — Not in English or Court language — Only irregularity See Note 2</p> <p>Judgment—Contents See Notes 6 and 9</p> <p>Judgment of acquittal—Detention of accused after pronouncement — Illegal — Formal warrant of release not necessary See Note 13</p> <p>Judgment not according to law — <i>De novo</i> trial to be ordered See Note 16</p> <p>Legislative changes See Notes 3 and 17</p> <p>Medical witness experts etc — Evidence not to be blindly accepted See Note 6</p> <p>Prosecution evidence trustworthy—Failure to prove motive immaterial See Note 6</p> <p>Section—Not applicable to orders on petitions See Note 1</p> <p>Sentence — Cannot be postponed after judgment See Note 10</p> <p>Sign — Meaning See Note 11</p> <p>Signature — Not to be with stamp — But if with stamp only irregularity See Note 11</p> |
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1 Object and applicability of the section — As has been already mentioned in Note 1 on S 366 the provisions of this section also are based upon good and substantial grounds of public policy¹

Section 367 — Note 1

- 1 (42) 29 AIR 1912 Lah 100 (101) 43 Cri L Jour 619 200 Ind Cas 106 *Gullah v Emperor*
 (92) 14 All 217 (272) 1892 All W N 83 *Queen Empress v Hargobind Singh*

This section applies to such judgments as are referred to in S 366 that is to say, to judgments in *trials*. It does not apply to orders on petitions³. It has been held by the Chief Court of Outh that this section has no application to appeals⁴. This view it is submitted is not correct as it goes against the express provisions of S 421. See also S 424 and Notes thereon.

As to whether the section applies to orders under Ss 118 and 123 see Note 17.

1a Judgment—Meaning of—The word judgment has not been defined in this Code. The wording of S 366 as well as this section shows that the word judgment means a decision in a trial which decides a case finally so far as the Court trying the case is concerned and terminating in either a conviction or acquittal of the accused¹. Thus an order of discharge is not a final order and is not therefore a judgment within the meaning of the section². For further discussion see Notes 2 and 3 on S 366. See also the under mentioned cases³.

2 Language of judgment—The judgment should be written in the language of the Court or in English¹. Writing the judgment in any other language is however, only an irregularity which can be cured by the provisions of S 537².

3 "Written by the presiding officer"—Prior to the amendment in 1923 this section provided that the judgment must be written by the presiding officer. It was therefore held that the judgment should be written by the Court itself and not by some body else to the dictation of the officer¹. The amendment of 1923 now allows such a procedure.

Where in the case of a trial by a Bench of Magistrates the President of the Bench is in a minority as to conviction or acquittal the judgment should be written by some member of the majority². See also Notes 2 and 3 on S 265.

4 Contents of judgment—General—This section requires that a judgment must contain the points for determination, the decision thereon and the reasons for the

2 (41) 1 Cri L Jour 969 (970) 6 Bom L R 897 *In re Nagappa* (Order under S 195—Record of reasons not necessary)

3 (72) 1872 Rat 61 (61) *Peg v Pandurang*

Also see S 494 Note 5

4 (40) 27 AIR 1940 Outh 369 (371) 41 Cri L Jour 711 *Jodha v Emperor*

Note 1a

1 (41) 28 Cal 652 (660) 5 Cal W N 457 (FB) *Dwarka Nath v Beni Madhab*

(49) 9 Cri L Jour 80 (82) 31 Mad 543 4 Ind Cas 1113 *Emperor v Moheshwara Kondaya*

[See also (47) 29 AIR 1942 Pat 107 (108) 43 Cri L Jour 7 197 Ind Cas 87 (DB) *Deonandan Mal v Chakraborty Mahant* (A judgment is no part of the trial and the trial does not extend to the date of delivery of judgment)]

2 (41) 28 Cal 652 (660) 5 Cal W N 457 (FB) *Dwarka Nath v Beni Madhab*

(47) 5 Cri L Jour 235 (236) 9 Dom L R 250 *Emperor v Nali Fakira* (Though record of reasons is not compulsory, it is desirable to record reasons)

(49) 9 Cri L Jour 80 (82) 31 Mad 513 4 Ind Cas 1113 *Emperor v Madheswara Kondaya*

3 (40) 27 AIR 1940 Outh 366 (367) 41 Cri L Jour 725 (726) *Emperor v Madho Singh* (Order of appeal Court requiring trial Court to take evidence of certain witnesses is not judgment)

(42) 29 Cal 7 6 (73) 6 Cal W N 633 (11) *Mir Ahmad Hossain v Mahomed Akbar*

Note 2

1 (46) 4 Cri L Jour 162 (163) 4 Cal L Jour 237 *Dinulddin Singh v Harishar Singh*

[See also (1865) 4 South W R Cr 19 (19) *Queen v Ellobunnes ur Gossing*]

2 (46) 4 Cri L Jour 162 (163) 4 Cal L Jour 237 *Dinulddin Singh v Harishar*

Also see S 537, Note 12

Note 3

1 (46) 4 Cri L Jour 394 (395) 4 Cal L Jour 411 *Mani Lal v Corporation of Calcutta*

(401) 1891 Rat 545 (546) *Queen Empress v Lalshree Bai*

(91) Outh Cal Cases N 192 p 245 t 49 *Queen Empress v Nandua*

2 (47) 15 AIR 1948 Mad 197 (197) 51 Mad 338 29 Cri L Jour 207 *Lalshree Bai v Emperor*

(26) 13 AIR 1906 Mad 551 (555) 27 Cri L Jour 90 *In re See Narayana*

(3) When the conviction is under the Indian Penal Code and it is Judgment in alternative doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed

Provided that, in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury

[(6) For the purposes of this section, an order under section 118 or section 123, sub-section (3), shall be deemed to be a judgment]

a. Inserted by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1923

Synopsis

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| 1 Object and applicability of the section | 11 "Shall be dated and signed by the presiding officer . . . at the time of pronouncing it" |
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1. Object and applicability of the section — As has been already mentioned in Note 1 on S 366 the provisions of this section also are based upon good and substantial grounds of public policy¹

Section 367 — Note 1

- 1 (49) 29 AIR 1912 Lah 100 (101) 43 Cri L Jour 619 200 Ind Cas 106 *Gullah v Emperor* (92) 14 All 242 (272) 1892 All W N 83 *Queen Empress v Hargobind Singh*

This section applies to such judgments as are referred to in S 366 that is to say, to judgments in *trials*.² It does not apply to orders on petitions.³ It has been held by the Chief Court of Orls that this section has no application to appeals.⁴ This view, it is submitted, is not correct as it goes against the express provisions of S 421. See also S 424 and Notes thereon.

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1a Judgment—Meaning of—The word judgment has not been defined in this Code. The wording of S 366 as well as this section shows that the word "judgment" means a decision in a *trial* which decides a case finally so far as the Court trying the case is concerned and terminating, in either a conviction or acquittal of the accused.¹ Thus, an order of discharge is not a final order and is not therefore a judgment within the meaning of the section.² For further discussion see Notes 2 and 3 on S 366. See also the under-mentioned cases.³

2 Language of judgment—The judgment should be written in the language of the Court or in English.¹ Writing the judgment in any other language is, however, only an irregularity which can be cured by the provisions of S 537.²

3 "Written by the presiding officer."—Prior to the amendment in 1923 this section provided that the judgment must be written by the presiding officer. It was, therefore, held that the judgment should be written by the Court itself and not by some body else to the dictation of the officer.¹ The amendment of 1923 now allows such a procedure.

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3 (72) 1872 Rat 61 (81) *Peg v Pandurong*

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2 (01) 29 Cal 632 (660) 5 Cal W N 457 (FB) *Duarika Nath v Beni Madhab*

(07) 5 Cr L Jour 205 (256) 9 Com L R 290, *Emperor v Nali Fakira* (Though record of reasons is not compulsory, it is desirable to record reasons)

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3 (40) 27 AIR 1940 Oudh 366 (397) 41 Cr L Jour 725 (726) *Emperor v Vaido Singh* (Order of appellate Court requiring trial Court to take evidence of certain witnesses is not judgment)

(02) 29 Cal 7 6 (733) 6 Cal W N 633 (1 L) *Mir Ahmad Hussein v Mahomed Asari*

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1 (06) 4 Cr L Jour 162 (163) 4 Cal L Jour 232 *Dhanu'dhara Singh v Harishar Singh*

[See also (1-65) 4 South W R Cr 19 (179) *Queen v E colonnes ur Gossing*]

2 (06) 4 Cr L Jour 162 (163) 4 Cal L Jour 232, *Dhanu'dhara Singh v Harishar*

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1 (04) 4 Cr L Jour 394 (395) 4 Cal L Jour 411, *Mani Lal v Corporation of Calcutta*

(91) 1-91 Rat 545 (546) *Queen Empress v Lal Shree Das*

(91) Oudh L Cases N 192 p 245 (491) *Queen Empress v Dhanu*

(24) 13 AIR 1924 Mad 197 (197) 31 Mad 535 29 Cr L Jour 207, *Lalshree v Emperor*

(26) 13 AIR 1926 Mad 554 (555) 27 Cr L Jour 90 *In re See Karama* 31

(3) When the conviction is under the Indian Penal Code and it is Judgment in alternative doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative

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Section 367 — Note 1

- 1 (47) 29 AIR 1942 Lah 100 (101) 43 Cri L Jour 619 200 Ind Cas 106 *Gullah v Emperor*
(92) 14 All 242 (272) 1892 All W N 83 *Queen Empress v Hargobind Singh*

and cannot merely adopt the opinion of the Magistrate by whom the case was forwarded⁷

It is undesirable to make a document, prepared by a party, part of a judgment unless the Court has checked the document and found it to be correct⁸

A judgment should specifically set forth facts and orders necessary to give authority to the Court in the particular case⁹

A judgment should not be unnecessarily long¹⁰ But it should be written in such a way that it would be easy to summarily dismiss an appeal against it on a perusal of the judgment alone¹¹

In a trial with the aid of assessors merely recording a finding on facts and evidence as explained to the assessors in summing up the evidence to them is not sufficient compliance with the section¹²

5 Points for determination. — This section lays down that every judgment must contain the point or points for determination To ascertain and define distinctly these points is the very ground stone of a sound and stable judgment¹ A judgment which does not set forth the points for determination is defective²

6 "Decision thereon" — Appreciation of evidence — Though the rules of evidence are the same in civil and criminal proceedings there is always a marked difference between the effect and appreciation of evidence in the two cases In civil cases a mere *preponderance* of probability or greater probative value is sufficient to warrant a conclusion, while in criminal cases before the accused can be convicted, there should be such a *moral certainty* of his guilt as convinces the mind of the tribunal as reasonable men, beyond the possibility of doubt or suspicion³ Thus it is primarily the duty of the

7. (39) 26 AIR 1939 Oudh 35 (36) 39 Cri L Jour 1005, *Lallu Ram v Emperor*
(19) 6 AIR 1919 Pat 290 (290) 20 Cri L Jour 444, *Thakur Singh v Emperor*
8 (20) 7 AIR 1920 Cal 87 (99) 47 Cal 154 21 Cri L Jour 396, *Kasim Ali v Emperor*, (Certain statements prepared by the Public Prosecutor)

9 (87) 1887 Rat 325 (326) *Queen Empress v Yeshwant* (Mamlatdar is not an officer to whom under S 12 of Act 5 [V] of 1879 the powers of a Collector under S 87 of the Act are delegated)

10 (86) 1886 Rat 310 (310) *Queen Empress v Kana* (Section 47 of Bombay Act 5 [V] of 1870 does not make the possession of more than one gallon of liquor penal)

11 (60) 1868 Pan Re No 111 Cr, p 103 (108) *Mahram on behalf of his brother Dahdul*

12 (33) 20 AIR 1933 Mad 233 (239) 56 Mad 231 34 Cri L Jour 431, *Narayana v Emperor*

11 (93) 1900 1803 1900 Low Rur Rul 626 (627) *Nga Ngyan Eazu v Empress*

12 (09) 10 Cri L Jour 325 (334) 3 Ind Cas 625 (Cal) *Ahudiram Dose v Emperor*

Note 5

1 (34) 21 AIR 1934 Sind 89 (92) 28 Sind L R 1^o 36 Cri L Jour 53, *Mitha v Emperor*

[See also (35) 22 AIR 1935 Nag 81 (83) *Bala v Emperor* (A judgment should commence with a statement of the facts in respect of which the accused is charged and not with circumstances which might be held to provide a motive for the offence)]

2 (34) 21 AIR 1934 Sind 89 (92) 28 Sind L R 1^o 36 Cri L Jour 53 *Mitha v Emperor* (When there are six several prisoners, accused of seven separate offences it is a perfunctory and perilous compliance with the law to raise no more than one point for decision)

(96) 1896 Pat 844 (845) *Queen Empress v Shidingsappa*

[See (91) 15 Bom 11 (12) *In re Shidingsappa*]

[See also (32) 19 AIR 1932 Snd 143 (144) 33 Cri L Jour 900, *Udhuram v Emperor* (Court should set forth points of decision in such a shape that at the first glance it may be apparent to itself and the appellate tribunal that nothing which is material has been overlooked)]

Note 6

1 (46) 23 AIR 1916 All 191 (19) 1915 All W L (All C) 2-7 (790) (DL) *Ram Kala v Emperor*

(44) 31 AIR 1914 Cal 53 (3-5) 1 L L (1914) Kcr 123 45 Cri L Jour 650 212 Ind Cas 47 (D L) *Emperor v Kala Mashyal*

(43) 30 AIR 1913 Lah 299 (299, 301) 45 Cr L J 162 209 I C 46 (DL) *Emperor v Mohd Hassan*

(43) 30 AIR 1913 Lah 56 (5-6) 44 Cri L Jour 397 205 Ind Cas 552 (D L), *Hassan Din v Emperor*

(1 and not proof on prosecution and on accused—Degree of certainty required indicated—Onus on prosecution to establish guilt beyond reasonable doubt never shifts)

(40) 27 AIR 1910 Mad 1 (1) 41 Cri L Jour 362 186 Ind Cas 704 *In re Kanakasabai* (Prosecution not absolved from duty of proving that a crime was committed even though it is established that accused has special knowledge as to place where a crime was committed or not)

decision¹ The object of these provisions is that a Criminal Court should consider the case before it in all its bearings and should on such consideration arrive at definite conclusions after considering the evidence in the case² Thus a judgment which consists of a few notes on the arguments of the counsel and a somewhat vague conclusion is no judgment at all³ But the section does not lay down any particular form which a judgment must take and a failure to strictly conform to the provisions of this section would be a mere irregularity curable under S 537 if it can be gathered from the body of the judgment itself that there has been substantial compliance with the provisions of the section⁴

Where there are separate trials separate judgments must be recorded Where however, two cases are closely connected together, the Court may write a detailed judgment containing a complete recital of the facts in the more important of the two cases and it would not be objectionable to refer to such recital in the separate judgment recorded in the less important case At the same time the Court should always be careful to see that evidence which is only admissible in one of the two cases is not referred to or put forward as a reason for a conviction or acquittal in the other case in which it is not relevant⁵

A judgment once delivered cannot be supplemented by means of an explanation furnished to the superior Court⁶

When a case is forwarded to a superior Magistrate under S 349 with the opinion of the forwarding Magistrate, the superior Magistrate must write an independent judgment

Note 4

1 (12) 13 Cr L Jour 559 (560) 8 Nag L R 84 15 Ind Cas 975 *Jairam v Emperor* (The provisions are mandatory and are intended to constitute the substance as distinguished from mere form of the judgment)

(40) 27 AIP 1940 Snd 118 (114) 41 Cr L Jour 724 *Abdul Karim v Emperor*

(87) 24 AIR 1937 Nag 122 (122) ILR (1936) Nag 217 39 Cr L Jour 370 *Sukhdaiyal v Mt Saraswati*

2 (97) 19 All 508 (507) 1897 All W N 142 (FB) *Queen Empress v Pandeh Dhat*

(32) 19 AIR 1932 Sind 180 (180) 84 Cr L Jour 163 *Gul Sheru v Emperor* (Intention of S 367 is that the Magistrate should direct his own attention to every material question of fact or law)

3 (30) 17 AIR 1930 Lah 1054 (1055) 32 Cr L Jour 252 *Mahomed Bakhsh v Emperor*

[See also (41) 28 AIR 1941 Oudh 575 (576) 42 Cr L Jour 633 194 Ind Cas 872 *Duan v Raja*

Jour 349 *Dapurao v Emperor*
brief sentences in order-sheet—

4 (37) 24 AIR 1937 Nag 120 (122) ILR (1936) Nag 217 39 Cr L Jour 370 *Sukhdaiyal v Mt Saraswati*

5 (20) 7 AIR 1920 All 79 (79 80) 21 Cr L Jour 412 *Bhola Nath v Emperor*

[See (27) AIR 1927 Mad 56 (57) 27 Cr L Jour 1164 *Thangaya Nadar v Emperor* (Where in a joint trial of several accused persons for various offences some triable by jury and others triable with the aid of assessors the Judge summed up the case at some length to the jury with regard to all the charges but when he came to write his judgment with regard to the charges triable by himself with

evidence cannot be upheld)

(97) 1 Cal W N 426 (427) *Asimadda v Govinda Baidya*]

6 (08) 7 Cr L Jour 312 (312) 7 Cal L Jour 236 *Jurakhan v King Emperor*

[See (01) 6 Cal W N 118 (120) *Nasir Mahita v Hari Charan*

(30) 17 AIR 1930 Cal 379 (379) 32 Cr L Jour 16 *Mani Krishna Sen v Emperor* (Trying Magistrate is not entitled to make any suggestion or representation in the explanation which is not founded on the record before him)]

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It is undesirable to make a document prepared by a party part of a judgment unless the Court has checked the document and found it to be correct.⁸

A judgment should specifically set forth facts and orders necessary to give authority to the Court in the particular case.¹¹

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In a trial with the aid of assessors merely recording a finding on facts and evidence as explained to the assessors in summing up the evidence to them is not sufficient compliance with the section.¹

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6 "Decision thereon" — Appreciation of evidence — Though the rules of evidence are the same in civil and criminal proceedings there is always a marked difference between the effect and appreciation of evidence in the two cases. In civil cases a mere *preponderance* of probability or greater probative value is sufficient to warrant a conclusion while in criminal cases before the accused can be convicted there should be such a *moral certainty* of his guilt as convinces the mind of the tribunal as reasonable men beyond the possibility of doubt or suspicion¹ Thus it is primarily the duty of the

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8 (20) 7 AIR 1920 Cal 87 (89) 47 Cal 154 21 Cr L Jour 380 *Kassem Ali v Emperor* (Certain statements prepared by the Public Prosecutor)

STATEMENTS PREPARED BY THE FBI & PROSECUTOR

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[See also (35) 22 AIR 1935 Nag 81 (83) *Bala v Emperor* (A judgment should commence with a statement of the facts in respect of which the accused is charged and not with circumstances which might be left to prove in a motive for the offence)]

2 (34) 21 A I R 1931 Sind 89 (3) 29 Sind L R 12 36 Cr L Jour 53 *Mitho v Emperor* (When there are several prisoners, accused of seven separate offences it is a perfunctory and perilous com-

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Note 6

1 (46) 33 ALR 1916 All 191 (1909) 1915 All W P (II C) 937 (1900) (DL) *Ram Kala v Emperor*
(44) 31 ALR 1914 S 1d 33 (32) 1 LR (1944) Kar 193 40 Cr L Jour 600 212 Ind Cas 467 (D B)
Emperor v Kaku Masaharu

(43) 30 A L R 1943 Lah 993 (92, 301) 45 Cr L J 149 209 I C 464 (DB) *Emperor v Mohd Hassan*
(43) 30 A L R 1943 Lah 56 (5) 44 Cr L Jour 397 05 Ind Cas 50 (DB) *Hassan Din v Emperor*
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Onus on prosecution to establish guilt beyond reasonable doubt never shifts.)

(40) 2nd AIR 1940 Mad 1 () 41 Cri L Jour 569 186 Ind Cas 701 *In re Kanakasabai Pillai* (Prosecution not absolved from duty of proving that a crime was committed even though it is established that accused has special knowledge on the point _____ was committed or not.)

3 (44) 31 AIR 1944 Lah 113 (115) 15 Cr L Jour 571 212 Ind Cas 279 Chaudan Lal v Emperor.

prosecution should establish the case against the accused by *positive affirmative* evidence of his guilt and suspicion however grave does not take the place of proof⁴. The onus cast

- (44) 31 A I R 1944 Lah 97 (101) 43 Cr L Jour 631 212 Ind Cis 410 (D B) *Emperor v Musaffar Hussain*
- (44) 31 A I R 1944 Sind 94 (95) 1 L R (1943) Kar 291 45 Cr L Jour 526 212 Ind Cas 109 (D B), *Kassim Haji Khan v Emperor*
- (43) 30 AIR 1943 Pat 416 (452) 22 Pat 614 45 Cr L Jour 507 212 Ind Cas 197 (DB) *Amir Iqbal Singh v Emperor* (A prisoner does not have to prove his defence but a probable alternative theory even if not proved provided it is not actually shewn to be false goes a long way to throw doubt on the prosecution case)
- (43) 30 AIR 1943 Pat 361 (363) 22 Pat 423 45 Cr L Jour 301 211 Ind Cis 115 (DB) *Gadai Sahu v Emperor*
- (40) 21 AIR 1940 Mad 1 (P) 41 Cr L Jour 369 186 Ind Cas 704 *In re Kanakasabai Pillai*
- (27) 14 AIR 1927 All 618 (619) 28 Cr L Jour 608 107 Ind Cas 784 *Municipal Board of Benares v Mahadeo* (In a prosecution for tying cattle on municipal lane the burden of proving that the land belongs to the municipality lies on the municipal board and that it is not for the accused to prove that the area is his private property)
- (33) 20 AIR 1933 Cal 532 (534) 60 Cal 636 34 Cr L Jour 1059 *Nishi Kanta Chatterji v Behari Katar*
- (30) 7 AIR 1930 Pat 533 (535) 20 Cr L Jour 253 *Ram Sunder Sahay v Emperor* (Prosecution can not rely on weakness of defence)
- (66) 1866 Rat 5 (2) *Reg v Jenloo*
- (18) 5 AIR 1918 Nag 123 (124) 20 Cr L Jour 747, *Gulzarsha Fahir v Emperor* (A moral conviction of guilt is no sufficient foundation for a verdict of guilty unless it is based on substantial facts which lead to no other reasonable conclusion than that the person charged is guilty)
- [See also (33) 20 A I R 1933 Sind 93 (93) 34 Cr L Jour 362 142 Ind Cas 591 (D B) *Lalchand v Emperor* (Accused ordered to abstain from certain act — Relation of accused disobeying order — Accused need not prove that disobedience of order by his relation was without his consent)]
- (18) 5 AIR 1918 All 160 (166) 19 Cr L Jour 935 47 Ind Cas 659 (D B) *Surendra Nath Muljari v Emperor* (Defence should not be called upon to frame a theory when the theory of prosecution itself is not clear)]
- 4 (40) 27 AIR 1940 Pat 365 (371) 41 Cr L Jour 114 185 Ind Cas 167 (DB) *Rambrichh Singh v Emperor*
- (35) 22 AIR 1935 Oudh 477 (480) 11 Luc 327 36 Cr L Jour 1007 156 Ind Cis 819 *Hari Krishna v Emperor*
- (35) 22 AIR 1935 Oudh 33 (34 35) 36 Cr L Jour 216 153 Ind Cas 52 (DB) *Chhulkau v Emperor*
- (34) 21 AIR 1934 Cal 407 (408) 32 Cr L Jour 712 146 Ind Cas 513 (DB) *Hem Chandra Halder v Emperor* (Mere conjecture not enough)

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of being one of the parties to a conspiracy it is not enough merely to prove his association with some of the conspirators)

- (92) 5 C P L R 11 (12) *Empress v Mt Bhura*
- (92) 1692 Oudh S C 221 (DB) *Queen Empress v Daji*
- (31) 18 AIR 1931 Lah 406 (408) 32 Cr L Jour 1019 *Amarnath v Emperor*
- (23) 10 AIR 1913 Lah 42 (43) 26 Cr L Jour 28 *Sarat Singh v Emperor*
- (14) 1 AIR 1914 Oudh 275 (278) 15 Cr L Jour 613 17 Oudh Cas 276 *Abbas Guli Khan v Emperor*
- (33) 20 AIR 1933 Oudh 149 (151) 34 Cr L Jour 493 8 Luck 301, *Patan v Emperor*
- (27) 14 AIR 1917 Lah 862 (864) 29 Cr L Jour 539 *Lala Ram v Emperor*
- (29) 16 AIR 1929 Pat 142 (113) 30 Cr L Jour 835 *Bivadeb Mandar v Emperor*
- (30) 17 AIR 1930 Lah 81 (86) 31 Cr L Jour 141, *Emperor v Soopi*
- (24) 15 AIR 1915 Lah 272 (273) 9 Lah 531 29 Cr L Jour 451 *Dula v Emperor* (Overruled on other ground)
- (30) 17 AIR 1930 Oudh 324 (323) 31 Cr L Jour 1076 6 Luck 68 *Rangil Lal v Emperor*
- (15) 2 AIR 1915 Low Bur 115 (118) 16 Cr L Jour 25 (P) *Aga Ferozein v Emperor*
- (33) 20 AIR 1933 Lah 28 (30) 34 Cr L Jour 556 *Pahmat Shah v Emperor*
- (34) 21 AIR 1934 Lah 693 (694) 36 Cr L Jour 772 *Sardar Ahmad v Emperor*

act of accused

last seen with deceased together even coupled with strong motive for crime is not sufficient proof of guilt)

3 (41) 31 AIR 1914 Lah 113 (115) 45 Cr L Jour 371 212 Ind Cas 279, *Chandan Lal v Emperor*.

prosecution should establish the case against the accused by *positive affirmative* evidence of his guilt and suspicion however grave does not take the place of proof.⁴ The onus rests

- (44) 31 A I R 1944 Lah 97 (101) 43 Cr L Jour 631 212 Ind Cas 440 (D B) *Emperor v Musaffar Hussain*
- (44) 31 A I R 1944 Snd 94 (96) 1 L R (1913) Har 291 43 Cr L Jour 526 212 Ind Cas 109 (D B), *Kassim Haji Khan v Emperor*
- (43) 30 AIR 1943 Pat 446 (452) 22 Pat 614 45 Cr L Jour 507 212 Ind Cas 197 (DB) *Atan Prasad Singh v Emperor* (A prisoner does not have to prove his defence but a probable alternative theory even if not proved provided it is not actually shown to be false goes a long way to throw doubt on the prosecution case)
- (43) 30 AIR 1943 Pat 361 (363) 22 Pat 423 43 Cr L Jour 301 211 Ind Cas 115 (DB) *Gadas Sahu v Emperor*
- (40) 27 AIR 1940 Mad 1 (7) 41 Cr L Jour 369 186 Ind Cas 701 *In re Kanakasabai Pillai*
- (27) 14 AIR 1927 All 618 (619) 28 Cr L Jour 608 107 Ind Cas 784 *Municipal Board of Denares v Mahaleo* (In a prosecution for tying cattle on municipal lane the burden of proving that the land belongs to the municipality lies on the municipal board and that it is not for the accused to prove that the area is his private property)
- (33) 20 AIR 1943 Cal 532 (534) 60 Cal 656 31 Cr L Jour 1059 *Nishi Kanta Chatterji v Dehari Bahar*
- (20) 7 AIR 1920 Pat 553 (555) 20 Cr L Jour 253 *Pam Sunder Sahay v Emperor* (Prosecution cannot rely on weakness of defence)
- (66) 1866 Rat 5 (3) *Peg v Jenkoo*
- (16) 5 AIR 1918 Nag 123 (121) 20 Cr L Jour 747, *Gulzarsha Fakir v Emperor* (A moral conviction of guilt is no sufficient foundation for a verdict of guilty unless it is based on substantial facts which lead to no other reasonable conclusion than that the person charged is guilty)
- [See also (33) 20 A I R 1933 Snd 93 (93) 31 Cr L Jour 362 142 Ind Cas 591 (D B) *Lalehand v Emperor* (Accused ordered to abstain from certain act — Relation of accused disobeying order — Accused need not prove that disobedience of order by his relation was without his consent)]
- (18) 5 AIR 1918 All 160 (166) 19 Cr L Jour 935 47 Ind Cas 659 (D B) *Surendra Nath Mukherji v Emperor* (Defence should not be called upon to frame a theory when the theory of prosecution itself is not clear)]
- 4 (40) 27 AIR 1910 Pat 365 (371) 41 Cr L Jour 114 185 Ind Cas 162 (DB) *Pambrishh Singh v Emperor*
- (35) 22 AIR 1935 Oudh 477 (480) 11 Luck 327 36 Cr L Jour 1007 156 Ind Cas 819 *Hari Krishna v Emperor*
- (35) 22 AIR 1935 Oudh 93 (34 35) 36 Cr L Jour 216 153 Ind Cas 52 (DB) *Chhutkai v Emperor*
- (34) 21 AIR 1934 Cal 407 (408) 33 Cr L Jour 712 146 Ind Cas 543 (DB), *Hem Chandra Halder v Emperor* (Mere conjecture not enough)

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of being one of the parties to a conspiracy it is not enough merely to prove his association with some of the conspirators)

- (92) 5 C P L R 11 (12) *Empress v M Bhura*
- (92) 1892 Oudh S C 221 (DB) *Queen Empress v Daya*
- (31) 18 AIR 1931 Lah 403 (408) 32 Cr L Jour 1019 *Amarnath v Emperor*
- (23) 10 AIR 1923 Lah 42 (43) 26 Cr L Jour 23 *Surat Singh v Emperor*
- (14) 1 AIR 1914 Oudh 275 (276) 15 Cr L Jour 643 17 Oudh Cas 276 *Abbas Guli Khan v Emperor*
- (33) 20 AIR 1933 Oudh 149 (151) 34 Cr L Jour 493 8 Luck 301, *Ritan v Emperor*
- (27) 14 AIR 1927 Lah 862 (864) 29 Cr L Jour 532 *Lala Ram v Emperor*
- (29) 16 AIR 1929 Pat 112 (113) 30 Cr L Jour 835 *Rasudeb Mandal v Emperor*
- (30) 17 AIR 1930 Lah 84 (86) 31 Cr L Jour 141 *Emperor v Soopi*
- (28) 15 AIR 1915 Lah 272 (273) 9 Lah 531 29 Cr L Jour 451, *Dula v Emperor* (Overruled on other grounds)
- (30) 17 AIR 1930 Oudh 371 (323) 31 Cr L Jour 1078 6 Luck 69 *Rings Lal v Emperor*
- (15) 2 AIR 1915 Low Bur 115 (118) 16 Cr L Jour 25 (26) *Yga To Thein v Emperor*
- (33) 20 AIR 1933 Lah 28 (30) 34 Cr L Jour 366 *Ishmat Shik v Emperor*
- (31) 21 AIR 1931 Lah 693 (694) 36 Cr L Jour 772 *Sardar Ahmad v Emperor*
- (18) 5 AIR 1918 Pat 146 (151) 19 Cr L Jour 749 *Pulatan Singh v Emperor* (Conduct of accused in giving false name and false residence on arrest is not sufficient in itself for conviction)
- (27) 14 AIR 1927 Lah 541 (590) 28 Cr L Jour 625 *Farla v Emperor* (Mere fact that accused was last seen with deceased together even coupled with strong motive to crime is not sufficient proof of guilt)

on the prosecution is not discharged by any absence of explanation or weakness on the part of the accused⁵ or even by the fact that the defence put forward by the accused was

- (39) 19 AIR 1932 Lah 195 (195 196) 33 Cr L Jour 501 *Dila Ram v Emperor* (Mere motive cannot be considered as sufficient evidence of the commission of a crime by a particular person)
- (27) 14 AIR 1927 Lah 74 (75) 28 Cr L Jour 118 *Arjan v Emperor* (Do)
- (26) 18 AIR 1926 Lah 88 (90) 7 Lah 84 27 Cr L Jour 709 *Rannun v Emperor* (Do)
- (33) 20 AIR 1933 All 394 (395) 34 Cr L Jour 731 *Mt Gayran v Emperor* (Do)
- [See (30) 17 AIR 1930 Cal 647 (650) 32 Cr L Jour 399 129 Ind Cas 619 (FB) *Rakhai Chandra Das v Emperor* (That a person was anxious to escape observation or even was doing his best to conceal his whereabouts after the date of the occurrence connected with the criminal conspiracy is not enough to infer the complicity of the person by completing what is necessary)]
- [See also (14) 1 AIR 1914 Cal 455 (466) 41 Cal 350 15 Cr L Jour 380 23 Ind Cas 980 (DB) *Ramesh Chandra Banerjee v Emperor* (It is no affair of the defence to supplement or explain deficiency or suspicious circumstances appearing on the face of the prosecution evidence)]
- (13) 14 Cr L Jour 601 (601) 21 Ind Cas 473 (DB) (Lah) *Faita v Emperor* (Presumption of guilt on the part of the accused cannot be made from the mere fact that the accused absconded)]
- 5 (44) 31 AIR 1914 FC 1 (17 18) 1914 FCR 61 11LR (1914) Nag 300 23 Pat 159 11LR (1914) Har 8 45 Cr L Jour 413 211 Ind Cas 556 (FC) *Piars Dusadh v Emperor*
- (43) 30 AIR 1913 Lah 293 (301) 45 Cr L Jour 149 203 Ind Cas 403 (DB) *Emperor v Mohd Hassan*
- (42) 29 AIR 1942 All 47 (50) 11LR (1941) All 912 43 Cr L Jour 380 198 Ind Cas 450 *Ghura v Emperor* (Sentence of accused must never be allowed to any degree to become a substitute for proof by prosecution of its case)
- (34) 21 AIR 1934 Cal 407 (408) 35 Cr L Jour 712 148 Ind Cas 543 (DB) *Hem Chandra Halder v Emperor*
- (33) 20 AIR 1933 Oudh 457 (459) 35 Cr L Jour 299 147 Ind Cas 111 (DB) *Ujja v Emperor*
- (16) 3 AIR 1916 Cal 188 (209) 42 Cal 957 16 Cr L Jour 497 29 Ind Cas 513 (DB) *Amritlal Hasra v Emperor*
- (92) 5 C P L R Cr 11 (12) *Empress v Mt Bhura*

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- conduct may affect his credibility but cannot affect his right to compel prosecution to prove its case)
- (31) 18 AIR 1931 Lah 361 (361) 32 Cr L Jour 1233 *Mela Ram v Emperor* (Prosecution cannot derive merit from failure of defence to cross examine witnesses or even to take part in proceedings)
- (22) 9 AIR 1922 All 24 (25) 23 Cr L Jour 193 *Ramhit v Emperor* (Because accused loses his head or gets frightened and does not tell truth he cannot on that account be prosecuted)
- (32) 19 AIR 1932 Lah 243 (244) 33 Cr L Jour 411 *Hayat v Emperor* (Murder—Two persons seen together and shortly afterwards one of them found to have been murdered—No onus rests on survivor to explain how deceased met with his death)
- (33) 20 AIR 1933 Oudh 276 (228) 8 Luck 397 34 Cr L Jour 930 *Har Dyal v Emperor*
- (33) 20 AIR 1933 Oudh 257 (258) 34 Cr L Jour 661 *Ramamurthi v Jai Indra Bahadur Singh*
- (25) 12 AIR 1925 Oudh 78 (88) 26 Cr L Jour 225 27 Oudh Cas 188 *Hira Lal v Emperor*
- (05) 2 Cr L Jour 352 (353) 2 All L Jour 411 *Abdul Ganni v King Emperor*
- (33) 20 AIR 1933 Oudh 333 (338) 8 Luck 570 35 Cr L Jour 45 *Ratan Lal v Emperor*
- (04) 1 Cr L Jour 390 (395) 28 Bom 533 6 Bom L R 379 *Emperor v Bankatraya*
- (19) 6 AIR 1919 Oudh 160 (174) 20 Cr L Jour 465 *Sushil Chandra v Emperor*

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it or innocence of

accused and not to decide about soundness of plea)

- (20) 7 AIR 1920 Pat 553 (555) 20 Cr L Jour 203 *Ram Sunder Sahay v Emperor*
- (94) 1894 Rat C96 (686) *Queen Empress v Jethmal Narayan* (Prisoner on his trial is merely on the defensive and owes no duty to anyone but himself)
- (33) 20 AIR 1933 Lah 871 (875) 35 Cr L Jour 137 *Emperor v Rat Singh*

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found to be false⁶

It is not only necessary that the guilt of the accused should be proved beyond a possibility of doubt but also that it should be proved strictly in accordance with law⁷ Thus it is improper for a Judge to make inquiries after a case is closed and to act upon statements and matters not made evidence on record⁸ Similarly, he ought not to allow

(27) 14 AIR 1917 Sind 85 (87) 27 Cri L Jour 1265 *Bukshan v Emperor* (But when a *prima facie* case is made out the presumption of innocence is displaced and the force of suspicious circumstances is augmented when accused offers no explanation)

(15) 2 AIR 1915 Lah 95 (97) 16 Cri L Jour 152 *Lachman Das v Emperor*

[See (30) 17 AIR 1930 Sind 211 (215) 24 Sind L R 252 31 Cri L Jour 1046, *Daksho v Emperor* (General criminality of tribe cannot be imputed to the individual members)]

(19) 6 AIR 1919 Pat 534 (536) 4 Pat L Jour 289 20 Cri L Jour 375 *Ram Prasad Mahlon v Emperor* (Prosecution story believed to be in substance unfounded — Judge can in his discretion determine

v Emperor

v Emperor

Bhikchand

Gangaram v Emperor

(16) 3 AIR 1916 All 63 (64) 17 Cri L Jour 23 (24) *Abdul Aziz v Emperor*

(21) 8 AIR 1921 Lah 89 (90) 22 Cri L Jour 59 *Hari Ram v Emperor*

(15) 2 AIR 1915 Lah 95 (97) 16 Cri L Jour 152 (151), *Lachman Das v Emperor*

(25) 12 AIR 1925 Lah 282 (283) 26 Cri L Jour 949 *Natha Singh v Emperor*

(25) 12 AIR 1925 Lah 42 (43) 26 Cri L Jour 393 *Tabri v Emperor* (The fact that the accused made an effort to concoct false evidence of an alibi does not go to prove that he committed the offence charged)

(33) 20 AIR 1933 Lah 946 (947) 35 Cri L Jour 79, *Parbhu v Emperor*

(11) 12 Cri L Jour 584 (584) 1st Ind Cas 849 (Low Bur) *Kyau Hia U v Emperor*

(21) 8 AIR 1921 Cal 531 (532) 23 Cri L Jour 220, *Gouri Narain v Tulshikaram Chettri* (Prosecution case false—Accused is entitled to acquittal whether his defence be true or false)

(33) 20 AIR 1933 Cal 603 (605) 31 Cri L Jour 1073 *Tarapada Mitra v Emperor*

[See also (33) 20 AIR 1933 Oadh 432 (435) 35 Cri L Jour 303 147 Ind Cas 113 (D B) *Itwari v Emperor* (Over zealous relation attempting to establish alibi—It is no ground for concluding accused to be guilty)]

(6th) 1867 Pun Re No 37 Cr, p 61 (67) (D B) *Crown v Shah Mahomed* (Innocent persons not usually deny presence or other circumstances which they suppose to tell against them)]

Also see S 256 Note 10 and S 290 Note 5

7 (21) 8 AIR 1921 Pat 400 (408), *Dhannu Beldar v Emperor*

(32) 33 Cri L Jour 514 (516) 137 Ind Cas 290 (Oadh) *Puttu v Emperor* (Where evidence is unreliable

irrelevant to charge against accused should be eliminated)

8 (41) 28 AIR 1911 Bom 412 (413) 43 Cri L Jour 213 197 Ind Cas 535 (DB) *Gulmalli Husain v Emperor*

(31) 7 Cal L Rep 193 (195) (D B) *In re Daya Dutt* (Reference to mortuary register which was not proved is irrelevant)

(75) 24 South W R Cr 14 (14) (DB) *In re Sreepulee Churn Sarkar* (Conviction based not upon recorded evidence but upon unrecorded evidence taken at the spot—High Court quashed the conviction)

(24) 15 AIR 1928 Lah 1 (3) 9 Lah 537 29 Cri L Jour 815, *Chiranjil Lal v Emperor* (Magistrate consulting is superior in disposing of bail application)

ascertaining age of girl from her father who produced horoscope of her birth)

[See (27) 14 AIR 1917 Pat 37 (37) 27 Cri L Jour 1112 *Jai Singh v Emperor* (Conviction cannot be

when making local inquiry)

himself to be influenced by proceedings which have taken place in another trial⁹ or by evidence taken in any connected case or proceeding before him¹⁰ Before recording a conviction the Court has not only to satisfy itself that the facts constituting the offence have been established, but also to see whether the proved or admitted facts bring the case within any of the exceptions which take the case out of the purview of the offence¹¹ Especially in cases where the accused specifically raises such a plea, such as the right of private defence, the exact circumstances justifying the act should be established¹²

In considering the effect of the evidence adduced, regard should be had only to the quality and weight of the evidence adduced and not to the number of witnesses examined¹³

(33) 20 AIR 1939 Cal 36 (39) 34 Cr L Jour 36, *Jagadesh Narain Tewari v Emperor*. (In dealing with trials of criminal cases extraneous considerations are to be excluded)

(75) 24 Suth W R Cr 28 (28) *Queen v Ram Churn Karmakar* (Sessions Judge should not import into his judgment opinion of assessor derived from personal knowledge and unsupported by evidence on record)

(70) 7 Bom H C R Cr 50 (54), *Reg v Vyankatrao Srinivas* (Magistrate should not import into case

facta (Magistrate in his judgment referring to

(09) 10 Cr L Jour 321 (325) 3 Ind Cas 622 (Lah), *Muzammal v Emperor* (It is improper to introduce private opinion of a person in judgment))

[See also (67) 8 Suth W R Cr 11 (12) (DB), *Queen v Phoolchand* (If a person has not been examined as a witness, the Judge has no right to refer to his having made any statement)]

9 (14) 1 AIR 1914 Cal 634 (634) 15 Cr L Jour 191 22 Ind Cas 767 (DB), *Pramotha Nath Roy Choudhry v King Emperor*

(70) 24 Suth W R Cr 15 (15) (DB) *Queen v Assanoolah* (Judge held to be in error in relying upon sum)

3, *Surendra Nath v Janki Nath*,
Kanhaiya
v Emperor
an v Emperor

ed Ismail

11 (29) 16 AIR 1929 Cal 346 (348) 56 Cal 1013 31 Cr L Jour 369, *Muhammad Ghul v Fazle Karim*

(22) 9 AIR 1922 Lah 314 (315) 22 Cr L Jour 507, *Gulam Rasul v Emperor* (Right of private defence established on evidence, though accused set up different defence)

[See also (40) 27 AIR 1940 Lah 157 (158) 41 Cr L Jour 576 189 Ind Cas 326 *Nihal Singh v Emperor* (Where the accused admits that he took part in the killing onus is strongly on him to show that his case comes under one of the exceptions to S 300, Penal Code)]

(10) 10 AIR 1922 Pat 300 (302) 20 Cr L Jour 191 18 Ind Cas 326 (DB), *Queen v Assanoolah*

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affecting the human body was being committed, on the person on whose behalf they interfered at that time)

peror

(26) 13 AIR 1926 Pat 433 (434) 27 Cr L Jour 1322 5 Pat 520, *Farman Khan v Emperor*

[See also (32) 10 AIR 1932 Pat 215 (217) 11 Pat 523 33 Cr L Jour 861 139 Ind Cas 616 (DB) *Ghyasuddin Ahmad v Emperor*]

13 (38) 1938 All W R 656 (657) *Pir Buz v Emperor*

(35) 22 AIR 1935 All 850 (851) 36 Cr L Jour 1362 158 Ind Cas 424 (DB), *Emperor v Dapu*

(20) 7 AIR 1920 Pat 366 (367) 21 Cr L Jour 33, *Brahmdco Singh v Emperor*

Thus it is open to the Court in its judgment to rely on the evidence of a particular person even though such person may be interested¹⁴ or to discard the evidence of a number of witnesses on the ground of their unreliability¹⁵ The Court should exercise great care in considering and giving weight to the evidence of accomplices (see S 337 Note 17), or to retracted confessions of accused persons (see Notes 18 and 19 on S 164) Where a part of the evidence of a witness is found to be false, the Court should not accept the other parts of his evidence to base a conviction thereon unless such evidence is corroborated by other independent evidence¹⁶ Especially in capital cases the evidence of persons who have testified

- (28) 15 AIR 1929 Mad 1135 (1136) 29 Cr L Jour 1011 *Muhammad Salia Rowther v Emperor* (No criminal Court is justified in brushing aside the documents to which the accused are parties when the accused them selves file those documents in Court along with their statements)
- (14) 1 AIR 1914 Lab 363 (366) 16 Cr L Jour 266 (267), *Sardar Ahmad v Emperor* (Held that in the case of unnatural offence under S 377 Penal Code, conviction can safely be based on uncorroborated testimony of the boy if it is not otherwise doubtful)
- (21) 8 AIR 1921 Oudh 115 (115) 22 Cr L Jour 647 21 Oudh Cas 225 *Gur Din v Emperor*
- (27) 12 AIR 1905 Oudh 501 (501) 27 Oudh Cas 327 26 Cr L Jour 530 *Bahadur v Emperor*
- (31) 18 AIR 1931 All 362 (363) 53 All 598 32 Cr L Jour 780 *Arjun Singh v Emperor* (Evidence of even one witness is sufficient for conviction on charge of perjury)
- (25) 12 AIR 1925 Lah 295 (296) 26 Cr L Jour 297 *Asis v Emperor* (Conviction on single witness's evidence—Evidence must be free from all doubt)
- (22) 9 AIR 1922 Pat 68 (91) *Ajodhya Prasad v Emperor*
- (18) 5 AIR 1918 Lab 322 (327) 19 Cr L Jour 946 *Ganpat v Emperor*
- (30) 17 AIR 1930 Lab 892 (893) 32 Cr L Jour 414 *Ram Saran Das v Emperor* (Policeman's testimony like that of every other witness, must be judged on its own merits)
- (34) 21 AIR 1934 Lah 158 (160) 36 Cr L Jour 108 *Hayat Mohammad v Emperor* (Witnesses being friends or relatives of each other is insufficient for discrediting their testimony)
- (26) 27 Cr L Jour 223 (294) 92 Ind Cas 175 (Lah), *Pali v Emperor* (It is not safe to base conviction on interested and contradictory evidence)
- [See (91) 3 Lah L Jour 482 (484) *Nura v Emperor*
- (93) 10 AIR 1923 Pat 519 (519) 24 Cr L Jour 360, *Bhanga Dubey v Emperor*
- (28) 15 AIR 1929 Ist 98 (100) 28 Cr L Jour 906 *Jogi Raut v Emperor*
- (115) 12 AIR 1925 Lah 49 (42) 26 Cr L Jour 333 *Tabra v Emperor*]
- [See also (35) 22 AIR 1935 Pesh 41 (43) 36 Cr L Jour 800 135 Ind Cas 270 (DB) *Masti Khan v Emperor* (A conviction can be based on a dying declaration alone if it is found to be true and genuine. It is not necessary for the Court to find some corroboration in order to do so)
- (15) 2 AIR 1915 Cal 235 (235) 15 Cr L Jour 722 26 Ind Cas 170 (DB) *Basu v Raika Singh* (Magistrate failing to appreciate evidence given by a Deputy Magistrate)]
- 14 (30) 17 AIR 1930 Cal 645 (646) 31 Cr L Jour 1225, *Haripada Baidya v Emperor*
- (29) 15 AIR 1928 Mad 1186 (1190) 51 Mad 956 30 Cr L J 317 (FB) *Veerappa Goundan v Emperor*

an Baksh v Emperor (Eye witness

not coming forward immediately investigation begins—His testimony should not be disregarded on that ground alone)

(26) 8 Lab L Jour 144 (146) *Gandannagh v Crown*]

[See also (15) 2 AIR 1915 All 464 (465) 16 Cr L Jour 805 31 Ind Cas 821 *Miharban Singh v Emperor* (Evidence of fellow castemen as to character of an individual not to be discarded solely on the ground that they are fellow castemen)]

corroborated on)]

15 See (25) 12 AIR 1925 Lah 397 (398) 26 Cr L Jour 1335 *Awab v Emperor*

open to the prosecution to pick out a bit here and a bit there from the evidence of a witness whom they themselves are not willing to accept as a witness of truth and to use these salvaged bits from testimony which is otherwise contaminated to bolster up their case against a particular accused person.)

from their former statements should not be relied upon¹⁷ The Court should not accept

(40) 27 AIR 1940 Lah 157 (158) 41 Cri L Jour 576 188 Ind Cas 326 (DB) *Nihal Singh v Emperor*
(30) 22 AIR 1935 Nag 81 (82) *Bala v Emperor*

(34) 21 AIR 1934 All 908 (919) 36 Cri L Jour 152 152 Ind Cas 741 (DB) *Neel Singh v Emperor*
(In capital cases Court is not justified in recording a conviction on evidence which is suspicious and tainted with lies)

(33) 20 AIR 1933 All 834 (834) 50 All 639 35 Cri L Jour 303 146 I C 957 (DB) *Ujagar v Emperor*

(33) 20 AIR 1933 Oudh 457 (459) 35 Cri L Jour 299 147 Ind Cas 111 (DB) *Ujja v Emperor*

(33) 20 AIR 1933 All 314 (318) 50 All 379 34 Cri L Jour 689 *Shukul v Emperor*

(31) 18 AIR 1931 Lah 38 (47) 32 Cri L Jour 592 *Mahla Singh v Emperor*

(27) 28 Cri L Jour 185 (186) 99 Ind Cas 857 (Lah) *Khera v Emperor*

(30) 1930 Mad W N 723 (726) *Vishwanatha Ayyar v Emperor*

(27) 14 AIR 1927 Nag 43 (44) 23 Cri L Jour 186 *Mt Yashoda v Emperor*

(33) 20 AIR 1933 All 401 (402) 34 Cri L Jour 765 *Man Singh v Emperor*

(16) 3 AIR 1916 Cal 98 (99) 16 Cri L Jour 411 (412) 42 Cal 784 *Hari Krishna v Emperor* (It is a dangerous precedent to convict a man on evidence of people who are found to be untruthful without corroboration)

(24) 11 AIR 1924 Nag 33 (35) 25 Cri L Jour 141 *Laxman v Emperor*

(17) 4 AIR 1917 Pat 331 (339) 16 Cri L Jour 639 (639) *Jagdeo Rai v Kali Rai*

(30) 7 AIR 1930 Oudh 460 (463) 32 Cri L Jour 94 *Gandan Lal v Emperor*

(27) 14 AIR 1927 Lah 797 (799) *Sardul Singh v Emperor*

(21) 8 AIR 1921 Pat 406 (408) *Dhannu Beldar v Emperor*

[See (38) 25 AIR 1938 Lah 850 (851) 40 Cri L Jour 185 179 Ind Cas 237 (DB) *Ghulam Nabi v Emperor* except his evidence only that

evidence of eye witnesses against some accused but not against others does not necessarily vitiate judgment)

(33) 20 AIR 1933 Oudh 59 (61) 34 Cri L Jour 243 *Ram Adhin v Emperor* (Prosecution witnesses considered unreliable in case of some accused — Their evidence must be closely sifted as regards others)]

[See also (44) 31 AIR 1944 Lah 97 (104) 45 Cri L Jour 634 212 Ind Cas 440 (DB), *Emperor v Musaffar Hussain* (If a witness is not found to have told the truth in one or two particulars the whole of his statement cannot be ignored. The Court must sift the evidence as to what it finds to be true and reject the rest)

(42) 29 AIR 1942 Pat 321 (322) 43 Cri L Jour 549 199 Ind Cas 317 (DB) *Basanti Kuli v Emperor* (Tainted evidence cannot be relied upon even for corroboration)

(35) 22 AIR 1935 Pesh 50 (51) 38 Cri L Jour 942 156 Ind Cas 436 (DB) *Gulzaman v Emperor* (The fact that a witness makes a false charge against an innocent person does not necessarily falsify the whole of his evidence)

(35) 22 AIR 1935 Pesh 50 (51) 38 Cri L Jour 942 156 Ind Cas 436 (DB) *Gulzaman v Emperor*

been falsely implicated — Statement not sufficient without corroboration against other accused)

(26) 13 AIR 1926 Oudh 26 (26) 26 Cri L Jour 1237 89 Ind Cas 241 *Hasnu Khan v Emperor* (Prosecution evidence tainted as to one accused — Court should hesitate to accept the evidence as to others also)

(29) 16 AIR 1929 Oudh 248 (250) 4 Luck 705 31 Cri L Jour 181 *Duarka v Emperor* (Witnesses altering statements in Sessions Court to fit evidence in Magistrate's Court — Evidence must be carefully scrutinized)

(23) 10 AIR 1923 All 352 (354) 45 All 300 24 Cri L Jour 596 *Khatal v Emperor* (The fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters)

(15) 2 AIR 1915 Cal 558 (562) 16 Cri L Jour 474 (498) 42 Cal 313 *Meredith v Sanjay Banu Dasu*

(18) 5 AIR 1918 Pat 536 (537) 19 Cri L Jour 877, *Phatala v Emperor*

[See however (14) 1 AIR 1914 Lah 93 (94) 15 Cri L Jour 148, *Lakha Singh v Emperor* (Evidence distrusted as regards one accused should not be disregarded altogether)

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[See

retracting in Sessions Court statements made before committing Magistrate to get accused acquitted — Court can prefer evidence given before Magistrate and convict on that basis)]

limited
or

Witnesses

blindly the evidence of medical men¹⁸ or experts¹⁹ or identification evidence,²⁰ to outweigh

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(24)

(23)

* Chandra Das

[See also (34) 21 AIR 1934 Pc 27 (98) 30 Cr L Jour 961 148 Ind Cas 1043 *Mahomed Khan v Emperor* (The medical evidence can only be used as corroborative of the charge and not as the evidence of the charge);

19 (19) 13 Cr L Jour 276 (231) 36 Mad 109 14 Ind Cas 418 (DB) *In re Basur Veetha Pow* (Conviction should not ordinarily be based on the mere evidence afforded by a comparison of handwriting by an expert without substantial corroboration)

(10) 11 Cr L Jour 114 (116) 13 Oudh Cas 1 5 Ind Cas 305 *Lalia Prasad v Emperor*

(09) 9 Cr L Jour 494 (501) 2 Ind Cas 154 (All) *Kala Charan Mukerji v Emperor* (It is unsafe to base conviction on the opinion of handwriting expert)

(25) 12 AIR 1923 Oudh 413 (415) 26 Cr L Jour 929 29 Oudh Cas 1, *Girdhar Lal v Emperor* (Corroboration of expert's evidence is necessary)

(32) 19 AIR 1932 Lah 490 (490) 33 Cr L Jour 593 *Prabhu Dial v Emperor*

(12) 13 Cr L Jour 563 (564) 15 Ind Cas 979 (Lah) *Jalal ud din v Emperor*

(05) 2 Cr L Jour 353 (355) 2 All L Jour 444 *Srikant v Emperor*

(22) 9 AIR 1922 Pat 73 (70) 1 Pat 242 23 Cr L Jour 639 *Bazari Hajam v Emperor*

[See also (35) 22 AIR 1935 Oudh 143 (150) 36 Cr L Jour 397 153 Ind Cas 780 *Onkar Dutt Nigam v Emperor* (Where an accused pleads insanity the opinion of an expert on lunacy ought not to be

when there is no other evidence to corroborate the expert)

(14) 1 AIR 1914 Lah 558 (559) 1914 Pun Re No 9 Cr 16 Cr L Jour 129 27 Ind Cas 903, *Ahmada v Emperor* (Deliberate opinion of expert that two thumb marks agree is sufficient to conclude that marks were made by same thumb — Such opinion is on quite different plane from opinion as to handwriting)

(33) 20 AIR 1933 Lah 561 (566) 34 Cr L Jour 735, *Dewan Singh v Emperor*

(29) 16 AIR 1929 Lah 210 (211) 30 Cr L Jour 52 *Disedad v Emperor* (Evidence of thumb impression expert is valuable.)

* or (Evidence of

on marks told to

(23) 10 AIR 1923 Lah 662 (662) 26 Cr L Jour 19 *Behman v Emperor*

(17) 4 AIR 1917 Oudh 118 (120) 18 Cr L Jour 456 (458) *Kallu v Emperor*

(32) 19 AIR 1932 S ud 55 (55) 33 Cr L Jour 641 *Nawab Kamal v Emperor*

(29) 16 AIR 1929 S ud 149 (149 150) 30 Cr L Jour 456 *Ramsan v Emperor*

(04) 1 Cr L Jour 475 (476) 2 Low Bur Rol 206 *Tha Hmu v Emperor*

(34) 21 AIR 1934 Lah 641 (647) 36 Cr L Jour 121 *Bhagal Ram v Emperor* (Value of identification evidence must vary with the circumstances of each case)

(15) 12 AIR 1915 Lah 137 (138) 25 Cr L Jour 1272 *Mahni v Emperor* (Identification evidence can not be accepted unless witness had picked out same person in identification parade.)

(29) 16 AIR 1929 All 923 (929) 31 Cr L Jour 206 *Man Singh v Emperor*

(30) 17 AIR 1930 All 746 (746) 32 Cr L Jour 152 *Abdul Jalil Khan v Emperor*

(25) 12 AIR 1925 Lah 19 (0) 5 Lah 396 27 Cr L Jour 176 *Lal Singh v Emperor*

[See also (35) 22 AIR 1935 Oudh 226 (228) 35 Cr L Jour 889 149 Ind Cas 1192 *Chauhan v Emperor* (Accused protesting on ground that identifying witness knows him before — Much value should not be attached to identification)]

(17) 4 AIR 1917 Lah 311 (315) 18 Cr L Jour 632 41 Ind Cas 820 *Sahas Singh v Emperor* (Evidence of identifying witness knowing accused before is worthless)

from their former statements should not be relied upon¹⁷ The Court should not accept

- (40) 27 AIR 1940 Lah 157 (158) 41 Cri L Jour 576 188 Ind Cas 326 (DB) *Nihal Singh v Emperor*
 (35) 22 AIR 1935 Nag 81 (82) *Bala v Emperor*
 (34) 21 AIR 1934 All 909 (919) 36 Cri L Jour 152 152 Ind Cas 741 (DB) *Nem Singh v Emperor*
 (In capital cases Court is not justified in recording a conviction on evidence which is suspicious and tainted with lies.)
 (33) 20 AIR 1933 All 834 (834) 53 All 639 35 Cri L Jour 353 146 I C 957 (DB) *Ujagar v Emperor*
 (33) 20 AIR 1933 Oudh 457 (459) 35 Cri L Jour 299 147 Ind Cas 111 (DB) *Ujja v Emperor*
 (33) 20 AIR 1933 All 314 (318) 53 All 379 34 Cri L Jour 689 *Shukul v Emperor*
 (31) 18 AIR 1931 Lah 38 (47) 32 Cri L Jour 522 *Mahla Singh v Emperor*
 (27) 28 Cri L Jour 185 (186) 99 Ind Cas 857 (Lah) *Kheri v Emperor*
 (30) 1930 Mad W N 723 (726) *Viswanatha Ayyar v Emperor*
 (27) 14 AIR 1927 Nag 43 (44) 28 Cri L Jour 186 *Mt Yashod v Emperor*
 (33) 20 AIR 1933 All 401 (402) 34 Cri L Jour 765 *Man Singh v Emperor*
 (16) 3 AIR 1916 Cal 98 (99) 16 Cri L Jour 411 (419) 42 Cal 784 *Hari Krishna v Emperor* (It is a dangerous precedent to convict a man on evidence of people who are found to be untruthful without corroboration)
 (24) 11 AIR 1924 Nag 33 (35) 25 Cri L Jour 141 *Laxman v Emperor*
 (17) 4 AIR 1917 Pat 331 (337) 18 Cri L Jour 639 (639) *Jagdeo Rai v Kala Rai*
 (30) 7 AIR 1930 Oudh 460 (463) 32 Cri L Jour 94 *Gandan Lal v Emperor*
 (27) 14 AIR 1927 Lah 797 (799) *Sardul Singh v Emperor*
 (21) 8 AIR 1921 Pat 406 (408) *Dhannu Beldar v Emperor*
 [See (38) 25 AIR 1938 Lah 850 (851) 40 Cri L Jour 185 179 Ind Cas 237 (DB) *Ghulari Nahi v Emperor* (Judge dealing first with statement of accused and finding it untrustworthy except his admission of guilt — He then finding that prosecution on evidence was unreliable but believing only that part which supported accused's admission of guilt — Way of approaching case held illegal)]

considered unreliable in case of some accused — Their evidence must be closely sifted as regards others]]

- [See also (44) 31 AIR 1944 Lah 97 (104) 45 Cri L Jour 634 212 Ind Cas 440 (DB), *Emperor v Yusufar Hussain* (If a witness is not found to have told the truth in one or two particulars the whole of his statement cannot be ignored. The Court must sift the evidence except what it finds to be true and reject the rest)]
 (42) 29 AIR 1942 Pat 321 (329) 43 Cri L Jour 549 199 Ind Cas 317 (DB) *Basanti Kaur v Emperor*
 (Tainted evidence cannot be relied upon even for corroboration)
 (35) 22 AIR 1935 Pesh 50 (51) 38 Cri L Jour 912 156 Ind Cas 430 (DB) *Gulaman v Emperor*
 (The fact that a witness makes a false charge against an innocent person does not necessarily falsify the whole of his evidence)
 (34) 21 AIR 1934 Oudh 507 (512) 38 Cri L Jour 86 152 I C 331 (DB) *Emperor v Ramlal* (Evidence of perjured
 (34) 21 AIR Emperor
 (Statements have
 been falsely implicated — Statement not sufficient without corroboration against other accused)
 (26) 13 AIR 1926 Oudh 26 (26) 26 Cri L Jour 1237 89 Ind Cas 241 *Hasnu Khan v Emperor*
 (Prosecution evidence tainted as to one accused — Court should hesitate to accept the evidence as to others also)
 (29) 16 AIR 1929 Oudh 248 (250) 4 Luck 705 31 Cri L Jour 181 *Dararka v Emperor* (Witnesses altering statements in Sessions Court to fit evidence in Magistrate's Court — Evidence must be carefully scrutinized)

[See however (14) 1 AIR 1914 Lah 93 (94) 15 Cri L Jour 148, *Lakha Singh v Emperor*

Emperor]
 v Ramlal
 Emperor

(Witnesses retracting in Sessions Court statements made before committing Magistrate to get accused acquitted — Court can prefer evidence given before Magistrate and convict on that basis)]

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* Chandra Da*

[See also (34) 21 AIR 1934 Pesh 27 (28) 35 Cr L Jour 961 148 Ind Cas 1043 *Mahomed Khan v Emperor* (The medical evidence can only be used as corroborative of the charge and not as the evidence of the charge)]

19 (19) 13 Cr L Jour 926 (231) 36 Mad 159 14 Ind Cas 418 (DB) *In re Basrur Venkata Row* (Conviction should not ordinarily be based on the mere evidence afforded by a comparison of handwriting by an expert without substantial corroboration)

(10) 11 Cr L Jour 114 (116) 13 Oudh Cas 1 5 Ind Cas 355 *Lalla Prasad v Emperor*

(09) 9 Cr L Jour 498 (501) 2 Ind Cas 154 (All) *Kali Charan Mukherji v Emperor* (It is unsafe to base conviction on the opinion of handwriting expert)

(25) 19 AIR 1925 Oudh 413 (415) 26 Cr L Jour 929 29 Oudh Cas 1 *Girdhari Lal v Emperor* (Corroboration of expert's evidence is necessary)

(39) 19 AIR 1932 Lah 490 (490) 33 Cr L Jour 593 *Prabhu Dial v Emperor*

(19) 13 Cr L Jour 563 (564) 15 Ind Cas 979 (Lah) *Jalal ud din v Emperor*

(05) 2 Cr L Jour 353 (355) 2 All L Jour 414 *Srikant v Emperor*

(22) 9 AIR 1922 Pat 73 (75) 1 Pat 249 23 Cr L Jour 636 *Bazari Hajari v Emperor*

[See also (35) 23 AIR 1935 Oudh 143 (150) 36 Cr L Jour 397 153 Ind Cas 780 *Onkar Dutt Nigam v Emperor* (Where an accused pleads insanity the opinion of an expert on lunacy ought not to be brushed aside on the strength of the lay opinion of the trial Judge)]

(31) 18 AIR 1931 Cal 441 (442) 32 Cr L Jour 1001 133 Ind Cas 111 (DB) *Harendra Nath Seta v Emperor* (The Court must not take the expert's opinion as granted but it must examine his evidence in order to satisfy itself that there can be no mistake and the responsibility is all the greater when there is no other evidence to corroborate the expert)

(14) 1 AIR 1914 Lah 558 (559) 1014 Pan Re No 9 Cr 16 Cr L Jour 139 27 Ind Cas 203, *Ahmada v Emperor* (Deliberate opinion of expert that two thumb marks agree is sufficient to conclude that marks were made by same thumb — Such opinion is on quite different plane from opinion as to handwriting)

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20 (27) 14 AIR 1907 Cal 820 (821) 28 Cr L Jour 874 *Emperor v Irjan*

(32) 19 AIR 1932 Oudh 99 (102) 7 Luck 559 33 Cr L Jour 331 *Gajadhar v Emperor* (Evidence of identity based on personal impression should be approached with considerable caution)

(33) 20 AIR 1933 Oudh 49 (49 50) 34 Cr L Jour 382 *Tula v Emperor*

caution marks told to

(34) 21 AIR 1934 Lah 641 (647) 36 Cr L Jour 121 *Bhagat Ram v Emperor* (Value of identification evidence must vary with the circumstances of each case)

(25) 12 AIR 1925 Lah 137 (138) 29 Cr L Jour 1272 *Mahm v Emperor* (Identification evidence cannot be accepted unless witness had picked out same person in identification parade)

(29) 16 AIR 1929 All 973 (923) 31 Cr L Jour 206 *Man Singh v Emperor*

(30) 17 AIR 1930 All 746 (744) 32 Cr L Jour 152 *Abdul Jalil Khan v Emperor*

(25) 12 AIR 1925 Lah 19 (20) 5 Lah 396 27 Cr L Jour 170 *Lal Singh v Emperor*

[See also (35) 22 AIR 1935 Oudh 226 (228) 35 Cr L Jour 689 145 Ind Cas 1192 *Chauhan v Emperor* (Accused protesting on ground that identifying witness knows him before — Much value should not be attached to identification)]

(17) 4 AIR 1917 Lah 311 (313) 18 Cr L Jour 832 41 Ind Cas 620 *Sahas Singh v Emperor* (Evidence of identifying witnesses having possibility of seeing the accused before is worthless)

from their former statements should not be relied upon¹⁷ The Court should not accept

- (40) 27 AIR 1940 Lah 157 (158) 41 Cri L Jour 576 188 Ind Cas 326 (DB) *Nihal Singh v Emperor*
 (35) 22 AIR 1935 Nag 81 (82) *Bala v Emperor*
 (34) 21 AIR 1934 All 908 (919) 36 Cri L Jour 152 152 Ind Cas 741 (DB) *Neri Singh v Emperor*
 (In capital cases Court is not justified in recording a conviction on evidence which is suspicious and tainted with lies)

v Emperor
Emperor

- (31) 18 AIR 1931 Lah 38 (47) 32 Cri L Jour 522 *Mahla Singh v Emperor*
 (27) 28 Cri L Jour 185 (186) 99 Ind Cas 857 (Lah) *Khari v Emperor*
 (30) 1930 Mad W N 723 (726) *Vishwanatha Ayyar v Emperor*
 (27) 14 AIR 1927 Nag 43 (44) 28 Cri L Jour 186 *Mt Kashodi v Emperor*
 (33) 20 AIR 1933 All 401 (402) 34 Cri L Jour 765 *Man Singh v Emperor*
 (16) 3 AIR 1916 Cal 98 (99) 16 Cri L Jour 411 (412) 42 Cal 784 *Hari Krishna v Emperor* (It is a dangerous precedent to convict a man on evidence of people who are found to be untruthful without corroboration)
 (24) 11 AIR 1924 Nag 33 (35) 25 Cri L Jour 141 *Lazman v Emperor*
 (17) 4 AIR 1917 Pat 331 (332) 18 Cri L Jour 639 (639) *Jagdeo Rai v Kali Rai*
 (30) 7 AIR 1930 Oudh 460 (463) 32 Cri L Jour 94 *Gendun Lal v Emperor*
 (27) 14 AIR 1927 Lah 797 (798) *Sardul Singh v Emperor*
 (21) 8 AIR 1921 Pat 406 (408) *Dhannu Beldar v Emperor*
 (See (39) 25 AIR 1938 Lah 850 (851) 40 Cri L Jour 185 179 Ind Cas 237 (DB) *Ghulam Nabi v*
Emperor except his
 g only that

(evidence of
 eye witnesses against some accused but not against others does not necessarily vitiate judgment)
 (33) 20 AIR 1933 Oudh 59 (61) 34 Cri L Jour 243 *Ram Adhin v Emperor* (Prosecution witnesses considered unreliable in case of some accused — Their evidence must be closely sifted as regards others)]

(See also (44) 31 AIR 1944 Lah 97 (104) 45 Cri L Jour 634 212 Ind Cas 410 (DB), *Emperor v Muzaaffar Hussain* (If a witness is not found to have told the truth in one or two particulars the whole of his statement cannot be ignored The Court must sift the evidence except what it finds to be true and reject the rest)

(42) 29 AIR 1942 Pat 321 (322) 43 Cri L Jour 549 199 Ind Cas 317 (DB) *Basanti Kaur v Emperor* (Tainted evidence cannot be relied upon even for corroboration)

(35) 22 AIR 1935 Pesh 50 (51) 36 Cri L Jour 942 156 Ind Cas 436 (DB) *Gulshan v Emperor* (The fact that a witness makes a false charge against an innocent person does not necessarily falsify the whole of his evidence)

(34) 21 AIR 1934 Oudh 507 (512) 36 Cri L Jour 86 152 I C 331 (DB) *Emperor v Ramlal* (Evidence of perjured witness should not

(34) 21 AIR 1934 Rang 98 (99)

(Statements of deceased only
 been falsely implicated — Statement not sufficient without corroboration against other accused)

(26) 13 AIR 1926 Oudh 26 (26) 26 Cri L Jour 1297 89 Ind Cas 241 *Hasmu Khan v Emperor* (Prosecution evidence tainted as to one accused — Court should hesitate to accept the evidence as to others also)

(29) 18 AIR 1929 Oudh 248 (250) 4 Luck 705 31 Cri L Jour 181 *Dwarka v Emperor* (Witnesses altering statements in Sessions Court to fit evidence in Magistrate's Court—Evidence must be carefully scrutinized)

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 (See however (14) 1 AIR 1914 Lah 93 (94) 15 Cri L Jour 148, *Lakka Singh v Emperor*

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to base conviction on the opinion of handwriting expert)

(25) 1 AIR 1925 Oudh 413 (415) 26 Cr L Jour 929 29 Oudh Cas 1, *Girdhari Lal v Emperor*.

when there is no other evidence to corroborate the expert)

(14) 1 AIR 1914 Lah 508 (559) 1914 Pan Re No 9 Cr 16 Cr L Jour 139 27 Ind Cas 203, *Ahmada v Emperor* (Deliberate opinion of expert that two thumb marks agree is sufficient to conclude that marks were made by same thumb — Such opinion is on quite different plane from

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not be attached to ident beat on)

(17) 4 AIR 1917 Lah 311 (315) 15 Cr L Jour 832 41 Ind Cas 820, *Sahaji Singh v Emperor* (Evidence of identifying witnesses having powerfully of seeing the accused before is worthless)

the testimony of respectable eye witnesses nor should the Court base its judgment on its own theories unsupported by evidence²¹ or on personal knowledge²² or on a hypothetical state of facts which were never put forward by the prosecution and were never suggested to the accused as being the case he had to meet²³ Mere suggestions by counsel in cross examination however ingenious are of no evidentiary value unless accepted by the witness or proved by other evidence²⁴ The evidence relating to alibi should be scrutinised very carefully²⁵

(12) 13 Cr L Jour 505 (556) 15 Ind Cas 971 (Lah) *Mans Ram v Emperor* (Identification of stolen property)

(39) 19 AIR 1937 Oudh 287 (287) 34 Cr L Jour 197 *Sheo Sahas v Emperor*.

(26) 27 Cr L Jour 946 (947) 96 Ind Cas 498 (Lah) *Ranga Singh v Emperor* (Track evidence)]

[See however (27) 14 AIR 1927 Oudh 196 (197) 2 Luck 444 28 Cr L Jour 460 *Mathura v Emperor* (Evidence of identification is not by itself unsafe basis for conviction)

(16) 3 A I R 1916 Lah 297 (297) 17 Cr L Jour 156 (157) *Nikka v Emperor* (Identification of particular accused by witnesses to whom they were strangers is not valueless)]

21 (42) 29 AIR 1942 All 47 (48) 1 L R (1941) All 912 43 Cr L Jour 380 198 Ind Cas 450 *Ghura v Emperor*

(34) 21 AIR 1934 All 714 (715) 35 Cr L Jour 1989 151 Ind Cas 350 *Dhum Bahadur v Horailal* (The trial Courts are expected to record findings with definiteness and precision and not to indulge in airy generalities)

(33) 20 AIR 1933 Oudh 566 (567) 35 Cr L Jour 278 147 Ind Cas 77 *Hashmal v Emperor*

(26) 27 Cr L Jour 1346 (1346) 98 Ind Cas 466 (All) *Ram Surai v Emperor*

(24) 11 AIR 1924 Pat 818 (815) 20 Cr L Jour 724 *Joharmal v Emperor*

(30) 17 AIR 1930 All 45 (48) 31 Cr L Jour 37 *Ut Bakhtawari v Emperor*

(17) 4 AIR 1917 Lah 48 (48) 18 Cr L J 490 (491) 1917 Pun Re No 1 Cr *Emperor v Buta Singh*

(24) 11 AIR 1924 Cal 611 (613) 26 Cr L Jour 71 *Superintendent & Remembrancer of Legal Affairs Bengal v Purna Chandra*

(30) 17 AIR 1930 Oudh 460 (463) 32 Cr L Jour 94 *Gendan Lal v Emperor*

(19) 6 AIR 1919 All 167 (167) 20 Cr L Jour 370 *Atay Ahmad v Emperor*

(86) 1986 All W N 20 (20) *Empress v Maheshu*

[See also (44) 31 AIR 1944 Sind 33 (37, 38) 1 L R (1944) Kar 193 45 Cr L Jour 650 212 Ind Cas 467 (DB) *Emperor v Kaku Mashghul* (A Judge should not rely for the first time upon a point which comes to his notice only at the time of judgment and which has not been made the subject of question or argument in the hearing of the case before him)

(23) 10 AIR 1923 Lah 128 (129) 23 Cr L Jour 606 68 Ind Cas 830 *Murad v Emperor* (An accused person must be convicted upon evidence which is on the record and not on what would have been deposited by the prosecution witnesses had they not been won over)

(68) 1 Beng L R A Cr 13 (15) 10 Sath W R Cr 37 (DB) *Queen v Fatik Biswas* (The knowledge by the Sessions Judge of the handwriting of the Judicial Officer before whom a statement was made

17 Lal
Emperor
to obtrude

in a judicial pronouncement)

(24) 11 AIR 1924 Rang 17 (17) 1 Rang 290 20 Cr L Jour 185 76 Ind Cas 420 *S C Gupta v Emperor* (The rule against the importation of personal knowledge into judgment does not apply to facts of which the Court may take judicial notice such as exhibits on the record)

(04) 1 Cr L Jour 90 (101) 1903 Pun Re No 27 Cr *Nurdin v Emperor*

(31) 18 AIR 1931 Sind 127 (198) 25 Sind L R 213 30 Cr L Jour 923 *Shamdhura v Emperor*

(05) 12 AIR 1925 Lah 166 (167) 25 Cr L Jour 803 *Walla Muhammad v Emperor*

[See also (33) 20 AIR 1933 Cal 36 (39) 34 Cr L Jour 36 *Jagadish v Emperor*]

23 (27) 14 AIR 1927 Lah 728 (728) 28 Cr L Jour 405 101 Ind Cas 181 *Harphul v Emperor*

" e different from the case put forward

v Emperor

v Emperor

v Karimuddin Sheikh

25 (28) 15 AIR 1928 Mad 791 (793) 29 Cr L Jour 717 *Public Prosecutor v Glidambaran*

The standard of proof required in criminal cases does not vary with the magnitude or enormity of the crime²⁶ though it is usual and prudent to observe the rule the fouler the crime is the clearer and plainer ought the proof of it to be.²⁷ In cases based on circumstantial evidence such evidence should be so strong as to point very clearly to the guilt of the accused²⁸ It is of utmost importance in such cases that in order to justify an inference of guilt the inculpatory facts should be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.²⁹ Thus where the action of the accused is open to two constructions one criminal

v *Emperor* (Where an accused takes the defence of alibi reasoning from probabilities cannot take the place of evidence)

(17) 4 AIR 1917 All 81 (85) 18 Cri L Jour 317 39 Ind Cas 429 (DB) *Tapeswari Prasad v Emperor*
26 (43) 30 AIR 1943 Pat 163 (169) 21 Pat 865 44 Cri L Jour 507 206 Ind Cas 365 *Lakshono Sahu v Emperor*

907 (DB) *Ujagar v*

27 (20) 7 AIP 1920 Pat 616 (670) 22 Cri L Jour 154 *Raghunandan v Emperor*

28 (34) 35 Cri L Jour 286 (988) 147 Ind Cas 106 (DB) (Oudh) *Nankai v Emperor* (It must be reasonably inconsistent with any theory of the accused's innocence)

(30) 17 AIR 1930 Mad 632 (635) 53 Mad 590 31 Cri L Jour 712 *Shankaralinga Thettan v Emperor*

(96) 27 Cri L Jour 1254 (1900) 99 Ind Cas 102 (Cal) *Arajah v Emperor*

[See also (29) 9 AIR 1922 Pat 582 (580) 1 Pat 630 24 Cri L Jour 91 71 Ind Cas 219 (DB) *Niru Bhagat v King Emperor* (Where there is only circumstantial evidence to connect the accused with the crime it is most necessary that every link in the chain of evidence should be carefully tested especially in case of a charge of murder no link should be missing and every link should be fully proved)]

for

1 AIR 1914 Cal 407 (409) 30 Cri L Jour 712 149 Ind Cas 843 (DB) *Hem Chandra Halder*

11 AIR 1914 (196) 60 Cal 1339 35 Cri L Jour 567 147 Ind Cas 1203 (DB) *Makar*
rule does not strictly apply where the decision in the case is not dependent on

1 C 1907 16 Cri L Jour 497 29 Ind Cas 513 (DB) *Amritlal Hasra*

1 C 1901 17 Cri L Jour 713 96 Ind Cas 161 (DB) *Emperor v*

17 Ind Cas 755 (DB) *Mahomed Khasim v*
the accused alone and admits of no reasonable

11 C 1911 *Falla Prasad v Emperor*

17 Ind Cas 755 (DB) *Emperor*

11 C 1911 *Falla Prasad v Emperor*

17 Ind Cas 755 (DB)

Emperor

17 Ind Cas 755 (DB)

for

the testimony of respectable eye witnesses nor should the Court base its judgment on its own theories unsupported by evidence²¹ or on personal knowledge²² or on a hypothetical state of facts which were never put forward by the prosecution and were never suggested to the accused as being the case he had to meet²³ Mere suggestions by counsel in cross-examination however ingenious are of no evidentiary value unless accepted by the witness or proved by other evidence²⁴ The evidence relating to alibi should be scrutinised very carefully²⁵

- (12) 13 Cr L Jour 500 (556) 15 Ind Cas 971 (Lah) *Mani Ram v Emperor* (Identification of stolen property)
 (32) 19 AIR 1932 Oudh 287 (287) 34 Cr L Jour 197 *Sheo Sahas v Emperor*.
 (26) 27 Cr L Jour 946 (947) 96 Ind Cas 498 (Lah) *Ranga Singh v Emperor* (Track evidence)
 [See however (27) 14 AIR 1927 Oudh 196 (197) 2 Luck 444 28 Cr L Jour 460 *Mathura v Emperor* (Evidence of identification is not by itself unsafe basis for conviction)
 (16) 3 A I R 1916 Lah 297 (297) 17 Cr L Jour 156 (157) *Nikka v Emperor* (Identification of particular accused by witnesses to whom they were strangers is not valueless)]
 21 (42) 29 AIR 1942 All 47 (49) 1 L R (1941) All 912 43 Cr L Jour 380 198 Ind Cas 450 *Ghura v Emperor*
 (34) 21 AIR 1934 All 714 (715) 35 Cr L Jour 1289 151 Ind Cas 300 *Dhnm Bahadur v Horulal* (The trial Courts are expected to record findings with definiteness and precision and not to indulge in airy generalities)
 (33) 20 AIR 1933 Oudh 566 (567) 35 Cr L Jour 278 147 Ind Cas 77, *Hashmat v Emperor*
 (26) 27 Cr L Jour 1346 (1346) 98 Ind Cas 486 (All) *Ram Surat v Emperor*
 (24) 11 AIR 1924 Pat 813 (815) 25 Cr L Jour 724 *Joharimal v Emperor*
 (30) 17 AIR 1930 All 40 (48) 31 Cr L Jour 37 *Mt Bakhtawari v Emperor*
 (17) 4 AIR 1917 Lah 48 (48) 18 Cr L J 490 (491) 1917 Pun Re No 1 Cr *Emperor v Buta Singh*
 (24) 11 AIR 1924 Cal 611 (613) 28 Cr L Jour 71, *Superintendent & Remembrancer of Legal Affairs Bengal v Purna Chandra*
 (30) 17 AIR 1930 Oudh 460 (463) 32 Cr L Jour 94 *Gendan Lal v Emperor*
 (19) 6 AIR 1919 All 167 (167) 20 Cr L Jour 370 *Alay Ahmad v Emperor*
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 (68) 1 Beng L R A Cr 13 (15) 10 Suth W R Cr 37 (DB) *Queen v Fatih Biswas* (The knowledge by the Sessions Judge of the handwriting of the Judicial Officer before whom a statement was made is no evidence of the statement having been made before that officer)]
 22 (42) 29 AIR 1942 Lah 232 (234) 43 Cr L Jour 308 202 Ind Cas 292 *Emperor v Brig Lal*
 (31) 21 AIR 1934 All 776 (779) 35 Cr L Jour 919 149 Ind Cas 210 (DB) *Ramkul v Emperor* (Personal views of a Judge upon a political organization and activities should not be allowed to obtrude in a judicial pronouncement)

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 ment does not apply to

- (00) 6 Oudh Cas 204 (211) *Sri Kishore v King Emperor*
 (19) 6 AIR 1919 Pat 111 (116) 20 Cr L Jour 283 *Satrughan v Emperor*
 (19) 6 AIR 1919 All 345 (347) 20 Cr L Jour 283 *Jai Narain v Emperor*
 (04) 1 Cr L Jour 539 (589) 0 Bom L R 480 *In re D Poaseca*
 (04) 1 Cr L Jour 99 (101) 1903 Pun Re No 27 Cr *Nurdin v Emperor*
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- (10) 11 Cr L Jour 245 (246) 5 Ind Cas 771 (Cal) *Bhanga Hadua v Emperor*
 (26) 27 Cr L Jour 1346 (1346) 98 Ind Cas 466 (All) *Ram Surat v Emperor*
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 25 (24) 15 AIR 1923 Mad 791 (793) 29 Cr L Jour 717 *Public Prosecutor v Chidambaram*

The standard of proof required in criminal cases does not vary with the magnitude or enormity of the crime⁶ though it is usual and prudent to observe the rule the fouler the crime is the clearer and plainer ought the proof of it to be⁷ In cases based on circumstantial evidence such evidence should be so strong as to point very clearly to the guilt of the accused⁸ It is of utmost importance in such cases that in order to justify an inference of guilt the inculpatory facts should be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt⁹ Thus where the action of the accused is open to two constructions one criminal

- (33) 4 AIR 1933 All 834 (83a) 55 All 639 3a Cr L Jour 3a3 140 Ind Cas 9a7 (DB) *Ujagar v Emperor* (Where an accused takes the defence of alibi reasoning from probabilities cannot take the place of evidence)
- (17) 4 AIR 1917 All 81 (85) 18 Cr L Jour 317 38 Ind Cas 429 (DB) *Tapeswari Prasad v Emperor*
- 26 (43) 30 AIR 1943 Pat 163 (163) 91 Pat 865 44 Cr L Jour 507 206 Ind Cas 365 *Lakshono Sahu v Emperor*
- (33) 20 AIR 1933 All 834 (83a) 55 All 639 3a Cr L Jour 3a3 140 Ind Cas 9a7 (DB) *Ujagar v Emperor* (Nature of sentence cannot affect the question of the standard of proof)
- (33) 20 AIR 1933 Snd 166 (166) 34 Cr L Jour 808 *Salu Marigan v Emperor*
- (17) 5 AIR 1918 Cal 314 (316) 19 Cr L Jour 81 *Ashraf Ali v Emperor*
- 27 (20) 7 AIR 1970 Pat 616 (670) 29 Cr L Jour 154 *Raghunandan v Emperor*
- 28 (34) 3a Cr L Jour 286 (989) 147 Ind Cas 106 (DB) (Oudh) *Nankai v Emperor* (It must be reasonably inconsistent with any theory of the accused's innocence)
- (30) 17 AIR 1930 Mad 639 (635) 53 Mad 590 31 Cr L Jour 712 *Slankaralinga Thevan v Emperor*
- (26) 27 Cr L Jour 1934 (193a) 98 Ind Cas 102 (Cal) *Arajah v Emperor*
- [See also (92) 9 AIR 1992 Pat 537 (58a) 1 Pat 630 24 Cr L Jour 91 71 Ind Cas 219 (DB) *Nsrubhagat v King Emperor* (Where there is only circumstantial evidence to connect the accused with the crime it is most necessary that every link in the chain of evidence should be carefully tested especially in case of a charge of murder No link should be missing and every link should be fully proved)]
- 29 (46) 83 AIR 1946 All 191 (193) 1945 All WR (HC) 297 (288) (DB) *Ramkala v Emperor*
- (43) 80 AIR 1943 Lah 56 (59) 44 Cr L Jour 397 205 Ind Cas 552 (DB) *Hasan Din v Emperor*
- (40) 27 AIR 1940 Mad 1 (4) 41 Cr L Jour 369 186 Ind Cas 704 *In re Kanakasabai Pillai*
- (35) 36 Cr L Jour 304 (30a) 153 Ind Cas 203 (DB) (Lah) *Mustafa v Emperor*
- (34) 21 AIR 1934 Cal 407 (408) 35 Cr L Jour 712 148 Ind Cas 543 (DB) *Hem Chandra Halder v Emperor*
- (34) 21 AIR 1934 Cal 124 (126) 60 Cal 1339 35 Cr L Jour 567 147 Ind Cas 1203 (DB) *Manar Ali v Emperor* (The rule does not strictly apply where the decision in the case is not dependent on circumstantial evidence alone)
- (16) 3 AIR 1916 Cal 188 (199) 42 Cal 957 16 Cr L Jour 497 99 Ind Cas 513 (DB) *Amritlal Hasra v Emperor*
- (15) 2 AIR 1915 Cal 256 (261) 41 Cal 601 15 Cr L Jour 713 26 Ind Cas 161 (DB) *Emperor v Kangal Wali*
- (15) 2 AIR 1915 Mad 627 (633) 16 Cr L Jour 19a 27 Ind Cas 755 (DB) *Mahamed Akasim v Emperor*
- (39) 19 AIR 1939 Oudh 251 (253) 6 Luck 658 32 Cr L Jour 1184 *Gajji Prasad v Emperor*

the testimony of respectable eye witnesses nor should the Court base its judgment on its own theories unsupported by evidence,²¹ or on personal knowledge²² or on a hypothetical state of facts which were never put forward by the prosecution and were never suggested to the accused as being the case he had to meet²³ Mere suggestions by counsel in cross examination, however ingenious, are of no evidentiary value unless accepted by the witness or proved by other evidence²⁴ The evidence relating to alibi should be scrutinised very carefully²⁵

- (12) 18 Cri L Jour 555 (556) 15 Ind Cas 971 (Lah) *Mani Ram v Emperor* (Identification of stolen property)
- (37) 19 AIR 1932 Oudh 287 (287) 34 Cri L Jour 197 *Sheo Sahai v Emperor*.
- (26) 27 Cri L Jour 946 (947) 96 Ind Cas 498 (Lah) *Ranga Singh v Emperor* (Track evidence)]
- [See however (27) 14 AIR 1927 Oudh 196 (197) 2 Luck 444 28 Cri L Jour 460, *Mathura v Emperor* (Evidence of identification is not by itself unsafe basis for conviction)]
- (16) 3 A I R 1916 Lah 297 (297) 17 Cri L Jour 156 (157) *Nikka v Emperor* (Identification of particular accused by witnesses to whom they were strangers is not valueless)]
- 21 (42) 29 AIR 1942 All 47 (48) 1 L R (1941) All 912 43 Cri L Jour 380 198 Ind Cas 459 *Ghura v Emperor*
- (34) 21 AIR 1934 All 714 (715) 35 Cri L Jour 1289 151 Ind Cas 350 *Dhum Bahadur v Horial* (The trial Courts are expected to record findings with definiteness and precision and not to indulge in airy generalities)
- (83) 20 AIR 1933 Oudh 566 (567) 35 Cri L Jour 276 147 Ind Cas 77, *Hashmat v Emperor*
- (26) 27 Cri L Jour 1346 (1346) 98 Ind Cas 466 (All), *Pam Surat v Emperor*
- (24) 11 AIR 1924 Pat 818 (815) 25 Cri L Jour 724 *Joharnal v Emperor*
- (30) 17 AIR 1930 All 45 (48) 31 Cri L Jour 37, *Mt Bakhtawari v Emperor*
- (17) 4 AIR 1917 Lah 48 (48) 18 Cr L J 490 (491) 1917 Pun Re No 1 Cr *Emperor v Bula Singh*
- (24) 11 AIR 1924 Cal 811 (618) 26 Cri L Jour 71, *Superintendent & Remembrancer of Legal Affairs, Bengal v Purna Chandra*
- (80) 17 AIR 1930 Oudh 460 (463) 62 Cri L Jour 94 *Gendan Lal v Emperor*
- (19) 6 AIR 1919 All 167 (167) 20 Cri L Jour 370 *Alay Ahmad v Emperor*.
- (66) 1866 All W N 20 (20) *Empress v Maheshu*
- [See also (44) 31 AIR 1914 Sind 33 (37 88) 1 L R (1944) Kar 123 45 Cri L Jour 600 212 Ind Cas 487 (DB) *Emperor v Kaku Mashghul*. (A Judge should not rely for the first time upon a point which comes to his notice only at the time of judgment and which has not been made the subject of question or argument in the hearing of the case before him)]
- (23) 10 AIR 1923 Lah 128 (129) 23 Cri L Jour 608 83 Ind Cas 830 *Murad v Emperor* (An accused person must be convicted upon evidence which is on the record and not on what would have been deposed by the prosecution witnesses had they not been won over)
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- (34) 21 AIR 1934 All 776 (782) 35 Cri L Jour 919 149 Ind Cas 210 (DB) *Ramhit v Emperor* (Personal views of a Judge upon a political organization and activities should not be allowed to obtrude in a judicial pronouncement)
- (24) 11 AIR 1924 Rang 17 (17) 1 Rang 290 25 Cri L Jour 185 76 Ind Cas 425 *S C Gupta v Emperor* (The rule against the importation of personal knowledge into judgment does not apply to facts of which the Court may take judicial notice such as exhibits on the record)
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- (04) 1 Cri L Jour 599 (589) 6 Bom L R 490, *In re D Fonseca*
- (04) 1 Cri L Jour 99 (101) 1903 Pun Re No 27 Cr *Nurdin v Emperor*
- (31) 18 AIR 1931 Sind 127 (129) 25 Sind L R 213 32 Cri L Jour 923 *Shambhuran v Emperor*
- (25) 12 AIR 1925 Lah 168 (167) 25 Cri L Jour 808 *Wali, Muhammad v Emperor*
- [See also (33) 20 AIR 1933 Cal 36 (39) 31 Cri L Jour 36, *Jagadish v Emperor*]
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(17) 4 AIR 1917 All 81 (85) 18 Cri L Jour 317 38 Ind Cas 429 (DB) *Tapeswari Prasad v Emperor*]

26 (43) 30 AIR 1943 Pat 163 (162) 21 Pat 865 44 Cri L Jour 507 206 Ind Cas 365 *Lakhono Sahu v Emperor*

(33) 20 AIR 1933 All 834 (832) 55 All 639 35 Cri L Jour 353 146 Ind Cas 957 (DB) *Ujagar v Emperor* (Nature of sentence cannot affect the question of the standard of proof)

(33) 20 AIR 1933 Sind 169 (168) 34 Cri L Jour 808 *Satu Mangan v Emperor*

(18) 3 AIR 1918 Cal 314 (316) 19 Cri L Jour 81 *Ashraf Ali v Emperor*

27 (20) 7 AIR 1920 Pat 919 (620) 22 Cri L Jour 154 *Raghunandan v Emperor*

28 (34) 35 Cri L Jour 286 (288) 147 Ind Cas 106 (DB) (Oudh) *Nankau v Emperor* (It must be reasonably inconsistent with any theory of the accused's innocence)

(30) 17 AIR 1930 Mad 639 (935) 53 Mad 590 31 Cri L Jour 712 *Shankaralinga Thevan v Emperor*

(26) 27 Cri L Jour 1254 (1255) 98 Ind Cas 102 (Cal), *Arajah v Emperor*

[See also (22) 9 AIR 1922 Pat 532 (535) 1 Pat 930 24 Cri L Jour 91 71 Ind Cas 219 (DB) *Nirru Bhagat v King Emperor* (Where there is only circumstantial evidence to connect the accused with the crime, it is most necessary that every link in the chain of evidence should be carefully tested especially in case of a charge of murder No link should be missing and every link should be fully proved)]

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(43) 30 AIR 1943 Lah 56 (58) 44 Cri L Jour 397 205 Ind Cas 552 (DB) *Hasan Din v Emperor*

(40) 27 AIR 1940 Mad 1 (4) 41 Cri L Jour 369 186 Ind Cas 704, *In re Kanakasabai Pillai*

(35) 36 Cri L Jour 304 (305) 153 Ind Cas 203 (DB) (Lah) *Mustafa v Emperor*

(34) 21 AIR 1934 Cal 407 (408) 35 Cri L Jour 712 149 Ind Cas 543 (DB), *Hem Chandra Halder v Emperor*

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(15) 2 AIR 1915 Cal 256 (261) 41 Cal 601 15 Cri L Jour 713 26 Ind Cas 161 (DB), *Emperor v Kangal Mah*

(15) 2 AIR 1915 Mad 627 (633) 16 Cri L Jour 195 27 Ind Cas 755 (DB) *Mahomed Ahasim v Emperor* (Where the circumstantial evidence points to the accused alone and admits of no reasonable doubt the accused can rightly be convicted)

Emperor

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- 21 (42) 29 AIR 1942 All 47 (48) 1 L R (1941) All 91^a 43 Cr L Jour 380 198 Ind Cas 45^b *Ghura v Emperor*
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- (19) 6 AIR 1919 All 345 (347) 20 Cr L Jour 233 *Jai Narain v Emperor*
- (04) 1 Cr L Jour 589 (589) 6 Bom L R 490 *In re D Fonseca*
- (04) 1 Cr L Jour 99 (101) 1903 Pun Re No 27 Cr *Nurdin v Emperor*
- (31) 18 AIR 1931 S nd 127 (129) 25 Sind L R 213 39 Cr L Jour 923 *Shambhuram v Emperor*
- (25) 12 AIR 1925 Lah 186 (167) 25 Cr L Jour 809 *Walla Muhammad v Emperor*
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957 (DB) *Ujagar v*

27 (20) 7 AIR 1930 Pat 616 (620) 20 Cr L Jour 154 *Raghunandan v Emperor*

28 (34) 35 Cr L Jour 286 (288) 147 Ind Cas 106 (DB) (Oudh) *Nanka v Emperor* (It must be reasonably inconsistent with any theory of the accused's innocence)

(30) 17 AIR 1930 Mad 630 (635) 53 Mad 600 31 Cr L Jour 712 *Shanlaralinga Thevar v Emperor*

(28) 27 Cr L Jour 1004 (1005) 98 Ind Cas 102 (Cal) *Arajali v Emperor*

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(34) 21 AIR 1934 Cal 407 (408) 35 Cr L Jour 712 148 Ind Cas 543 (DB) *Hem Chandra Halder v Emperor*

(34) 21 AIR 1934 Cal 124 (126) 60 Cal 1339 35 Cr L Jour 567 147 Ind Cas 1203 (DB) *Manar Ali v Emperor* (The rule does not strictly apply where the decision in the case is not dependent on circumstantial evidence alone)

(16) 3 AIR 1916 Cal 188 (199) 40 Cal 907 16 Cr L Jour 497 29 Ind Cas 513 (DB) *Amritlal Hazra v Emperor*

(15) 2 AIR 1915 Cal 256 (261) 41 Cal 601 15 Cr L Jour 713 26 Ind Cas 161 (DB) *Emperor v Kangal Wali*

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(29) 16 AIR 1929 Lah 61 (63) 29 Cr L J

Mohammad Ali v Emperor

and the other honest, the Court should not assume that it was criminal - the presumption of innocence should prevail³⁰

As to what constitutes proof of guilt of an accused person in any case depends upon the bundle of facts which serve to convince the Court of the prosecution story and of the charges against the accused. Absolute certainty amounting to a demonstration of guilt can seldom be had and it must only be judged whether, in the circumstances of each particular case, the degree of probability is so high as to justify one in regarding it as certainty and in acting accordingly³¹. A number of facts each having some probative value, but inconclusive by itself may be quite sufficient in their cumulative effect to justify a conviction,³²

- (30) 17 AIR 1930 Lah 659 (662) - 31 Cri L Jour 871, *Feroz v Emperor*
 (14) 1 AIR 1914 Cal 65 (68) 41 Cal 621 14 Cri L Jour 660 (662), *Emperor v Suranamoyee Biswas*.
 (Circumstantial evidence must be exhaustive and exclude possibility of guilt by other person)
 (13) 14 Cri L Jour 316 (317) 1913 Pun Re No 27 Cr - 19 Ind Cas 1001, *Bishen Das v Emperor*
 (10) 11 Cri L Jour 82 (86) 4 Ind Cas 941 (Lab), *Oordit Singh v Emperor*
 (26) 27 Cri L Jour 1297 (1303) 98 Ind Cas 241 (Pat), *Danaman Udas Pal v. Emperor*,
 (17) 4 AIR 1917 Lah 366 (367) 18 Cri L Jour 375 (376) 1916 Pun Re No 32 Cr, *Thakar Das v. Emperor*

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- must leave some loophole for the contingency, however remote and infinitesimal, of possible error)
 (20) 7 AIR 1920 All 99 (100) - 21 Cri L Jour 777 - 58 Ind Cas 457 (DB), *Sheo Narayan Singh v Emperor*
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32. (26) 27 Cri L Jour 775 (775) 93 Ind Cas 311 (Lab), *Abdullah v Emperor*.

but a collection of separate circumstances each by itself insufficient, being quite consistent with the innocence of the accused, cannot have such evidentiary value³³ Where, however, the evidence for the prosecution case is in the main trustworthy, it cannot be held that it is unsupportable merely because the prosecution failed to prove a motive for the crime,³⁴ or because there are discrepancies in detail,³⁵ unless such discrepancies are material and

[See also (35) 22 AIR 1935 Pesh 75 (78) 36 Cri L Jour 939 156 Ind Cas 433 (DB) *Akhaista Khan v Emperor* (Although the mere fact that an accused person absconds cannot in itself be taken as proof of his guilt it is of great corroborative value when we gluing other and direct evidence)]

33 (27) 14 AIR 1927 Pat 257 (261) 28 Cri L Jour 497 *Devendra v Emperor*

34 *Emperor v Mahomed*
tending towards

(DB), *Bisshari v Emperor*

(30) 17 AIR 1930 Sind 225 (238, 243) 31 Cri L Jour 1026 126 Ind Cas 449 (DB) *Mohamad Yusuf v Emperor* (Absence of ascertainable motive comes to nothing if the crime is proved to have been committed by other evidence At the same time to elude out a weak case by way of motive apparently tending towards possible crime is a very unsatisfactory and dangerous process)

(22) 9 AIR 1922 Nag 172 (174) 23 Cri L Jour 391 67 Ind Cas 343, *Kisan Baghuji v Emperor*

(25) 12 AIR 1925 Lah 929 (330) 26 Cri L Jour 774 *Mohua v Emperor*

(34) 21 AIR 1934 Lah 413 (415) 15 Lah 314 36 Cri L Jour 97 *Chanan Singh v Emperor*

(28) 15 AIR 1929 Lah 637 (659) 29 Cri L Jour 378 *Chandu v Emperor*

(30) 17 AIR 1930 Lah 490 (490) 31 Cri L Jour 1069, *Sewa Singh v Emperor* (Failure of prosecution to establish motive is not sufficient reason to disbelieve eye witnesses)

(10) 11 Cri L Jour 498 (500) 7 Ind Cas 601 4 Sind L R 38, *Emperor v Balochkhan*

(It is not the bounden duty of the prosecutor to prove the motive for a crime It is sufficient if the prosecution prove by clear and reliable evidence that certain persons committed the offence)

(33) 20 AIR 1933 Oudh 340 (343) 34 Cri L Jour 538, *Emperor v Ram Dal* (Prosecution is not bound to furnish evidence of motive of accused)

[See also (34) 21 AIR 1934 Pesh 129 (131) 36 Cri L Jour 443 153 Ind Cas 35 (DB) *Government Advocate N W F P v Amir Hamza* (The existence of the motive does not necessarily lead to the conclusion that the person having the same must have committed the offence)]

35 (44) 31 AIR 1944 Lah 97 (101) 45 Cri L Jour 634 212 Ind Cas 440 (DB), *Emperor v Musaffar Hussain*

(23) 10 AIR 1923 Cal 463 (466) 24 Cri L Jour 193 71 Ind Cas 657 (DB), *Emperor v Satyendra Kumar Dutt*

(23) 10 AIR 1923 Oudh 217 (219) 24 Cri L Jour 770 74 Ind Cas 434 (DB), *King Emperor v Narain*

(28) 15 AIR 1928 Pat 100 (101) 6 Pat 627 29 Cri L Jour 239, *Ghanshyam Singh v Emperor*

(34) 21 AIR 1934 Lah 710 (714) 36 Cri L Jour 419, *Emperor v Muhammad Khan*

[See (33) 20 AIR 1933 Oudh 269 (271) 35 Cri L Jour 59 *Chhota Lal v Emperor* (Evidence cannot be totally rejected simply because of existence of some deliberate falsehood)]

(33) 20 AIR 1933 Sind 166 (168) 34 Cri L Jour 808 *Salu Mangani v Emperor* (Minor discrepancies will always be found where honest witnesses come to depose.)

(29) 16 AIR 1929 Nag 375 (327) 30 Cri L Jour 944 *Kisandas v Emperor*

[See also (30) 17 AIR 1930 Nag 109 (109, 110) 31 Cri L Jour 417, *Bageshwar v Emperor* (Want of interest in prosecution does not stamp evidence of witness with truth)]

(28) 15 AIR 1928 All 250 (252) 29 Cri L Jour 477, *Kashi Ram v Emperor* (Evidence against accused free from improbabilities or material contradictions—It is not proper to act on surmise disregarding clear evidence)

(09) 11 Cri L Jour 66 (67) 4 Ind Cas 864 1909 Pan Re No 15 Cr, *Emperor v Harnama*
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- (30) 17 AIR 1930 Lah 659 (662) 31 Cri L Jour 871, *Feros v Emperor*
 ('14) 1 AIR 1914 Cal 65 (68) 41 Cal 621 • 14 Cri L Jour 860 (662), *Emperor v Suranamoyee Biswas*.
 (Circumstantial evidence must be exhaustive and exclude possibility of guilt by other person)
 (13) 14 Cri L Jour 316 (317) 1913 Pun Re No 27 Cr 19 1st Cas 1004, *Bishen Das v Emperor*
 ('10) 11 Cri L Jour 82 (86) 4 1st Cas 941 (Lah), *Gurdas Singh v Emperor*
 (26) 27 Cri L Jour 1297 (1303) 98 1st Cas 211 (Pat), *Dinamani Udas Pal v Emperor*
 ('17) 4 AIR 1917 Lah 366 (367) 18 Cri L Jour 375 (376) 1916 Pun Re No 32 Cr, *Thakar Das v Emperor*
 ('26) 13 AIR 1926 Lah 691 (691) 27 Cri L Jour 1004 7 Lah 561, *Ghauns v Emperor*
 (26) 13 AIR 1926 Lah 68 (90) 7 Lah 84 27 Cri L Jour 709, *Rannun v Emperor*

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[See also (24) 25 Cri L Jour 97 (104) 76 Ind Cas 97 (Pesb), Abdul Wahab v Emperor (Purely circumstantial evidence however overwhelming and convincing it may be, has the character which must leave some loophole for the contingency, however remote and infinitesimal, of possible error)
(20) 7 AIR 1920 All 99 (100) 21 Cri L Jour 777 • 58 Ind Cas 457 (DB) Sreo Narayan Singh v Emperor (In the case of circumstantial evidence where the failure of one link destroys the chain, it is of the utmost importance to get on to the record every piece of evidence which makes the chain)]
30 (44) 81 AIR 1914 Sind 118 (118, 119) ILR (1943) Kar 371 45 Cri L Jour 704 218 Ind Cas 31? (DB), Sharif Jio v Emperor (But this does not mean that the Court should go out of its own way to invent thus and that possible explanation of incriminating evidence so as to acquit the accused)
(40) 27 AIR 1940 Mad 1 (3, 4) 41 Cri L Jour 369 186 Ind Cas 701, In re Kanakasabai Pillai
(27) 14 AIR 1927 Pat 292 (296) • 28 Cri L Jour 611, Kumar Prasad v Emperor
(13) 14 Cri L Jour 251 (252) 19 Ind Cas 507 (Bom) Emperor v Shivdas Omkar
(30) 17 AIR 1930 Sind 99 (101) 24 Sind L R 96 31 Cri L Jour 117, Nur Khan v Emperor
(31) 18 AIR 1931 Mad 689 (693) 54 Mad 931 33 Cri L Jour 51, Venkatasubba v Emperor
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 (See also (34) 21 AIR 1934 Pesh 53 (56) 35 Cri L Jour 860 148 Ind Cas 760 (DB), *Mir Sahib Khan v Emperor* (Dacoity case—Accused recently wounded and unable to give satisfactory explanation of injury—Accused conveyed to place of hiding — Fact has some corroborative value but is also capable of explanation other than that of his complicity in the particular dacoity)
 (1912) 13 Cri L Jour 449 (450) 15 Ind Cas 81 (DB) (Cal), *Mobarak Ali v Emperor* (The fact that a man is interested in establishing the contents of a forged document does not raise presumption that he filed it knowing it to be forged)
 (11) 12 Cri L Jour 69 (71) 9 Ind Cas 400 (DB) (Lah), *Lachman Singh v King Emperor*. (Before an accused person can be convicted of an offence, every conceivable hypothesis of innocence must be at least reasonably excluded))
 31 (16) 3 AIR 1916 Cal 524 (528) 16 Cri L Jour 576 30 Ind Cas 129 (SB), *Emperor v Nagendra Nath* (In order to show that the accused is guilty, his guilt must be so probable that a prudent man

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cused should be

but a collection of separate circumstances each by itself insufficient, being quite consistent with the innocence of the accused, cannot have such evidentiary value³³ Where, however, the evidence for the prosecution case is in the main trustworthy, it cannot be held that it is unsupportable merely because the prosecution failed to prove a motive for the crime,³⁴ or because there are discrepancies in detail,³⁵ unless such discrepancies are material and

[See also ('35) 22 AIR 1935 Pesh 75 (78) 36 Cri L Jour 958 156 Ind Cas 433 (DB), *Khaista Khan v Emperor* (Although the mere fact that an accused person absconds cannot in itself be taken as proof of his guilt, it is of great corroborative value when weighing other and direct evidence)]

33 ('27) 14 AIR 1927 Pat 257 (261) 29 Cri L Jour 497, *Detendra v Emperor*

34 ('34) 21 AIR 1934 Sind 6 (7) 35 Cri L Jour 736 : 149 Ind Cas 672 (DB), *Emperor v Mahomed Khabar* (On the other hand to eke out a weak case by proof of motive apparently tending towards possible crime is a very dangerous and unsatisfactory process)

('34) 21 A 1 R 1934 Oudh 405 (411) 35 Cri L Jour 1113, 150 Ind Cas 819 (DB), *Bhikhar v Emperor*

('30) 17 AIR 1930 Sind 225 (238, 243) 31 Cri L Jour 1026 : 126 Ind Cas 449 (DB), *Mohamad Yusuf v Emperor* (Absence of ascertainable motive comes to nothing if the crime is proved to have been committed by other evidence At the same time to eke out a weak case by way of motive apparently

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35 ('44) 31 AIR 1944 Lah 97 (101) : 45 Cri L Jour 631 : 212 Ind Cas 440 (DB), *Emperor v Muzaffar Hussain*

('23) 10 AIR 1923 Cal 463 (466) : 24 Cri L Jour 193 : 71 Ind Cas 657 (DB), *Emperor v. Satyendra Kumar Dutt*

('23) 10 AIR 1923 Oudh 217 (219) 24 Cri L Jour 770 : 74 Ind Cas 434 (DB), *King-Emperor v. Narottam* (Prosecution evidence not to be rejected because of immaterial discrepancies or improbabilities, unless some alternative explanation of the facts of the case is forthcoming)

('12) 13 Cri L Jour 300 (300) 14 Ind Cas 764 (DB)(Bom), *Emperor v. Somnath Karunashankar*, (It is not necessary for a conviction that the Court should find the complainant's case proved exactly as it was stated by him)

('28) 15 AIR 1928 Pat 100 (101) : 6 Pat 627 : 29 Cri L Jour 239, *Ghanshyam Singh v Emperor*.

('34) 21 AIR 1934 Lah 710 (714) : 36 Cri L Jour 419, *Emperor v. Muhammad Khan*

[See ('33) 20 AIR 1933 Oudh 269 (271) : 35 Cri L Jour 58, *Chhote Lal v Emperor* (Evidence cannot be totally rejected simply because of existence of some deliberate falsehood.)

('33) 20 AIR 1933 Sind 166 (168) : 34 Cri L Jour 808, *Safu Mangan v Emperor* (Minor discrepancies will always be found where honest witnesses come to depose)

(1909) 10 AIR 1909 N. 205 (207) 20 Cri L Jour 100 : 100 Ind Cas 100 (DB), *Emperor v. ...*

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eror. (Evidence against accused free from improbabilities or material contradictions—It is not proper to act on surmise dis-regarding clear evidence)

('09) 11 Cri L Jour 66 (67) : 4 Ind Cas 864 : 1909 Pun Re No. 15 Cr, *Emperor v. Harnam*, (attention to immaterial discrepancies is improper)]

and the other honest the Court should not assume that it was criminal the presumption of innocence should prevail³⁰

As to what constitutes proof of guilt of an accused person in any case depends upon the bundle of facts which serve to convince the Court of the prosecution story and of the charges against the accused. Absolute certainty amounting to a demonstration of guilt can seldom be had and it must only be judged whether, in the circumstances of each particular case the degree of probability is so high as to justify one in regarding it as certainty and in acting accordingly³¹. A number of facts each having some probative value but inconclusive by itself may be quite sufficient in their cumulative effect to justify a conviction³²

- (30) 17 AIR 1930 Lah 659 (662) 31 Cri L Jour 871, *Feroz v Emperor*
 (14) 1 AIR 1914 Cal 65 (68) 41 Cal 621 14 Cri L Jour 660 (662) *Emperor v Suranamojee Biswas*
 (Circumstantial evidence must be exhaustive and exclude possibility of guilt by other person)
 (13) 14 Cri L Jour 316 (317) 1913 Pun Re No 27 Cr 19 Ind Cas 1004 *Bishen Das v Emperor*
 (10) 11 Cri L Jour 82 (86) 4 Ind Cas 941 (Lah) *Gurdev Singh v Emperor*
 (26) 27 Cri L Jour 1297 (1303) 99 Ind Cas 241 (Pat) *Dynamani Udas Pal v Emperor*
 (17) 4 AIR 1917 Lah 366 (367) 18 Cri L Jour 375 (376) 1916 Pun Re No 32 Cr *Thakar Das v Emperor*
 (26) 13 AIR 1926 Lah 691 (691) 27 Cri L Jour 1004 7 Lah 561 *Ghauns v Emperor*
 (26) 13 AIR 1926 Lah 88 (90) 7 Lah 84 27 Cri L Jour 709, *Rannun v Emperor*
 (25) 12 AIR 1925 Lah 323 (325) 26 Cri L Jour 760 *Majhi v Emperor*
 (14) 1 AIR 1914 Cal 450 (450) 15 Cri L Jour 293 *Chiraguddin v Emperor*

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(Duty of prosecution is to exclude explanation of all facts consistent with innocence of accused))

- [See also (24) 25 Cri L Jour 97 (101) 78 Ind Cas 97 (Pesh) *Abdul Wahab v Emperor* (Purely circumstantial evidence however overwhelming and convincing it may be has the character which must leave some loophole for the contingency however remote and infinitesimal of possible error)
 (20) 7 AIR 1920 All 99 (100) 21 Cri L Jour 777 58 Ind Cas 457 (DB) *Sheo Narayan Singh v Emperor* (In the case of circumstantial evidence where the failure of one link destroys the chain it is of the utmost importance to get on to the record every piece of evidence which makes the chain)]
 30 (44) 31 AIR 1944 Sind 118 (118 119) ILR (1943) Kar 371 45 Cri L Jour 704 218 Ind Cas 317 way to

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- (27) 14 AIR 1927 Pat 292 (296) 28 Cri L Jour 611 *Kumar Prasad v Emperor*
 (13) 14 Cri L Jour 201 (252) 19 Ind Cas 507 (Bom) *Emperor v Shindas Omkar*
 (30) 17 AIR 1930 Sind 99 (101) 24 Sind L R 96 31 Cri L Jour 117 *Nur Khan v Emperor*
 (31) 18 AIR 1931 Mad 689 (693) 54 Mad 931 33 Cri L Jour 61 *Venkatatubba v Emperor*
 (04) 1 Cri L Jour 610 (611) 6 Bom L R 551 *Emperor v Ramchandra Dhondoo*
 (31) 18 AIR 1931 Oudh 385 (386) 32 Cri L Jour 801 *Harari v Emperor*
 (24) 11 AIR 1924 Mad 816 (817) 25 Cri L Jour 1221, *In re Narayana*
 [See also (34) 21 AIR 1934 Pesh 53 (56) 35 Cri L Jour 860 148 Ind Cas 760 (DB) *Mir Sahib Khan v Emperor* (Daocoty case—Accused recently wounded and unable to give satisfactory explanation but is

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dence on both sides of interested nature — Truth of either version and guilt of accused should be judged from surrounding circumstances)]

- 32 (26) 27 Cri L Jour 775 (775) 95 Ind Cas 311 (Lal) *Abdullah v Emperor*

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but a collection of separate circumstances each by itself insufficient, being quite consistent with the innocence of the accused, cannot have such evidentiary value³³ Where, however, the evidence for the prosecution case is in the main trustworthy, it cannot be held that it is unsupportable merely because the prosecution failed to prove a motive for the crime,³⁴ or because there are discrepancies in detail,³⁵ unless such discrepancies are material and

[See also (35) 22 AIR 1935 Pesh 75 (78) 36 Cr L Jour 959 156 Ind Cas 433 (DB) *Khaista Khan v Emperor* (Although the mere fact that an accused person absconds cannot in itself be taken as proof of his guilt: it is of great corroborative value when weighing other and direct evidence)]

33 (27) 14 AIR 1927 Lat 257 (261) 28 Cr L Jour 497 *Devendra v Emperor*

34 (34) 21 AIR 1934 Sind 6 (7) 35 Cr L Jour 736 148 Ind Cas 672 (DB) *Emperor v Mahomed Khabar* (On the other hand to eke out a weak case by proof of motive apparently tending towards possible crime is a very dangerous and unsatisfactory process)

(34) 21 A I R 1934 Oudh 405 (411) 35 Cr L Jour 1113 150 Ind Cas 819 (DB), *Bhishhari v Emperor*

(30) 17 AIR 1930 Sind 225 (238, 243) 31 Cr L Jour 1026 126 Ind Cas 440 (DB), *Mohamad Yusuf v Emperor* (Absence of ascertainable motive comes to nothing if the crime is proved to have been committed by other evidence. At the same time to eke out a weak case by way of motive apparently tending towards possible crime is a very unsatisfactory and dangerous process.)

(22) 9 AIR 1922 Nag 172 (174) 23 Cr L Jour 391 67 Ind Cas 343, *Kisan Razhuji v. Emperor*

(25) 12 AIR 1925 Lah 328 (330) 26 Cr L Jour 774 *Mohna v Emperor*

(34) 21 AIR 1934 Lah 413 (415) 15 Lah 814 36 Cr L Jour 97 *Chanan Singh v Emperor*

(29) 15 AIR 1928 Lah 657 (659) 29 Cr L Jour 378 *Chandu v Emperor*

(30) 17 AIR 1930 Lah 490 (490) 31 Cr L Jour 1069 *Sewa Singh v Emperor* (Failure of prosecution to establish motive is not sufficient reason to disbelieve eye witnesses)

(30) 17 AIR 1930 Lah 490 (490) 31 Cr L Jour 1069 *Sewa Singh v Emperor*

(30) 17 AIR 1930 Lah 490 (490) 31 Cr L Jour 1069 *Sewa Singh v Emperor*

(30) 17 AIR 1930 Lah 490 (490) 31 Cr L Jour 1069 *Sewa Singh v Emperor*

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(30) 17 AIR 1930 Lah 490 (490) 31 Cr L Jour 1069 *Sewa Singh v Emperor*

(30) 17 AIR 1930 Lah 490 (490) 31 Cr L Jour 1069 *Sewa Singh v Emperor*

(It is

not the bounden duty of the prosecutor to prove the motive for a crime. It is sufficient if the prosecution prove by clear and reliable evidence that certain persons committed the offence)

(33) 20 AIR 1933 Oudh 340 (343) 34 Cr L Jour 538, *Emperor v Ram Datt* (Prosecution is not bound to furnish evidence of motive of accused)

[See also (34) 21 AIR 1934 Pesh 129 (131) 36 Cr L Jour 443 153 Ind Cas 85 (DB) *Government Advocate, N W F P v Amir Hamaa* (The existence of the motive does not necessarily lead to the conclusion that the person having the same must have committed the offence)]

35 (44) 31 AIR 1944 Lah 97 (101) 45 Cr L Jour 634 212 Ind Cas 440 (DB), *Emperor v Musaffar Hussain*

(23) 10 AIR 1923 Cal 463 (466) 24 Cr L Jour 193 71 Ind Cas 657 (DB), *Emperor v. Satyendra Kumar Dutt*

(23) 10 AIR 1923 Oudh 217 (219) 24 Cr L Jour 770 74 Ind Cas 434 (DB), *King Emperor v Narattam* (Prosecution evidence not to be rejected because of immaterial discrepancies or improbabilities)

(23) 10 AIR 1923 Oudh 217 (219) 24 Cr L Jour 770 74 Ind Cas 434 (DB), *King Emperor v Narattam*

(23) 10 AIR 1923 Oudh 217 (219) 24 Cr L Jour 770 74 Ind Cas 434 (DB), *King Emperor v Narattam*

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will always be found where honest witnesses come to depose.)

(30) 17 AIR 1930 Lah 490 (490) 31 Cr L Jour 1069 *Emperor v. Ageshwar v Emperor* (Want of

accused free from improbabilities or material contradictions.—It is not proper to act on surmise dis-
regarding clear evidence)

(09) 11 Cr L Jour 66 (67) 4 Ind Cas 264 1909 Pun Re No. 15 Cr, *Emperor v Harmsingh* (attention to immaterial discrepancies is improper)]

important and go to the root of the matter.³⁶ As to how far oral testimony can be relied upon, see the undermentioned cases³⁷

Since it is the duty of the prosecution to establish the case against the accused to a certainty, the accused is entitled to the benefit of any doubt which may reasonably

36. ('35) 22 AIR 1935 All 162 (171) : 36 Cri L Jour 634 : 155 Ind Cas 369 (DB), *Bacha Dabu v. Emperor*. (When there is a very serious discrepancy between the statements of the approvers and the evidence of the witnesses, their evidence cannot be acted upon either by itself or as corroboration of the approver's testimony)

('29) 1929 Mad W N 592 (595), *Pedda Pullappa v. Emperor*. (When there are important discrepancies in evidence, it can neither be clear nor convincing)

('33) 20 AIR 1933 Oudh 226 (223, 229) : 8 Luck 397 : 34 Cri L Jour 935, *Har Dayal Singh v. Emperor*.

('16) 2 AIR 1915 Lah 438 (438). 16 Cri L Jour 699 (699) : 1915 Pun Be No 51 Cr, *Mohabb v. Emperor*.

[See ('13) 14 Cri L Jour 314 (315) : 19 Ind Cas 1002 (Cal), *Kalu Khalashi v. Emperor*.

('33) 34 Cri L Jour 227 (230) : 141 Ind Cas 785 (790) (Pat), *Sadhu Dome v. Emperor*.]

37. ('43) 30 AIR 1943 Mad 590 (591) : 44 On L Jour 783 : 208 Ind Cas 424, *In re Mooka Nadar*. (Where the defence witnesses were not cross-examined by the Public Prosecutor and their evidence stands un rebutted, there is no reason why their evidence should not be accepted)

('40) 27 AIR 1940 Lah 210 (213, 214) : 11LR (1940) Lah 521 : 41 Cri L Jour 639 : 188 Ind Cas 440, *Ohaman Lal v. Emperor* (Where an offence is committed by a jail official in jail premises against a convict the evidence of other convicts cannot be said to be unreliable)

('35) 22 AIR 1935 Cal 591 (594) : 36 Cri L Jour 1254 : 158 Ind Cas 67 (DB), *Emperor v. Mominudda Sardar* (Murder case—That eye-witnesses not disposed at first to disclose what they knew is no ground to discredit their evidence.)

('35) 22 AIR 1935 Oudh 1 (3) : 10 Luck 281 : 38 Cri L Jour 166 : 152 Ind Cas 473, *Turab v. Emperor*. (Witness saying that he has seen murder being committed but not giving information—His evidence is not free from suspicion.)

('34) 21 AIR 1934 Nag 204 (205) (DB), *Hemraj Lodhi v. Ramcharan Lodhi* (Where the eye-witness to the murder has tried to improve upon truth by introducing matter which is impossible his evidence should not be accepted)

('34) 21 AIR 1934 All 776 (780) : 35 Cri L Jour 919 : 149 Ind Cas 210 (DB), *Ramhit v. Emperor*. (In riot cases, the oral evidence must generally be approached with caution and carefully scrutinised)

('34) 21 AIR 1934 Oudh 13 (13) : 35 Cri L Jour 681 : 148 Ind Cas 259 (DB), *Emperor v. Kehri* (Evidence of witnesses rejected as regards most accused named as participators—Their evidence is unreliable as to others also, in absence of any cogent reasons for accepting same)

('33) 20 AIR 1933 All 834 (835) : 55 All 639 : 35 Cri L Jour 853 : 146 Ind Cas 957 (DB), *Ujagar v. Emperor*. (In communal riot cases, it is unsafe to convict on evidence of one witness, unless there is

Khatula v. Emperor.

Nanku Mahton v. Emperor.
alleging themselves—

Evidence is open to grave suspicion)

('23) 15 AIR 1928 Nag 295 (295) : 24 Nag L R 95 : 111 Ind Cas 135, *Premchand v. Hiralal* (Secondary evidence of hearsay character which does not corroborate any primary evidence cannot be relied on to support conviction)

('19) 6 AIR 1919 Oudh 310 (311) : 22 Oudh Cas 375 : 20 Cri L Jour 749 : 53 Ind Cas 156, *Rameshwar Tewari v. Emperor*. (The mere fact that some of the witnesses for the defence are fellow castemen of the accused is no ground for discrediting their evidence)

('19) 6 AIR 1919 Oudh 79 (80) : 21 Cri L Jour 60 : 51 Ind Cas 412, *Rohan v. King Emperor*. (The mere fact that some of accused's witnesses are his caste fellows is not by itself a sufficient reason for discrediting their testimony)

('15) 2 AIR 1915 All 464 (465) : 16 Cri L Jour 805 : 31 Ind Cas 821, *Maharban Singh v. Emperor*. (Respectable witnesses not to be disbelieved on ground of influence of accused)

(1909) 10 Cri L Jour 463 (468) : 4 Ind Cas 13 (DB) (Cal), *Girirardhar Lal v. Emperor* (The Court should consider whether the value of the evidence of witnesses who depose before it has been weakened by the fact they may have been tied down to giving it by reason of previous statements taken from them)

(An elementary principle

Gangadhar Tylak.

('33) 20 AIR 1933 Lah 667 (668) : 34 Cri L Jour 606 (607), *Abbas Ali v. Emperor*. (Evidence of children)

arise in the prosecution case³³ The maxim of law is that it is better that a guilty man

- 38 (43) 30 AIR 1913 Pat 82 (87) 21 Pat 667 41 Cri L Jour 337 205 Ind Cas 69 (DB) *Jain Lal v Emperor*
 (41) 23 AIR 1911 Mad 80 (82) 43 Cri L Jour 596 200 Ind Cas 93 (DB) *In re Kuruta Nagamma*
 (41) 23 AIR 1911 Mad 238 (243 244) 42 Cri L Jour 651 193 Ind Cas 53 (DB) *In re Ram Peddi*
 (40) 27 AIR 1910 Lah 217 (220 221) 41 Cri L Jour 667 169 Ind Cas 717 (DB) *Mohan Singh Bath v Emperor* (R ot—R otters arrested shortly after occurrence—No injuries on them—Evidence part san—Benefit of doubt should be given)
 (40) 27 AIR 1910 Pat 365 (371) 41 Cri L Jour 114 185 Ind Cas 162 (DB) *Ratibrickh Singh v Emperor*
 (33) 39 Cal W N 396 (401) (DB) *Mahendra Nath Chakravarty v Emperor* (Deposition of witness acknowledged by him to be correct—Decision on footing of existence of mistake in deposition—Held matter being left in doubt accused should get benefit of doubt)
 (34) 21 AIR 1934 Pesh 53 (57) 35 Cri L Jour 860 148 Ind Cas 760 (DB) *Mir Sahib Khan v Emperor* (When once doubts are entertained as to the truth of the prosecution case as a whole there is

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Emperor (But the mere fact that an accused is given the benefit of doubt does not entitle the co accused to an acquittal where the evidence against such co accused is far stronger and far more reliable

v v Sahab Din

for

- (27) 14 AIR 1927 Oudh 311 (612) 29 Cri L Jour 693 *Gur Charan v Emperor*
 (25) 12 AIR 1925 Oudh 676 (678) 26 Cri L Jour 1012 *Bishambar Nath v Emperor*
 (17) 4 AIR 1917 Cal 687 (687) 17 Cri L Jour 9 (9 10) *Deputy Legal Remembrancer v Matukdhar Singh*
 (33) 20 AIR 1933 Lah 899 (900) 35 Cri L Jour 143 *Godha Waryam v Emperor*
 (33) 20 AIR 1933 Lah 714 (716) 35 Cri L Jour 31 *Chenchal Singh v Emperor*
 (33) 20 AIR 1933 Lah 511 (512) 34 Cri L Jour 1213 *Jahana v Emperor*
 (32) 19 AIR 1932 Lah 193 (196) 33 Cri L Jour 501, *Dula Ram v Emperor* (Circumstantial evidence suspicious—Accused should be given benefit of doubt)
 (26) 28 Cri L Jour 114 (115) 99 Ind Cas 392 (Lah) *Musaffar v Emperor*
 (29) 30 Cri L Jour 727 (728) 117 Ind Cas 212 (Nag) *Ram Lal Lodhi v Emperor*
 (28) 29 Cri L Jour 208 (208) 106 Ind Cas 600 (Lah) *Kallu v Emperor*
 (97-01) 1 Upp Bur Rul 316 (317) *King Emperor v Nga Tok Hla*
 (26) 28 Cri L Jour 117 (118) 34 Cri L Jour 794 *Nga Ba Pa v Emperor*
 (33) 20 AIR 1933 Rang 93 (96) 31 Cri L Jour 747 *Nga Kan Hla v Emperor*
 (07) 5 Cri L Jour 67 (70) (Lah) *Sant Singh v Crown*
 (11) 12 Cri L Jour 361 (362) 12 Ind Cas 649 (Lah) *Muha nada v Emperor*
 (18) 14 Cri L Jour 320 (320) 19 Ind Cas 1003 (Lah) *Kesar Singh v Emperor*
 (77) 1877 Rat 127 (128) *Queen Empress v Shivgod*
 (34) 21 AIR 1934 Lah 693 (694) 36 Cri L Jour 778 *Sardar Ahmed v Emperor*
 (34) 21 AIR 1934 Lah 211 (211) 36 Cri L Jour 37 *Ghulam Ahmad v Emperor*

Jaraju (Accused

must be given benefit of assumption that he knows the law)

[See also (18) 5 AIR 1918 AH 100 (106) 19 Cri L Jour 935 47 Ind Cas 639 (DB) *Surendra Nath Mukerji v Emperor* (Accused is entitled to benefit of any point essential to questions which lie at the root of inquiry which have been put forward and subsequently abandoned by prosecution)]

(1907) 6 Cal W N 340 (381) (DB) *Maitraj Bibee v Crown* (Case of much suspicion but one in which there was a clear to be sufficient doubt to warrant the Court in saying that accused ought to have the benefit of the doubt)

(14) 1 AIR 1914 Snd 116 (117) 7 Snd L R 103 15 Cri L Jour 423 *Emperor v Tilam Lakh* (Prosecution in alternative based on two contradictory statements—1 presumption in favour of the reconciliation must be made)

(14) 1 AIR 1914 Snd 115 (116) 7 Snd L R 96 15 Cri L Jour 373 *Imambuz Khudabuz v Emperor* (Do)]

important and go to the root of the matter³⁶ As to how far oral testimony can be relied upon see the undermentioned cases³⁷

Since it is the duty of the prosecution to establish the case against the accused to a certainty the accused is entitled to the benefit of any doubt which may reasonably

- 36 (35) 22 AIR 1935 All 167 (171) 36 Cri L Jour 684 155 Ind Cas 369 (DB) *Bacha Babu v Emperor* (When there is a very serious discrepancy between the statements of the approvers and the evidence of the witnesses their evidence cannot be acted upon either by itself or as corroboration of the approver's testimony)
- (29) 1929 Mad W N 592 (595) *Pedda Pullappa v Emperor* (When there are important discrepancies in evidence it can neither be clear nor convincing)
- (33) 20 AIR 1933 Oudh 226 (228 229) 8 Luck 397 31 Cri L Jour 930, *Har Dayal Singh v Emperor*
- (15) 2 AIR 1915 Lah 438 (439) 16 Cri L Jour 699 (699) 1915 Pun Re No 51 Cr *Mohabbil v Emperor* [See (13) 14 Cri L Jour 314 (315) 19 Ind Cas 1002 (Cal) *Kalu Khalashi v Emperor*
- (33) 34 Cri L Jour 227 (230) 141 Ind Cas 786 (790) (Pat) *Sadhu Dome v Emperor*]
- 37 (43) 30 AIR 1943 Mad 530 (591) 44 Cri L Jour 783 208 Ind Cas 424 *In re Mooka Nadar* (Where the defence witnesses were not cross examined by the Public Prosecutor and their evidence stands un rebutted there is no reason why their evidence should not be accepted)
- (40) 27 AIR 1940 Lah 210 (213 214) ILR (1910) Lah 521 41 Cri L Jour 639 186 Ind Cas 440 *Charan Lal v Emperor* (Where an offence is committed by a jail official in jail premises against a convict the evidence of other convicts cannot be said to be unreliable)
- (35) 22 AIR 1935 Cal 591 (594) 36 Cri L Jour 1254 153 Ind Cas 67 (DB) *Emperor v Mominuddi Sardar* (Murder case—That eye-witnesses not disposed at first to disclose what they knew is no ground to discredit their evidence)
- (30) 22 AIR 1935 Oudh 1 (3) 10 Luck 261 36 Cri L Jour 166 152 Ind Cas 473 *Turab v Emperor* (Witness saying that he has seen murder being committed but not giving information—His evidence is not free from suspicion)
- (34) 21 AIR 1934 Nag 204 (205) (DB) *Hemraj Lodhi v Ranicharan Lodhi* (Where the eye-witness to the murder has tried to improve upon truth by introducing matter which is impossible his evidence should not be accepted)
- (34) 21 AIR 1934 All 776 (780) 35 Cri L Jour 919 149 Ind Cas 210 (DB) *Ramhit v Emperor* (In riot cases the oral evidence must generally be approached with caution and carefully scrutinised)
- (34) 21 AIR 1934 Oudh 13 (13) 35 Cri L Jour 681 149 Ind Cas 259 (DB) *Emperor v Keln* (Evidence of witnesses rejected as regards most accused named as participants—Their evidence is unreliable as to others also in absence of any cogent reasons for accepting same)
- (33) 20 AIR 1933 All 834 (835) 55 All 639 35 Cri L Jour 353 146 Ind Cas 907 (DB) *Ujagar v Emperor* (In communal riot cases it is unsafe to convict on evidence of one witness, unless there is satisfactory circumstantial evidence in addition)
- (33) 20 AIR 1933 Oudh 404 (406) 35 Cri L Jour 192 146 Ind Cas 900 (DB) *Khatia v Emperor* (Evidence discarded against some accused should not be relied on against others)
- (30) 17 AIR 1930 Pat 338 (340 341) 32 Cri L Jour 439 129 Ind Cas 866 (DB) *Nanhu Malton v Emperor* (Witnesses implicating accused only when faced with necessity of exculpating themselves—Evidence is open to grave suspicion)
- (28) 15 AIR 1928 Nag 295 (295) 24 Nag L R 95 111 Ind Cas 135 *Premchand v Haralal* (Secondary evidence of hearsay character which does not corroborate any primary evidence cannot be relied on to support conviction)
- (19) 6 AIR 1919 Oudh 310 (311) 22 Oudh Cas 375 20 Cri L Jour 749 53 Ind Cas 156 *Rameshwar Tewari v Emperor* (The mere fact that some of the witnesses for the defence are fellow castemen of the accused is no ground for discrediting their evidence)
- (19) 6 AIR 1919 Oudh 79 (80) 21 Cri L Jour 60 54 Ind Cas 412, *Pohan v King Emperor* (The mere fact that some of accused's witnesses are his caste fellows is not by itself a sufficient reason for discrediting their testimony)
- (15) 2 AIR 1915 All 464 (465) 16 Cri L Jour 805 31 Ind Cas 821 *Misharban Singh v Emperor* (Respectable witnesses not to be disbelieved on ground of influence of accused)
- (1909) 10 Cri L Jour 463 (463) 4 Ind Cas 13 (DB) (Cal) *Gurbardhari Lal v Emperor* (The Court should consider whether the value of the evidence of witnesses who depose before it has been weakened by the fact they may have been tied down to giving it by reason of previous statements taken from them)

(An elementary principle)

* Gangadhar Tilak

- (33) 20 AIR 1933 Lah 667 (668) 34 Cri L Jour 600 (607) *Abbas Ali v Emperor* (Evidence of children)

arise in the prosecution case³³ The maxim of law is that it is better that a guilty man

- 38 (43) 30 AIR 1913 Pat 82 (87) 21 Pat 667 44 Cri L Jour 337 20 Ind Cas 69 (DB) *Jain Lal v Emperor*
 (41) 28 AIR 1941 Mad 870 (912) 43 Cri L Jour 296 200 Ind Cas 9 (DB) *In re Kuruva Nagamias*
 (41) 28 AIR 1941 Mad 238 (243 244) 43 Cri L Jour 654 19 Ind Cas 53 (DB) *In re Ram Peddi*
 (40) 27 AIR 1910 Lah 217 (220 221) 41 Cri L Jour 667 183 Ind Cas 717 (DB) *Molan Singh Bath v Emperor* (Rioters arrested shortly after occurrence—No injuries on them—Evidence partisan—Benefit of doubt should be given)
 (40) 27 AIR 1940 Pat 362 (371) 41 Cri L Jour 114 18 Ind Cas 162 (DB) *Rambhich Singh v Emperor*
 (35) 39 Cal W N 396 (401) (DB) *Maheera Nath Chakravarty v Emperor* (Deposition of witness acknowledged by him to be correct—Dress on footing of existence of mistake in deposition—Held, matter being left in doubt accused should get benefit of doubt)
 (34) 21 AIR 1934 Pesh 53 (57) 32 Cr L Jour 860 148 Ind Cas 760 (DB) *Mir Sahib Khan v Emperor* (When once doubts are entertained as to the truth of the prosecution case as a whole there is

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Emperor (But the mere fact that an accused is given the benefit of doubt does not entitle the co accused to an acquittal where the evidence against such co accused is far stronger and far more reliable

v *Sahab Din*

ror

- (22) 12 AIR 1925 Oudh 676 (678) 26 Cri L Jour 101¹ *Bishambar Nath v Emperor*
 (17) 4 AIR 1917 Cal 687 (697) 17 Cri L Jour 9 (9 10) *Deputy Legal Remembrancer v Matuldhari Singh*
 (33) 20 AIR 1933 Lah 899 (900) 35 Cri L Jour 143 *Godha Waryam v Emperor*
 (33) 20 AIR 1933 Lah 714 (716) 35 Cri L Jour 81 *Chencha Singh v Emperor*
 (33) 20 AIR 1933 Lah 511 (512) 34 Cri L Jour 1213 *Jahana v Emperor*
 (32) 19 AIR 1932 Lah 192 (196) 33 Cri L Jour 501 *Dula Ram v Emperor* (Circumstantial evidence suspicious—Accused should be given benefit of doubt)
 (26) 28 Cri L Jour 114 (115) 99 Ind Cas 892 (Lah) *Musaffar v Emperor*
 (29) 30 Cri L Jour 727 (728) 117 Ind Cas 212 (Nag) *Ram Lal Lodhi v Emperor*
 (28) 29 Cri L Jour 203 (208) 106 Ind Cas 800 (Lah) *Kallu v Emperor*
 (97-01) 1 Upp Bar Rul 316 (317) *King Emperor v Nga Tok Hla*
 (33) 20 AIR 1933 Rang 117 (118) 34 Cri L Jour 794 *Nga Da Pa v Emperor*
 (33) 20 AIR 1933 Rang 92 (96) 31 Cri L Jour 747 *Nga Kan Hlu v Emperor*
 (07) 5 Cri L Jour 67 (70) (Lah) *Sant Singh v Crown*
 (11) 12 Cri L Jour 561 (562) 12 Ind Cas 649 (Lah) *Muha nada v Emperor*
 (13) 14 Cri L Jour 390 (390) 19 Ind Cas 1003 (Lah) *Kesar Singh v Emperor*
 (77) 1877 Rat 127 (128) *Queen Empress v Shivgod*
 (34) 21 AIR 1934 Lah 693 (694) 36 Cri L Jour 778 *Sardar Ahmed v Emperor*
 (34) 21 AIR 1934 Lah 211 (211) 36 Cri L Jour 3¹ *Ghulam Ahmad v Emperor*
 (34) 21 AIR 1934 Lah 10 (10) 35 Cri L Jour 615 *Lalu Rahim Mirasi v Emperor*
 (11) 12 Cri L Jour 497 (500) 12 Ind Cas 217 (Mad) *Teik Khaya Hussain v Emperor*
 (10) 3 AIR 1916 Ah 363 (366) 17 Cri L Jour 102 (105) *Mt Anandi v Emperor*
 [See (31) 18 AIR 1931 Mad 42 (42) 37 Cri L Jour 26¹ *Public Prosecutor v Nagaraju* (Accused must be given benefit of assumption on that he knows the law)
 [See also (18) 5 AIR 1918 Ah 160 (166) 19 Cri L Jour 935 47 Ind Cas 619 (DB) *Surendra Nath Mukerji v Emperor* (Accused is entitled to benefit of any point essential to questions which lie at the root of inquiry which have been put forward and subsequently abandoned by prosecution)
 (1907) 6 Cal W N 340 (381) (DB) *Mohjan Bibee v Crown* (Case of much suspicion but one in which there was held to be sufficient doubt to warrant the Court in saying that accused ought to have the benefit of the doubt)
 (14) 1 AIR 1914 Snd 116 (117) 7 Snd L R 108 15 Cri L Jour 483 *Emperor v Tilam Lakhs* (Prosecution in alternative based on two contradictory statements—Presumption in favour of their reconciliation must be made)
 (14) 1 AIR 1914 Snd 115 (116) 7 Snd L R 98 15 Cri L Jour 379 *Imambur Khan v Emperor* (Do))

should escape punishment than that an innocent person should be made to suffer³⁹ But the doubt, the benefit of which the accused is entitled to, should be such as any rational, thinking and sensible man may fairly and reasonably entertain. not the doubts of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism⁴⁰

The judgment in a criminal case should scrutinise and discuss the evidence, oral and documentary,⁴¹ and should contain findings that all the ingredients required to make up the offence are proved or are not proved as the case may be⁴² Where the Judge makes any local inspection, the nature of such inquiry should be set forth in the judgment if it has influenced his judgment⁴³

7. Reasons for decision.—The section requires that the judgment should give reasons for the decision on the various points arising for determination¹ The judgment should, therefore, contain a discussion of the evidence² It is not sufficient merely to say that 'the prosecution case has been proved beyond a shadow of doubt'³ But a judgment is not required to be a resume or reproduction of all the evidence on record. A Court is

39 (31) 18 AIR 1931 Cal 752 (757) 33 Cr L Jour 85, *Sal Shekh v Emperor*

40 (92) 1892 Oudh S C No 221 p 422 (422) (DB), *Queen Empress v Debi Singh* (The doubt which entitles an accused person to an acquittal should be a reasonable doubt and no other)
[See (24) 11 AIR 1924 All 511 (513) 20 Cr L Jour 324, *Lakhan v Emperor*]

41. (43) 30 AIR 1949 Pat 131 (133) 21 Pat 854. 44 Cr L Jour 356 205 Ind Cas 241 (DB) *Jamadar Singh v Emperor*

(34) 21 AIR 1934 All 776 (782) 35 Cr L Jour 919 149 Ind Cas 210 (DB), *Ramhit v Emperor* (A

ting the Bench must discuss the matter and arrive at their conclusion before an order of conviction or acquittal can be properly passed))

Emperor (Magistrate is first to discuss prosecution evidence and come to an independent finding on truth or falsity of prosecution story He should then examine statement of the accused and criticize it in the light of circumstances brought on record After having weighed prosecution evidence and statement of the accused he should formulate his conclusion as to the guilt of the accused))

(05) 9 Cal W N cclxxxvi (cclxxxvi), *Mahammed Hussain v Emperor*

43 (96) 1896 All W N 73 (74), *In the matter of the petition of Kala*

(25) 12 AIR 1925 Cal 353 (353) 25 Cr L Jour 705, *Bhola Nath Nandi v Kedar Nandi* (Record of local inspection should be allowed to be objected to if desired before judgment)

[See also (81) 7 Cal L Rep 193 (196) (DB), *In the matter of Devi Dutt* (If local inspection is necessary, it should be a part of the trial — The result should be embodied in evidence)]

(23) 10 AIR 1923 Cal 320 (321) 23 Cr L Jour 502, *Azis Mandal v Girish Chandra* (Local inspection used solely for understanding evidence — Judgment is not vitiated thereby))

Note 7

1 (38) 25 AIR 1938 Cal 551 (552) 38 Cr L Jour 835, *Nirmal Kumar v Emperor* (Merely stating that Judge agrees with opinion of assessors is no judgment)

(1865) 4 Suth W R Cr 18 (18) *Queen v Aruj Shaikh*

[See (95) 1895 Rat 833 (834) *Queen Empress v Dhurmiya* (There should be sufficient particulars in a judgment to enable appellate Court to know what facts were found and how)]

entitled to and should select such important evidence as it considers necessary to support a decision on the material points arising for consideration⁴ It is not proper to base a conviction merely on the appearance and manner of speech of the accused⁵ Where there are several accused persons the judgment should analyse the evidence against each of them separately⁶

The Court should arrive at an independent conclusion on the case before it⁷ A reference to the opinion of the Advocate General or the Public Prosecutor in the judgment is irrelevant⁸

8 Remarks in the judgment — A judgment should not contain any damaging remarks against the character of persons neither parties nor witnesses before the Court who therefore have had no opportunity of defending themselves against such remarks¹

should contain such of the evidence as is necessary to ascertain the facts deposed to and the importance of and the value to be attached to the evidence of the witnesses and the reasoning based on this evidence on which Judge founds his decision and his sentence)

- (33) 20 AIR 1933 All 690 (696) 34 Cri L Jour 967 55 All 1040 *Jhabwala v Emperor*
 (34) 11 AIR 1924 Pat 181 (189) 24 Cri L Jour 181, *Durga Singh v Emperor* (Magistrate drawing inferences from documents and from probabilities and giving strong reasons for his conclusion — Judgment is not defective though there is no reference to oral evidence)
 (35) (22) 93 Cri L Jour 161 (162) 85 Ind Cas 625 (Lab) *Ghulam Mahomed v Emperor* (An ugly stammering nervous man may be innocent while a good looking plausible man may be a scoundrel)
 (36) (40) 27 AIR 1910 Sind 113 (113 114) 41 Cri L Jour 724, *Abdul Karim v Emperor*
 (38) 20 AIR 1938 Pat 34 (35) 39 Cri L Jour 221 *Mewalal Singh v Emperor* (Evidence adduced on behalf of the accused in support of their case must also be carefully and fully considered)
 (37) 24 AIR 1937 Sind 26 (27 28) 30 Sind L R 382 38 Cri L Jour 363 *Ghousbus v Emperor*
 (24) 11 AIR 1924 Oudh 335 (336) 27 Oudh Cas 32 25 Cri L Jour 913 *Idu v Emperor*
 (24) 11 AIR 1924 Mad 350 (351) 25 Cri L Jour 790 *In re Sama Chari*
 (24) 11 AIR 1924 Rang 67 (67) 25 Cri L Jour 205, *Nga Mu v Emperor*
 (25) 12 AIR 1925 Sind 204 (205) 25 Cri L Jour 1377 19 Sind L R 96 *Khairo v Emperor*

v Emperor (Appellate judgment)

- [See (97) 7 Cri L Jour 400 (401) 12 Cal W N 604 *Mohesh Sonar v King Emperor* (Postponement of case to enable the accused to get a ruling from the High Court)]
 (8) (18) 5 A 1 R 1918 Bom 226 (227 228) 42 Bom 400 19 Cri L Jour 607, *In re Hubert Crawford* (Question of jurisdiction is for the Magistrate to decide and counsel's opinion is irrelevant)

Note 8

- (1) (43) 30 AIR 1943 Lah 298 (300) 45 Cri L Jour 149 203 Ind Cas 468 (D D), *Emperor v Mohamed Hassan*
 (42) 29 A 1 R 1942 Lah 232 (233 234) 43 Cri L Jour 808 202 Ind Cas 292, *Emperor v Brij Lal* (Sub-divisional Magistrates making remarks casting slur on the impartiality of Honorary Magistrates — Remarks to be expunged from judgment)
 (40) 27 AIR 1940 Mad 134 (134) 41 Cri L Jour 317 186 Ind Cas 472 *In re Lalshmana Rao*
 (39) 25 AIR 1939 Sind 103 (105) 39 Cri L Jour 524 *Kartarchand v Emperor* (Person neither accused nor witness — Magistrate is not justified in condemning him without giving him opportunity of being heard)
 (34) 21 A 1 R 1934 Sind 68 (69) 35 Cri L Jour 1138 *Emperor v Mahomed Umer* (Magistrate should reserve mistake or irregularity of police-officer for separate official correspondence — Judgment should not comment on conduct of police-officer who has had no opportunity to explain it.)
 (34) 36 Cri L Jour 383 (383) 35 Pun L R 373 (373 374) *Dhagat Singh v Emperor* (High Court may expunge remarks.)
 (21) 8 AIR 1921 Bom 394 (395) 45 Bom 1127 22 Cri L Jour 335 *In re Holbasappa*
 (29) 16 AIR 1929 Lah 201 (209) 29 Cri L Jour 1102 *Maharam v Emperor*
 (33) 20 A 1 R 1933 Sind 91 (92) 27 Sind 31 Cri L J 367, *Tejmal Narayandas v*

Even in the case of parties and witnesses the Court should not make any unfounded and unnecessary observations which are calculated to injure their reputation or wound their feelings, especially when the person attacked has had no opportunity of defending himself.² While, on the one hand, Courts are at liberty to discuss the conduct of the persons before them, either as parties or witnesses, untrammelled by any considerations, on the other hand, they are not permitted to travel beyond the record and are bound to exercise due restraint on the language employed by them.³ Similarly, unfounded remarks against the conduct of counsel should not find a place in the judgment.⁴

Though a humorous judgment is not necessarily a bad judgment,⁵ facetious comments which do not contribute to the disposal of the case and which are likely to wound the feelings of persons should be avoided.⁶

(25) 12 AIR 1925 Lah 392 (394) : 26 Cr L Jour 1326 . 6 Lah 166, *Banarsi Das v. Emperor*.

(97) 21 Mad 83 (91) . 2 Weir 503, *Queen Empress v. Raman* (Judge should not censure conduct of a police officer without giving opportunity to Public Prosecutor to call him)

his decision—Civil case)

2. (39) 26 AIR 1939 Lah 174 (175) ILR (1939) Lah 327 : 40 Cr L Jour 655, *In re Advocate General* (Courts should neither make any sweeping assertions against parties or witnesses before them as are not borne out by the evidence produced before them nor should they use language which is unduly harsh)

(37) 24 AIR 1937 Oudh 277 (278, 279) : 38 Cr L Jour 376, *Rishi Lal v. Emperor* (Accused acquitted—Prosecution story held unreasonable and improbable—Complainant held guilty of immoral conduct with accused's brother—Held, finding was unnecessary and irrelevant)

(30) 17 AIR 1930 Lah 1048 (1050) : 32 Cr L Jour 268, *Emperor v. Wasir Singh* (Remarks imputing perjury and incompetence to an official in the discharge of his official duties to be avoided except in very clear cases and after giving the official concerned an opportunity during the trial of explaining his conduct)

(25) 12 AIR 1925 Lah 187 (188) . 5 Lah 476 . 26 Cr L Jour 463, *Amarnath v. Emperor* (Court ought not to comment adversely on witness's conduct relying on matters which are not evidence)

(11) 12 Cr L Jour 398 (394) : 11 Ind Cas 577 (Lah), *Naba v. Emperor*

(04) 1 Cr L Jour 99 (101, 102) 1903 Pun Ra No 27 Cr, *Nur Din v. Emperor*. (Great danger to administration of justice would result if witnesses were restrained from giving their real views for fear of offending the presiding Judge)

(67) 8 Suth W R Cr 13 (15), *Queen v. Dhurum Dutt* (Remarks to the effect that the prisoner was a person of wealth and influence, and had prevented truth from appearing, ought not, unless established in evidence, to be made)

(11) 12 Cr L Jour 464 (465) 11 Ind Cas 1000 (Low Bur), *Ma Kya v. Kan Lal Gyi* (Immunity which Judges and Magistrates enjoy in writing judgments carries with it the duty of circumspection—Temptations to pullover or pour ridicule on strangers should be restrained and comments on the conduct of the parties and witnesses should not go beyond what is really necessary for the elucidation of the case)

(75) 23 Suth W R Cr 65 (66), *Queen v. Budri Roy*. (Testimony or conduct of police-officers concerned in the trial should be scrutinised and commented on in the same degree as those of other material witnesses and no further)

3. (43) 30 AIR 1943 Lah 298 (302) . 45 Cr L Jour 149 . 209 Ind Cas 468 (DB), *Emperor v. Mohd. Hassan*

(40) 27 AIR 1940 Lah 42 (43) : 41 Cr L Jour 380, *Karamat Ullah v. Emperor* (Judge is entitled to pass remarks in judgment on conduct of party or witness provided remarks are justified by findings)

(39) 26 AIR 1939 Lah 174 (175) . 1 LR (1939) Lah 327 . 40 Cr L Jour 655, *In re Advocate General* (While commenting on conduct of police-officers it is objectionable to Court to appeal to press to take up defects pointed out by it in working of police and to start public agitation against them)

4. (14) 1 AIR 1914 Oudh 171 (173) : 15 Cr L Jour 420, *Lachchu v. Emperor*

(77) 1 Cal L Rep 62 (61), *In re Jamsheer Sirdar*. (Comment on the defence counsel's mode of examining the witnesses at a previous trial is unwarranted)

5. (11) 12 Cr L Jour 461 (463) : 11 Ind Cas 1000 (Low Bur), *Ma Kya v. Kan Lal Gyi*

6. (11) 12 Cr L Jour 464 (464) . 11 Ind Cas 1000 (Low Bur), *Ma Kya v. Kan Lal Gyi*

(82) 5 C P L R Cr 24 (27), *Empress v. Baldeo* (Magistrates should refrain from joking in their judgments.)

A judgment should not contain any remarks calculated to throw doubt on the conclusion which it embodies.⁷ See also Note 13

In cases which have assumed a communal aspect, the language of the judgment should not be such as to promote communal enmity.⁸

See also Notes on S 363 and Note 7 on S 361A

9. Offence to be specified—It is necessary that the judgment should distinctly specify the offence or offences of which the accused is convicted.¹ This section also requires that where the offence is under the Penal Code or under any other law, the section of the Act under which the accused is convicted should be stated.²

Where a Judge convicts the accused on a charge of culpable homicide not amounting to murder, he should state in his judgment under which of the exceptions in S 300 of the Penal Code the case falls.³

10. "Punishment to which he is sentenced."—Where a Court finds an accused person guilty, it is bound to pass some sentence.¹ This section shows that the sentence is part of the judgment² and a Court has, therefore, no power to postpone the passing of the sentence to some future date once it convicts the accused.³

(31) 1931 Mad W N 1152 (1156), *Public Prosecutor v. Diraviya Thevan* (Atmosphere of a Court of law should be as scientific as that of a hospital or lecture-room and the language of a judgment should be entirely devoid of anything approaching facetiousness)

(19) 13 Cr L Jour 259 (265) : 14 Ind Cas 613 (Low Bur), *Emperor v. Thomas Pellako*

7. ('38) 25 AIR 1338 Sind 103 (105) : 39 Cr L Jour 521 *Kartarchand v. Emperor* (Order of Magistrate exculpating rather than inculcating accused—Remarks seriously to the prejudice of accused are not justified)

sion on evidence is unwarranted)

(30) 1930 Mad W N 1253 (1254), *Nanjunda Naicken v. Ratnasabapathi* (After scrutinising the evidence against the accused it is improper for a Magistrate to observe that the accused has "escaped from the clutches of the law")

8 ('36) 23 AIR 1936 Lah 429 (433) : 37 Cr L Jour 661, *Emperor v. Altaf Ullah*,

Note 9

1. ('75) 7 N W P H C B 137 (144), *Queen v. Jamurha*

(22) 9 AIR 1922 All 21 (22) : 23 Cr L Jour 219, *Munshi Lal v. Emperor*.

(1865) 4 Suth W R Cr 19 (19), *Queen v. Bhobunesshur*.

2. ('95) 1895 Rat 806 (806), *Queen-Empress v. Kallappa*

[See also (06) 9 Cr L Jour 271 (272) : 1 Sind L R 32, *Crown v. Hays Mir Mahmand* (Section containing several sub-sections—Sub-section under which accused is convicted must be stated)]

3 ('66) 1 Agra Cr 3 (6), *Government v. Kalika Misser*.

Note 10

(72 92) 1872 1892 Low Bur Bul 409 (409), *Queen-Empress v. M. Bauk*.

(1865) 3 Suth W R Cr L 15 (15)

[See also ('30) 17 AIR 1930 Pat 241 (242) : 9 Pat 113 : 31 Cr L Jour 793, *Narayan Maharani v. Emperor* (Where the offence is utterly trivial and the prosecution is inspired by motives other than the pursuit of justice and the Magistrate is convinced of the commission of offence from evidence on record, Magistrate should give effect to his opinion by convicting the accused and imposing a purely nominal penalty)]

Also see S 245, Note 6, S 253, Note 6 and S 303, Note 15.

[But see ('24) 15 AIR 1924 Nag 183 (189) : 24 Nag L R 110 : 23 Cr L Jour 503, *Sitaram Kunbi v. Emperor*. (There is no law that says that penalty must follow conviction)]

2. ('95) 1895 Rat 804 (803), *Queen Empress v. Sahadat Miran* (Cannot therefore be subsequently altered)

3. ('12) 13 Cr L Jour 268 (268) : 14 Ind Cas 672 (Bom), *Emperor v. Kesharilal*.

It is the duty of a Court, pronouncing a sentence, to define precisely the nature of the sentence intended to be passed, the sentence ought to be self contained, so that the functionary who has to execute it should have nothing to do but to obey the directions given therein without making an inquiry on his own account⁴. Thus, a direction in a sentence that the accused should be detained in a reformatory school for a period of five years unless he should sooner attain the age of eighteen years would not be a legal sentence, as it would leave to the officer in charge of the school to determine when the sentence would expire, otherwise than by reference to the warrant⁵.

It has been held that an order of disqualification for holding a driving licence passed under S 17 (1) of the Motor Vehicles Act is not such a punishment as is required to be specified under this section⁶.

11. "Shall be dated and signed by the presiding officer . . . at the time of pronouncing it" — The judgment must be dated and signed by the presiding officer,¹ at the time of pronouncing it in open Court.²

The word 'sign' has not been defined in this Code. It has been held to mean the "writing of the name of the person who is the signatory, so that it may convey a distinct idea to others that the writing indicates a particular individual whose signature it purports to be"³. Merely putting the initials of the presiding officer has been held not to amount to signing the judgment within the meaning of this section.⁴ The signature should be made with a pen and ink and not with a stamp⁵.

The omission to date and sign a judgment by the presiding officer is, however, only an irregularity covered by S 537 and will not render the judgment void⁶. Similarly, the affixing of a signature with a stamp instead of with pen and ink is merely an irregularity⁷.

Where a case was heard by only three Magistrates of a Bench, but the judgment was signed by seven, it was held that this was an illegality⁸. As to judgments by a Bench of Magistrates, see S 350A and Notes thereon.

See also S 265, Note 3 and S 537, Note 12.

As to whether a judgment written by a Magistrate can be delivered by his successor, see S 350, Note 6.

12. Judgment in the alternative — Sub-section (3). — Sub section (3) of this section allows a judgment to be given in the alternative, when there is a doubt as to

4 (1911) 24 Mad 13 (15, 16) 1 Weir 892, *Queen-Empress v. Rama*
(93) 15 All 208 (209) 1893 All W N 107, *Queen-Empress v. Narain*

Also see S 32, Note 3

5 (93) 15 All 208 (209) 1893 All W N 107 *Queen Empress v. Narain*

6 (45) 32 AIR 1945 Mad 27 (28) ILR (1945) Mad 315 46 Cr L Jour 300 217 Ind Cas 233,
In re K. V. Subramania Ayyar

Note 11

1 (89) 1889 All W N 181 (184) *Empress v. Jia Lal*

2 (17) 4 AIR 1917 Mad 310 (341) 17 Cr L Jour 166 (166) 40 Mad 108, *In re Savarimuthu Pillai*

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4 (30) 17 AIR 1930 Mad 867 (868) 54 Mad 252 32 Cr L Jour 430, *Brahmiah v. Emperor* (And is an illegality)

emperor

8 (31) 18 AIR 1931 Mad 494 (495) 32 Cr L Jour 971, *Picha Kudamban v. Sertanar Theian*.

which of two sections or which of two parts of the same section applies¹ Such a judgment in the alternative can be passed only in cases in which not the facts but the application of the law to the facts is doubtful² See also Note 1 on S 236

Where a judgment does not state in *express* terms that the Court is in doubt under which of two sections or which of two parts of the same section the offence falls as required by this section it is only an irregularity which will not vitiate the judgment³

13 Judgment in cases of acquittal — Where the accused is acquitted, the judgment should state what the offences are of which he is acquitted and should direct that he be set at liberty¹ An order sheet cannot be a substitute for the judgment and a mention of acquittal in it is not sufficient compliance with the provisions of sub section (4)² When a verdict of not guilty is recorded the Court should not in its judgment make any suggestion against the accused, except that of establishing his innocence³ See also Note 8

As soon as a judgment of acquittal is pronounced the accused is entitled to be discharged from custody and his further detention is illegal and no formal warrant of release addressed by the Court to the superintendent of the jail is necessary⁴

14 Judgment in capital cases—Sub section (5) —This sub section requires that if an accused person is convicted of an offence punishable with death and the Court sentences him to any punishment other than death it shall, in its judgment state the reasons why the sentence of death was not passed¹ It therefore, contemplates sentences of death in capital cases as the ordinary rule and sentences of transportation for life as the exception Before passing the lesser sentence the Judge should find that there are really

Note 12

1 (45) 32 AIR 1945 Cal 421 (423) 221 Ind Cas 499 (DB) *Moklari v Emperor*
 (40) 27 AIR 1940 Pat 289 (290) 19 Pat 369 41 Cri L Jour 910 190 Ind Cas 457, *Nebti Mandal v Emperor* (Charge under Ss 302 and 201, Penal Code — Doubt as to the offence committed by accused

v Emperor

2 (14) 1 AIR 1914 Lah 549 (550) 14 Cri L Jour 664 (665) 1913 Pan Be No 11 Cr *Partapa v Emperor*

(75) 7 N W P H C R 137 (143) *Queen v Jamurha*

(87) 1887 Pan Be No 11 Cr p 19 (21 22) *Khan Muhammed v Empress*

3 (99) 2 Weir 440 (440) *Tahirugadu v Sivayya*

Also see S 537 Note 12

Note 13

1 (92) 1892 All W N 157 (157) *Queen Empress v Abdul Majid Khan*

2 (41) 28 AIR 1941 Oudh 575 (576) 42 Cri L Jour 633 194 Ind Cas 872 *Diwan v Raja Ram*
 (The mere mention of the fact of acquittal or conviction in the order-sheet without there being any order of acquittal or conviction in the judgment itself amounts to a most flagrant disregard of the provisions of law contained in Ss 258 and 367)

3 (22) 9 AIR 1922 Pat 97 (99) 23 Cri L Jour 371, *Bir Narayansingh v Emperor*

4 (69) 5 Mad H O R App u (u n)

[See also (38) 25 AIR 1938 All 534 (535) 39 Cri L Jour 971 *Id Yakub v Emperor*]

Also see S 220 Note 1 and S 306 Note 5

Note 14

1 (40) 27 AIR 1940 Pesh 49 (51) 42 Cri L Jour 234 192 Ind Cas 179 (DB) *Mianji Khan v Emperor* (Remark that all circumstances were considered dispassionately is not sufficient reason.)

v Nga Shu

(33) 20 AIR 1933 Rang 61 (61) 34 Cri L Jour 699, *Nga Sen Tun v Emperor*

(64) 1861 Sath W R Cr Gap 27 (27) *Queen v*

extenuating circumstances not merely an absence of aggravating circumstances, it is not for the Judge to ask himself whether there are reasons for imposing the penalty of death but whether there are reasons for abstaining from doing so² But if the Judge is in doubt whether a sentence of death or a sentence other than death should be passed, the doubt, like all other doubts should result in favour of the accused³

This section, however does not indicate what reasons should be considered sufficient for not passing a sentence of death in a capital case⁴ Such reasons must be in accordance with established legal principles⁵

15 Trial by jury — Heads of charge to the jury — Proviso — Where the case is tried by jury the Judge is not bound to write a judgment, it is enough if he records the heads of the charge to the jury As the law allows an appeal in cases of trial by jury on the ground of misdirection in the charge to the jury, the Judge should record the heads of the charge in such a form as to enable the Court of appeal to judge whether the facts and circumstances of the case were properly placed before the jury and the law correctly explained to them¹ It is not sufficient for the Judge merely to state in his record

2 (1900-02) 1 Low Bur Rul 216 (219) (FB) *Crown v Tha Sin*

(35) 22 AIR 1935 Oudh 265 (268) 38 Cri L Jour 529 *Naresh Singh v Emperor*

(33) 20 AIR 1933 Nag 307 (309) 34 Cri L Jour 1168 30 Nag L R 8 *Local Government v Sitrya Arguna* (The fact that the assessors gave their opinion that the accused was not guilty is no reason for passing the lesser sentence)

(08) 3 Cri L Jour 25 (26) 3 Low Bur Rul 111, *Shue Cho v Emperor* (This sub-section applies also to the High Court on its original criminal jurisdiction)

(22) 8 AIR 1922 Low Bur 32 (33 34) 11 Low Bur Rul 323 23 Cri L Jour 437, *Emperor v Nga Shue Hia U*

(03 04) 2 Low Bur Rul 63 (64) *Ha'nd v King Emperor*

(24) 11 AIR 1924 Rang 179 (180) 25 Cri L Jour 1121 1 Rang 751 *Ma She Y v Emperor*

[See (30) 17 AIR 1930 Cal 193 (195) 31 Cri L Jour 817, *Emperor v Dukars Chandra* (Per Cuming J)]

[See also (43) 30 AIR 1943 Mad 69 (71) 1 L R (1843) Mad 148 44 Cri L Jour 299 204 Ind Cas 545 (DB) *In re Ramudu* (Conviction for murder — Sentence of death—No mitigating circumstances — That accused were between 16 and 18 years is no ground for reducing sentence to transportation for life)]

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5 (26) 13 AIR 1928 Lah 428 (429) 7 Lah 141 27 Cri L Jour 764 *Waryam Singh v Emperor* (Voluntary drunkenness is no reason for not inflicting death sentence.)

[See (35) 22 AIR 1935 Lah 337 (339) 36 Cri L Jour 1001 16 Lah 1131 *Mewa v Emperor* (Common intent on to murder brutally carried out — All accused taking part in beating — Merely because by whom the fatal blow is caused is not known is no reason for awarding lesser penalty)]

(38) 20 AIR 1933 Nag 307 (309) 34 Cri L Jour 1168 30 Nag L R 9 *Local Government v Sitrya Arguna* (Fact that assessors gave their opinion that accused was not guilty is no reason for passing lesser sentence)

(29) 16 AIR 1929 All 160 (161) 30 Cri L Jour 559 *Parshadi v Emperor* (It should not be a practice to assume that where the particular person cannot be found to be guilty of the fatal blow the capital sentence should not be inflicted)]

Note 15

is of charge

(26) 13 AIR 1925 Cal 895 (897) 27 Cri L Jour 926 *Emperor v G C Wilson*

(07) 5 Cri L Jour 427 (431) 34 Cal 698 11 Cal W N 666 *Jatindra Nath v Emperor*

(22) 9 AIR 1922 Cal 192 (197) 21 Cri L Jour 8 *Abdul Gafur Khan v King Emperor*

(19) 6 AIR 1919 Cal 439 (449) 20 Cri L Jour 661, *Afsrud v King Emperor*

(97) 25 Cal 561 (503) *Divu Vandal v Queen Empress*

that the law on the subject was explained and that the abstract of the evidence recorded in Court was given to the jury.²

Although there is nothing in this section as to when the heads of the charge should be written it is desirable that the Judge should write them out as soon as possible after the delivery of the charge to the jury and while the facts are still fresh in his mind.³

In cases of trials by jury the written heads of charge are the only record of the Judge's address to the jury and the Court of appeal must perforce base its decision in an appeal upon that record.⁴

See also the undermentioned cases.⁵

16 Judgment not in conformity with section — Procedure in appeal.

— Where an appellate Court finds that the trial Court has not written a judgment in conformity with the provisions of this section, the proper procedure is to reverse the

(75) 23 Suth W R (Rules) 7 (7-8) (The record of the charge to the jury should represent with absolute certainty the substance of the charge to enable the appellate Court to see that the case was fairly and properly placed before the jury)

(75) 23 Suth W R Cr 32 (33) *Queen v Kasim Sheikh*

(09) 9 Cri L Jour 452 (453) 38 Cal 231 1 Ind Cas 970 *Fansindra Nath Danerjee v Emperor*

(17) 4 AIR 1917 All 173 (175) 18 Cri L Jour 491 (493) 39 All 318 *Ibrahimuddin v Emperor*

(08) 8 Cri L Jour 35 (37) 10 Bom L R 565, *In re Shambhal*

v Emperor.

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jury important testimonies in trial in extenso)

[See also (25) 12 AIR 1925 Cal 926 (927) 26 Cri L Jour 1279, *Abdul Rahim v Emperor*

(21) 8 AIR 1921 Cal 269 (270) 23 Cri L Jour 41 *Gangadhar Goala v Reed*

(24) 11 AIR 1924 Cal 771 (772) 31 Cal 79 • 25 Cri L Jour 945 *Kisanuddin v King Emperor* (Judge

(25) 12 AIR 1925 Pat 797 (801, 802) 4 Pat 626 27 Cri L Jour 49 *Rupan Singh v Emperor*

(30) 17 AIR 1930 Pat 243 (244-245) 9 Pat 149 31 Cri L Jour 788, *Dhanpat Tiwari v Emperor*. (Per Dhanle J)

[See also (37) 24 AIR 1937 Cal 266 (268) 38 Cri L Jour 767, *Madan Tiwari v Emperor* (Merely stating that no fewer than twenty-nine sections of the Penal Code were read and explained to jury is not enough)]

[See however (32) 19 AIR 1932 Cal 786 (786) 31 Cri L Jour 56, *Hanif v Emperor* (No mention as to how sections were explained to jury — No difficulty about sections — Charge is not bad.)]

3 (09) 9 Cri L Jour 452 (453) 38 Cal 231 1 Ind Cas 970 *Fansindra Nath v Emperor*

[See (75) 23 Suth W R (Rules) 7 (7) (It is not necessary that a charge to jury should be reduced to

S 367 (5) of the Cr P C it is not necessary for the Sessions Judge to record the heads of re-charge in respect of the fresh charge under a particular section when the fresh charge is the same as the original charge already recorded, and the omission to do so is not fatal to a conviction.)

(30) 17 AIR 1930 Rang 351 (352) 8 Rang 372 32 Cri L Jour 23, *U Ba Thein v Emperor* (Practice of Rangoon High Court in taking only shorthand notes in murder cases deprecated — Record of charge must be made in all appealable cases)

extenuating circumstances not merely an absence of aggravating circumstances it is not for the Judge to ask himself whether there are reasons for imposing the penalty of death but whether there are reasons for abstaining from doing so² But if the Judge is in doubt whether a sentence of death or a sentence other than death should be passed, the doubt, like all other doubts should result in favour of the accused³

This section however, does not indicate what reasons should be considered sufficient for not passing a sentence of death in a capital case⁴ Such reasons must be in accordance with established legal principles⁵

15 Trial by jury — Heads of charge to the jury — Proviso. — Where the case is tried by jury the Judge is not bound to write a judgment, it is enough if he records the heads of the charge to the jury As the law allows an appeal in cases of trial by jury on the ground of misdirection in the charge to the jury, the Judge should record the heads of the charge in such a form as to enable the Court of appeal to judge whether the facts and circumstances of the case were properly placed before the jury and the law correctly explained to them¹ It is not sufficient for the Judge merely to state in his record

2 (1900-02) 1 Low Bur Rul 216 (219) (FB) *Crown v Tha Sin*

(35) 22 AIR 1935 Oudh 265 (268) 36 Cri L Jour 529 *Naresh Singh v Emperor*

(33) 20 AIR 1933 Nag 307 (309) 34 Cri L Jour 1163 30 Nag L R 9 *Local Government v Sitya Arjuna* (The fact that the assessors gave their opinion that the accused was not guilty is no reason for passing the lesser sentence)

(06) 3 Cri L Jour 25 (26) 3 Low Bur Rul 111, *Shue Cho v Emperor* (This sub-section applies also to the High Court on its original criminal jurisdiction)

(22) 9 AIR 1923 Low Bur 32 (33 §4) 11 Low Bur Rul 323 23 Cri L Jour 437, *Emperor v Nga Shue Hia U*

(03 04) 2 Low Bur Rul 63 (64) *Hanud v King Emperor*

(24) 11 AIR 1924 Rang 179 (180) 25 Cri L Jour 1121 1 Rang 751, *Mr She Y v Emperor*

[See (30) 17 AIR 1930 Cal 193 (195) 31 Cri L Jour 317 *Emperor v Duhars Chandra* (Per Cuming J)]

[See also (43) 30 AIR 1943 Mad 69 (71) 1 L R (1943) Mad 148 44 Cri L Jour 299 204 Ind Cal 545 (DB) *In re Ramudu* (Conviction for murder — Sentence of death — No mitigating circumstances — That accused were between 18 and 18 years is no ground for reducing sentence to transportation for life)]

3 (72 92) 1872 1892 Low Bur Rul 459 (461) *Nga Po Aung v Queen Empress*

[But see (1900 02) 1 Low Bur Rul 216 (220) (FB) *Crown v Tha Sin* (Detum of Irwin J that such doubt should be left to the High Court disapproved in 3 Cri L Jour 25 3 Low Bur Rul 111)]

4 (06) 4 Cri L Jour 130 (133) 3 Low Bur Rul 163, *Emperor v Nga Tun*

5 (26) 13 AIR 1926 Lah 423 (429) 7 Lah 141 27 Cri L Jour 764 *Waryam Singh v Emperor* (Voluntary drunkenness is no reason for not inflicting death sentence)

[See (35) 22 AIR 1935 Lah 337 (338) 36 Cri L Jour 1001 16 Lah 1131 *Yewa v Emperor* (Common intent on to murder brutally carried out — All accused taking part in beating — Merely because by

lesser sentence)

(29) 16 AIR 1929 All 160 (161) 30 Cri L Jour 559 *Parshad v Emperor* (It should not be a practice to assume that where the particular person cannot be found to be guilty of the fatal blow the capital sentence should not be inflicted)]

Note 15

1 (37) 24 AIR 1937 Cal 266 (268) 38 Cri L Jour 767 *Madan Tulal Das v Emperor* (Heads of charge to jury should clearly and distinctly show what the exposition of the law actually was)

ror

(19) 6 AIR 1919 Cal 439 (442) 20 Cri L Jour 661 *Afsrudd v King Emperor*

(97) 25 Cal 561 (563) *Diru Mandal v Queen Empress*

that the law on the subject was explained and that the abstract of the evidence recorded in Court was given to the jury²

Although there is nothing in this section as to when the heads of the charge should be written, it is desirable that the Judge should write them out as soon as possible after the delivery of the charge to the jury and while the facts are still fresh in his mind³

In cases of trials by jury the written heads of charge are the only record of the Judge's address to the jury and the Court of appeal must perforce base its decision in an appeal upon that record⁴

See also the undermentioned cases⁵

16. Judgment not in conformity with section — Procedure in appeal. — Where an appellate Court finds that the trial Court has not written a judgment in conformity with the provisions of this section, the proper procedure is to reverse the

{ 75 } 23 Suth W R (Rules) 7 (7, 8) (The record of the charge to the jury should represent with absolute certainty the substance of the charge to enable the appellate Court to see that the case was fairly and properly placed before the jury)

{ 75 } 23 Suth W R Cr 32 (33) *Queen v Kasim Sheikh*

{ 09 } 9 Cri L Jour 450 (453) 38 Cal 231 1 Ind Cas 970 *Fanindra Nath Banerjee v Emperor*

{ 17 } 4 AIR 1917 All 173 (175) 19 Cri L Jour 491 (493) 39 All 348 *Ikrasuddin v Emperor*

{ 08 } 8 Cri L Jour 35 (37) 10 Bom L R 565, *In re Shambulal*

{ 95 } 2 Weir 499 (499) *In re Dara Narayana Reddi*

{ 93 } 2 Weir 383 (383) *In re Lazumana*

{ 88 } 2 Weir 493 (493) *In re Anchula*

{ 16 } 8 AIR 1918 Pat 236 (237 238) 17 Cr L J 353 (355) 1 Pat L Jour 317 *Eknath Sahay v Emperor*,

{ 63 } 9 Suth W N Cr 52 (53) *Queen v Denonath*

{ 90 } 1896 Rat 850 (850) *Queen Empress v Fakira Venkappa* (In long trial Judge ought to read to jury important testimonies in trial *in extenso*)

{ See also (25) 1^o AIR 1925 Cal 926 (927) 26 Cri L Jour 1278, *Abdul Rahim v Emperor*

{ 21 } 8 AIR 1921 Cal 269 (270) 23 Cri L Jour 41 *Gangadhar Goala v Reed*

{ 24 } 11 AIR 1924 Cal 771 (772) 51 Cal 79 25 Cri L Jour 945 *Khanuddin v King Emperor* (Judge is not bound to write down everything he says to the jury)

{ 97 } 1897 Rat 917 (917) *Queen Empress v Basuantiappa* (It cannot be presumed that the Judge said only that which is recorded))

{ 30 } 17 AIR 1930 Pat 243 (244, 245) 9 Pat 143 31 Cri L Jour 796, *Dhanpat Tiwari v Emperor*. (Per Dhawle, J)

{ See also (37) 24 AIR 1937 Cal 266 (268) 38 Cri L Jour 767, *Madan Laladas v Emperor* (Merely stating that no fewer than twenty-nine sections of the Penal Code were read and explained to jury is not enough)}

{ See however (32) 19 AIR 1932 Cal 786 (786) 31 Cri L Jour 56 *Hanif v Emperor* (No mention as to how sections were explained to jury — No difficulty about sections — Charge is not bad)}

{ 30 } 17 AIR 1930 Pat 243 (244, 245) 9 Pat 143 31 Cri L Jour 796, *Dhanpat Tiwari v Emperor*

jury should be reduced to

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respect of the fresh charge under a particular section when the fresh charge is the same as the original

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judgment of the lower Court and to order a *de novo* hearing and not to retain the case on its own file and ask the lower Court to record a proper judgment¹ See also Notes on S. 424.

17. Sub-section (6). — Even before the addition of sub s (6) to this section in 1923, it was held by the High Court of Madras that the words "offence (if any)" in sub s (2) of this section and the wording of sub s (2) of S 117 suggested that the provisions of this section would apply to orders under S 118 and sub s (3) of S 123¹ The High Court of Calcutta held in the undermentioned case² that, whether this section applies or not the order should show that the case of each counter petitioner had been considered on its own merits The enactment of sub s (6) to the section in 1923 gives legislative recognition to the view of the Madras High Court mentioned above This sub section makes an order under S 118 or S 123, sub s (3), a judgment for the purposes of this section, and, therefore, by analogy an order passed under either of the two sections must be self contained It must show that the Court has considered the evidence against each of the suspected persons and has found that the evidence proves the case against each of them individually³

18. Effect of non-compliance with the section — See Note 12 on Section 537

Sentence of death **368.* (1)** When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

Sentence of transportation (2) No sentence of transportation shall specify the place to which the person sentenced is to be transported.

1 Form of sentence. — A sentence of death should direct that the accused be hanged by the neck until he be dead An order that the accused is sentenced "to receive the supreme penalty" is not in proper form¹

369.† Save as otherwise provided by this Code or by any other law Court not to alter judgment for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error.

Synopsis

- | | |
|------------------------------|---|
| 1 Legislative changes | 5 Power of High Court to review its judgment. |
| 2 Scope of the section. | 6 "Save as otherwise provided by this Code" |
| 3 Judgment when final. | |
| 4 "Alter or review the same" | |

* 1882 S 368, 1872 Ss 319, 321, 1861 Ss 50, 51, 53

† Code of 1898, original S 369

Court not to alter judgment 369 No Court, other than a High Court when it has signed its judgment, shall alter or review the same, except as provided in Ss 395 and 484 or to correct a clerical error

1882 S 369, 1872 S 464, 1861—Nil

Note 16

1 (20) 7 AIR 1920 Mad 171 (172) 21 Cri L Jour 52, *In re Karupiah Pillai*
Also see S 423, Note 28

Note 17

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ror

Section 368 — Note 1

1. (36) 23 AIR 1936 Rang 46 (47) . 37 Cri L Jour 290, *Nga Thein Mg v. Emperor*

NOTE to the Synopsis. See the Notes indicated for the following topics :

Damaging observations against witness—Power to re-consider See Note 4

Final orders — Cannot be reviewed — Examples See Note 2

Inherent power of High Court — Power to review its own order not included See Note 6

Interlocutory orders — Can be re-considered — Examples See Note 2

Judgment — Final only after pronouncing and signing See Note 3

Judgment—Means decision in a trial See Note 2

Principle — Not applicable to administrative or ministerial orders See Note 2

Revision application in High Court—Dismissal for default — Fresh application — Whether can be entertained See Note 5

1 Legislative changes — There was no provision corresponding to this section in the Code of 1861. Section 464 of the Code of 1872 provided that a judgment or final order cannot be altered or reviewed by the Court giving such judgment or order.

Changes made by Codes of 1882 and 1898 —

(1) Section 369 of the Code of 1882 excluded High Courts from the purview of this section (See Note 6)

(2) The words 'except as provided in sections 395 and 484 or to correct a clerical error' were introduced

Changes made in 1923 —

The words "Save as otherwise provided" such High Court, no Court' were substituted for the words "No Court other than a High Court", and the words "as provided in ss. 395 and 484, or" occurring after the word "except" were omitted by the Code of Criminal Procedure (Amendment) Act, 18 (XVIII) of 1923 (See Note 6)

2 Scope of the section — It is a universal principle of law that, when a matter has been finally disposed of by a Court, the Court is, in the absence of a direct statutory provision, *functus officio* and cannot entertain a fresh prayer for the same relief unless and until the previous order of final disposal has been set aside (See Note 19 on S 435). This section is based on this principle. The judgment of a Criminal Court is final, as far as that Court is concerned, and, on signing and pronouncing it, such Court becomes *functus officio* and has, therefore, no power to review, override, alter or interfere with the judgment in any manner except —

(1) where it is otherwise provided by the Code or by any other law for the time being in force (see Note 6), or

(2) for the purpose of correcting clerical errors¹

Section 369 — Note 2

1 (66) 5 Suth W R Cr 61 (64) Beng L R Sup Vol 436 (FB) *Queen v Goda, Raout* (Dissenting from 3 Suth W R Cr 45)

(72) 17 Suth W R Cr 2 (2) *In re Krishna Churan*, (5 Suth W R Cr 61 followed)

(26) 13 AIR 1926 Mad 420 (420, 421) . 27 Cri L Jour 184, *In re Arumuga Padayachi*

(24) 11 AIR 1924 Mad 640 (641) . 26 Cri L Jour 370 . 47 Mad 428, *In re Somee Naidu*

(30) 17 AIR 1930 Mad 1001 (1002) . 53 Mad 670 . 32 Cri L Jour 429, *Ekambara v. Alamelammal*,

(68) 4 Mad H C R App xix (xix)

(25) 12 AIR 1925 Oudh 476 (477) ; 26 Cri L Jour 513, *Paras Ram v Emperor*

(11) 12 Cri L Jour 473 (474) . 12 Ind Cas 81 (Low Bur), *Emperor v. Nga Ke Maung*

(71) 3 N W P H C R 273 (275) *Queen v Tiloke Chand*

(66) 5 Suth W R Cr 61 (64) Beng L R Sup Vol 436 (FB) *Queen v Goda, Raout* (Dissenting from 3 Suth W R Cr 45)

(Assumes the

S 437 cannot be reviewed)

(34) 21 AIR 1934 Oudh 85 (85, 86) . 33 Cri L Jour 417, *Tameshwar Dutt Singh v Bharath Singh*, (Order of reference under S 438 cannot be reviewed by subsequent order)

Also see cases in foot notes to Note 5

under s 204,¹⁴ or to a witness,¹⁵ can be reconsidered by the Court. An order of discharge not amounting to an acquittal,¹⁶ or an order of dismissal under s 203 of the Code,¹⁷ or an order cancelling a notice under s 107 of the Code, for the absence of the complainant,¹⁸ is not a final order and can be reconsidered by the Court.

The general principle abovementioned has no application to administrative or ministerial orders ¹⁹

3. Judgment when final. — A judgment of a criminal Court becomes final only after it is pronounced and signed¹ A judgment, therefore, which though signed has not been pronounced is inoperative and incomplete and the Judge has power to alter or vary it before pronouncing it² Similarly, where the Magistrate is pronouncing a judgment before signing it, and his attention is drawn to certain matters in it showing an error or mistake therein, he has ample powers to correct any mistake or alter the judgment before signing it³ Under the rules of the Allahabad High Court, a judgment becomes final only

[See also (20) 7 AIR 1920 Pat 563 (564, 565) 21 Cr L Jour 594 5 Pat L Jour 47, Ram Bara v Ram Pratap (Inadvertent order of transfer)]

14 (23) 10 AIR 1923 Cal 662 (662) 25 Cn L Jour 464, *Lalit Mohan v. Nona Lal*

Also see S 204 Note 10

15 (31) 18 AIR 1931 Pat 81 (81, 82) 33 Cr L Jour 551, *Assistant Government Advocate v Upendranath Mukerjee*

16 ('30) 17 AIR 1930 Cal 61 (62) 31 Cr L Jour 260, *Deby Das Karmakar v. Emperor* (Order of discharge under S 209)

(01) 28 Cal 652 (658, 662) 5 Cal W N 457 (FB), *Dwarkanath Mondul v Benamadhab Banerjee*

(25) 12 AIR 1925 Nag 432 (432) 28 Cr L Jour 1040, *Asgar Ali v Albar Ali* (Order of dismissal under S 258)

(09) 9 Cr1 L Jour 80 (82) 81 Mad 543 (545) 4 Ind Cr3 1113 (FB), *Emperor v Maheshwara*

(27) 14 AIR 1927 Mad 503 (503, 504) 28 Cr L J 304, *Venkkanna v Emperor* (Discharge under S 259)

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Note 3

[See also (39) 26

v *Raya Premji*

18 (23) 10 AIR

a discharge — It was, however, held in this case that the Magistrate cannot re-institute the enquiry though a fresh complaint is not barred)

19 (33) 20 AIR 1933 Pat 242 (243) 12 Pat 234 • 34 Cn L Jour 1198, *Uma Singh v. Emperor*.

pronounced is mere expression of opinion)

judgment despite the pronouncement of the earlier judgment)

(66) 5 South W R Cr 61 (64) Beng L R Sup Vol 436, *Queen v. Goda Raout*

(93) 1893 Rat 659 (663), *Queen v Waman*

after it is sealed and therefore the High Court has power to alter or add to its judgment before it is actually sealed.⁴ See also the case cited below.⁵

A Division Bench of the Chief Court of Oudh has, however, held that the sealing of the judgment is not what creates finality in the judgment and that it is only a ministerial act⁶ though it is the practice of the Court that judgments in criminal appeals and revisions are sealed. According to the practice of the Bombay High Court in its ordinary original criminal jurisdiction no judgment nor any other pronouncement of its decision is signed until the warrant is signed by the presiding Judge and therefore before signing the warrant the Court can alter or review its sentence, though already pronounced.⁷

A judgment within the meaning of this section should be taken to mean and refer only to the judicial act of the Court in finally disposing of the case and must refer to and indicate only the order of the Court when it is read out and signed by the Judge. It does not refer to any formal orders which are contemplated to be drawn up and issued⁸ in consequence by a ministerial officer of the Court. Such ministerial orders which are issued may be corrected or altered.⁹ See also Section 350, Note 6.

4 "Alter or review the same"—It has been seen in Note 2 that the Court after signing and pronouncing its judgment becomes *functus officio* and has no power thereafter to add to or alter such judgment in any manner. Any such alteration or addition if made would be without jurisdiction and a nullity.¹ Thus, the following alterations and additions are illegal:

(1) The addition of an explanatory note to the judgment after it is pronounced.²

(2) Subsequent sentence under s 75 Penal Code (enhancing punishment on account of a previous conviction) after accused has already been convicted and sentenced.³

4 (16) 3 AIR 1916 All 183 (184) 38 All 134 (137) 17 Cr L Jour 47, *Gobind Sahai v Emperor* (21 All 177 and 27 All 92 1 Cr L Jour 710 followed)

(99) 21 All 177 (178) 1899 All W N 15 *Queen Empress v Lalit Tiwari*

(04) 1 Cr L Jour 710 (711) 27 All 92 1904 All W N 195 *Kallu v Emperor*

5 (03) 7 Cal W N vii (viii) *Bibhuti v Sasi Mone*

6 (40) 27 AIR 1940 Oudh 371 (374) 185 Ind Cas 780 (783 784) 41 Cr L Jour 682 *Mt Rajkumari v Emperor* (21 All 177 27 All 92 1 Cr L Jour 710 AIR 1916 All 183 38 All 134 17 Cr L Jour 47, 7 Cal W N vii, dissented from)

7 (36) 23 AIR 1936 Bom 193 (195) 37 Cr L Jour 753 60 Bom 485 *Emperor v Abdul Rahman*

8 (26) 13 AIR 1926 Mad 470 (420 421) 27 Cr L Jour 184 *In re Arumuga Padayachi*

9 (70) 2 N W P H C R 117 (118 119) (FD) *Queen v Nyn Singh*

Note 4

1 (45) 32 A I R 1945 Oudh 52 (53) 46 Cr L Jour 694 220 Ind Cas 430 *Mahomed Mustaqim v Sukraj* (Appeal dismissed for absence of appellant on date of hearing—Subsequent order restoring appeal is *ultra vires*)

sentence)

(96) 1896 Rat 877 (877) *Queen Empress v Ranchhod Hari* (Review of order of predecessor)

(19) 6 A I R 1919 All 329 (330) 20 Cr L Jour 496 *Raj Kumar Das v Emperor* (Alteration in the order requiring security under s 107)

[See however (186) 3 Sath W R Cr 16 (16) (An amendment referring to the time at which the sentence should commence is not an alteration of the sentence itself)]

2 (78-80) 2 All 33 (35) *Empress of India v Chatter Singh*.

[See (40) 27 A I R 1940 Lah 192 (193) 41 Cr L Jour 703, *Ghanshyam Das v Suraj Bhan* (High Court has no power to amend its own order by way of explanation or otherwise)]

3 (16) 5 AIR 1916 Bom 250 (250) 42 Bom 202 19 Cr L Jour 279 *Mari Parsi v Emperor*

(3) The enhancement of the sentence passed even though it be at the request of the accused himself in order to make his case appealable⁴

(4) The addition of a sentence of imprisonment in default of payment of fine even though it had been omitted to be passed by oversight⁵

In the last mentioned case the Court can only report the matter to the High Court under s 438⁶. Even in cases where the Court finds that the conviction and sentence passed by it are illegal⁷ or where the innocence of the accused is discovered from facts which come to light subsequent to the conviction and sentence passed by the Court⁸ the only remedy would be to report the matter to the High Court under s 438 or to refer the matter to the Provincial Government for necessary action under chapter XXIX and not to review or re consider the matter itself. Similarly, where a mistake is pointed out to the Magistrate subsequent to his passing an order under s 488 he cannot amend the order but can only submit the proceedings to the Sessions Judge for submission to the High Court for rectification⁹.

This rule against review of judgments applies only to cases where the portion of the judgment or order sought to be reviewed forms an integral part of the judgment which cannot be treated as *separate and distinct* from such judgment¹⁰. Where however the judgment contains damaging observations against a witness who at the time had no opportunity of explaining or defending himself it has been held that the Judge has power to re consider that portion of it for the purpose of expunging such observations if thereby the *judgment against the accused* is not affected reviewed or varied¹¹. Similarly where the Magistrate accidentally omits to pass an order regarding the disposal of property at the time of the judgment he or his successor can subsequently pass an order for its disposal as such an addition is not an alteration of the judgment¹². A judgment cannot be said to be altered within the meaning of this section in the following cases

(1) Where the Sessions Judge sentences the accused to transportation in ignorance of the fact that the accused is already serving a sentence of imprisonment and after becoming aware of it directs that the sentence of transportation should take effect immediately¹³

(2) Where the Court adds a direction as to costs in a proceeding under s 115¹⁴

4 (83) 1883 All W N 16 (16) *Qurban Ali v Ansuddin* (See however S 413 Note 4)

5 See cases in foot note (6)

6 (21) 8 AIR 1921 Bom 368 (368) 22 Cr L Jour 608 *In re Dhond Nathaji Raut*
Gywe

Queen Empress

"*ho*

1 Cr L Jour 499 *Ekambara Mudali v Alamelam*

mal (Court cannot treat its order of acquittal as a nullity)

(1865) 6 South W R Cr 70 (70) *Gunowree Bhowa v Jhandoo*

(68) 4 Mad H C R App xix (xix)

(78) 1878 Rat 137 (137) *Queen Empress v Tukaram*

Also see S 438 Note 4

8 (23) 10 AIR 1923 All 473 (474) 45 All 143 21 Cr L Jour 766 *Kale v Emperor*

(77) 1 Ind Jur N S 333 *Reg v Hart*

9 (40) 27 A I R 1940 Rang 222 (223) 41 Cr L Jour 833 190 Ind Cas 142 *Saw Gwan Shew v Ma Kin Kin*

10 (17) 4 A I R 1917 Lah 163 (164) 18 Cr L Jour 332 (333) 1916 Pun Re No 25 Cr Official
Recorder, Karachi v *Ganga Nam*

11 (10) 11 Cr L Jour 178 (179) 5 Ind Cas 611 (Lah) *In re Malik Umar Hayat*

Also see S 561A Note 7

12 (22) 9 AIR 1922 Mad 399 (329) 24 Cr L Jour 159 *In re Subba Raidu*

[But see (01) 4 Bom L R 12 (13) *Sakharam v Jaram*]

13 (88) 1888 Rat 391 (391) *Queen Empress v Hart*

14 (20) 7 A I R 1920 Cal 320 (320) 47 Cal 874 21 Cr L Jour 751 *Nagar Chandra Pal v Sudhartha Krishna*

- (3) Where the appellate Court setting aside a conviction on the ground of want of jurisdiction but omitting to order a re-trial adds the necessary directions subsequently.¹⁵

5 Power of High Court to review its judgment—Before the amendment of 1923 the section ran as follows

No Court other than a High Court when it has signed its judgment shall alter or review the same except as provided in ss 395 and 484 or to correct a clerical error

The question arose whether the express negation of the power of review in respect of criminal tribunals other than the High Court had the effect of conferring upon the High Court such a power by implication. It was held in a series of decisions that the exclusion of judgments of the High Court from the purview of the section could not in the absence of any provision expressly conferring the power be read as conferring upon the High Court any such power¹ and that the Legislature in thus excluding High Courts from the purview of that section had in mind s 434 and the Letters Patent which provide for review of judgments where questions of law are reserved for consideration²

The section has been amended in order to give effect to the view above mentioned³. Where the High Court has pronounced its judgment and signed it, it becomes *functus officio* and neither the Judge, who passed the judgment nor any other Bench of the High Court has any power to review re-consider or alter it except for correcting a clerical error⁴ whether the judgment was passed in revision,⁵ or on

15 (81) 3 Mad 48 (51) 2 Weir 756 *In re Rama Reddy*

Note 5

1 (23) 10 AIR 1923 Mad 476 (427) 48 Mad 332 24 Cri L Jour 439 *Kunhamad Haji v Emperor*

(86) 14 Cal 42 (47) (FB) *In re Gibbons*

(05) 1895 Rat 791 (791) *Queen v Mohun Abhesingh*

2 (85) 7 All 672 (674) 1885 All WN 177 *Queen-Empress v Durga Charan*

(93) 1895 Rat 791 (791) *Queen v Mohun Abhesingh*

(86) 10 Bom 176 (180) (FB) *Queen-Empress v C P Fox*

(23) 10 AIR 1923 Mad 426 (433) 46 Mad 387 24 Cri L Jour 439 *Kunhamad Haji v Emperor*

(36) 22 AIR 1935 All 60 (60) 50 All 990 35 Cri L Jour 148, *Kunji Lal v Emperor* (The reference to Letters Patent is to Clauses 18 and 19 in the case of Allahabad High Court)

[See (24) 11 AIR 1924 Mad 640 (641) 47 Mad 428 26 Cri L Jour 370 *In re Somu Naidu*]

3 Statement of Objects and Reasons 1921

(35) 22 AIR 1935 All 466 (467) 36 Cri L Jour 1286 57 All 867 *Banwari Lal v Emperor*

(24) 11 AIR 1924 Mad 640 (643) 47 Mad 428 26 Cri L Jour 370 *In re Somu Naidu*

4 (44) 31 AIR 1944 Pat 209 (209) 23 Pat 28 46 Cri L Jour 39 715 Ind Cas 121 (DB) *Mohan Singh v Emperor*

(33) 20 AIR 1933 Cal 870 (871 874) 31 Cri L Jour 1100 61 Cal 155 *Dahu Raut v Emperor* (Reversed 838 (PC) on another point)

ra v Emperor

v v Emperor

(17) 4 AIR 1917 Bom 233 (238) 18 Cri L Jour 689 (889) *Nagangauda v Emperor*

[See (27) 14 AIR 1927 Mad 961 (967) 28 Cri L Jour 974 (SB) *Muthu Balu Chettiar v Chairman Madurai Municipality* (But where a Bench of the High Court heard the case but did not finally dispose of the case, held another Bench of the Court had power to hear and dispose of the case)]

5 (35) 22 AIR 1935 All 466 (467) 36 Cri L Jour 1286 57 All 867 *Banwari Lal v Emperor*

(09) 16 AIR 1929 Lah 797 (799) 10 Lah 241 30 Cri L Jour 615 *Emperor v Dhanna Lal* (Overruled in AIR 1945 Lah 130 1LR (1944) Lah 591 46 Cri L Jour 568 (SB) on another point)

(09) 10 Cri L Jour 314 (318) 1909 Pun Re No 8 Cr 3 Ind Cas 560, *Hira v Emperor*

(85) 7 All 672 (673) 1885 All WN 177 *Queen-Empress v Durga Charan*.

(85) 10 Bom 176 (180) (FB) *Queen-Empress v C P Fox*

(3) The enhancement of the sentence passed even though it be at the request of the accused himself in order to make his case appealable⁴

(4) The addition of a sentence of imprisonment in default of payment of fine even though it had been omitted to be passed by oversight⁵

In the last mentioned case the Court can only report the matter to the High Court under S 438⁶ Even in cases where the Court finds that the conviction and sentence passed by it are illegal⁷ or where the innocence of the accused is discovered from facts which come to light subsequent to the conviction and sentence passed by the Court⁸ the only remedy would be to report the matter to the High Court under S 438 or to refer the matter to the Provincial Government for necessary action under chapter XXIX and not to review or reconsider the matter itself Similarly where a mistake is pointed out to the Magistrate subsequent to his passing an order under S 488 he cannot amend the order but can only submit the proceedings to the Sessions Judge for submission to the High Court for rectification⁹

This rule against review of judgments applies only to cases where the portion of the judgment or order sought to be reviewed forms an integral part of the judgment which cannot be treated as *separate and distinct* from such judgment¹⁰ Where however the judgment contains damaging observations against a witness who at the time had no opportunity of explaining or defending himself it has been held that the Judge has power to reconsider that portion of it for the purpose of expunging such observations if thereby the *judgment against the accused* is not affected reviewed or varied¹¹ Similarly where the Magistrate accidentally omits to pass an order regarding the disposal of property at the time of the judgment he or his successor can subsequently pass an order for its disposal as such an addition is not an alteration of the judgment¹² A judgment cannot be said to be altered within the meaning of this section in the following cases

(1) Where the Sessions Judge sentences the accused to transportation in ignorance of the fact that the accused is already serving a sentence of imprisonment and after becoming aware of it directs that the sentence of transportation should take effect immediately¹³

(2) Where the Court adds a direction as to costs in a proceeding under S 145¹⁴

4 (83) 1883 All W N 18 (16) *Qurban Ali v Ansuddin* (See however S 413 Note 4)

5 See cases in foot note (6)

6 (21) 8 AIR 1921 Bom 368 (368) 22 Cr L Jour 608 *In re Dhond Nathay Raut*

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Jour 429 *Ekanibara Mudali v Alamelam*

mal (Court cannot treat its order of acquittal as a nullity)

(1865) 6 Suth W R Cr 70 (70) *Gunowree Bhatia v Jhandoo*

(68) 4 Mad H C R App xix (xix)

(78) 1878 Rat 137 (137) *Queen Empress v Tukaram*

Also see S 438 Note 4

8 (23) 10 AIR 1923 All 473 (474) 45 All 143 24 Cr L Jour 766 *Kale v Emperor*

(77) 1 Ind Jur N S 333 *Reg v Hart*

9 (40) 27 A 1 R 1940 Rang 222 (223) 41 Cr L Jour 833 190 Ind Cas 142 *Saw Gwan Sheen v Ma Kin Kin*

10 (17) 4 A 1 R 1917 Lah 163 (164) 18 Cr L Jour 332 (333) 1916 Pun Re No 25 Cr Official Receiver Karachi v Ganga Ram

11 (10) 11 Cr L Jour 178 (179) 5 Ind Cas 611 (Lah) *In re Malik Umar Hayat*

Also see S 561A Note 7

12 (22) 9 AIR 1922 Mad 329 (329) 21 Cr L Jour 159 *In re Subba Reddy*

[But see (01) 4 Bom L R 12 (13) *Sakaram v Jaram*]

13 (88) 1888 Rat 391 (391) *Queen Empress v Hart*

14 (20) 7 A 1 R 1920 Cal 370 (320) 47 Cal 974 21 Cr L Jour 751 *Nagar Chandra Pal v Sudhartha Krishna*

(3) Where the appellate Court setting aside a conviction on the ground of want of jurisdiction but omitting to order a re trial adds the necessary directions subsequently¹²

5 Power of High Court to review its judgment—Before the amendment of 1923 the section ran as follows

No Court other than a High Court when it has signed its judgment shall alter or review the same except as provided in ss 395 and 481 or to correct a clerical error

The question arose whether the express negation of the power of review in respect of criminal tribunals other than the High Court had the effect of conferring upon the High Court such a power by implication. It was held in a series of decisions that the exclusion of judgments of the High Court from the purview of the section could not in the absence of any provision expressly conferring the power be read as conferring upon the High Court any such power¹ and that the Legislature in thus excluding High Courts from the purview of that section had in mind s 434 and the Letters Patent which provide for review of judgments where questions of law are reserved for consideration²

The section has been amended in order to give effect to the view above mentioned³. Where the High Court has pronounced its judgment and signed it it becomes *functus officio* and neither the Judge who passed the judgment nor any other Bench of the High Court has any power to review re consider or alter it except for correcting a clerical error⁴ whether the judgment was passed in revision⁵ or on

15 (81) 3 Mad 48 (51) 2 West 758 *In re Rams Reddy*

Note 5

1 (23) 10 AIR 1933 Mad 470 (427) 48 Mad 392 24 Cr L Jour 439 *Kunhamad Haja v Emperor*

(86) 14 Cal 42 (47) (FB) *In re Gibbons*

(95) 1895 Rat 791 (791) *Queen v Mohun Abhesingh*

(85) 7 All 872 (874) 1885 All W N 177 *Queen Empress v Durga Charan*

(95) 1895 Rat 791 (791) *Queen v Mohun Abhesingh*

(86) 10 Bom 178 (180) (F B) *Queen Empress v C P Fox*

(23) 10 AIR 1923 Mad 478 (433) 46 Mad 392 24 Cr L Jour 439 *Kunhamad Haja v Emperor*

(30) 22 AIR 1935 All 60 (89) 56 All 990 30 Cr L Jour 1493 *Kunji Lal v Emperor* (The reference to Letters Patent is to Clauses 18 and 19 in the case of Allahabad High Court)

[See (24) 11 AIR 1924 Mad 840 (611) 47 Mad 428 26 Cr L Jour 370 *In re Somu Naidu*]

3 Statement of Objects and Reasons 1921

(35) 22 AIR 1935 All 466 (467) 36 Cr L Jour 1286 57 All 867 *Danwari Lal v Emperor*

(24) 11 AIR 1924 Mad 640 (643) 47 Mad 428 26 Cr L Jour 370 *In re Somu Naidu*

4 (44) 31 AIR 1944 Pat 209 (09) 23 Pat 28 46 Cr L Jour 30 215 Ind Cas 121 (DB) *Mohan Singh v Emperor*

dispose of the case held another Bench of the Court had power to hear and dispose of the case.))

5 (35) 22 AIR 1935 All 466 (467) 36 Cr L Jour 1286 57 All 867 *Banwari Lal v Emperor*

(29) 16 AIR 1929 Lah 797 (799) 10 Lah 211 30 Cr L Jour 815 *Emperor v Dhanna Lal* (Overruled in AIR 1945 Lah 130 11R (1944) Lah 391 46 Cr L Jour 568 (SB) on another point)

(09) 10 Cr L Jour 514 (318) 1909 Pun Re No 8 Cr 3 Ind Cas 560 *Hira v Emperor*

(69) 1889 Rat 458 (458) *Queen Empress v Chimaba*

(9) 26 Cal 188 (191 192) 3 Cal W N 49 *Hurballath v Lucimeswar*

(05) 2 Cr I Jour 465 (467) 1905 Upp Bur Bul Cr P C 35 *Ah Lak v Emperor*

(19) 6 AIR 1919 Pat 514 (514) 20 Cr L Jour 447 *Nand Kishore v Emperor*

(16) 3 AIR 1916 All 183 (183) 17 Cr L Jour 47 (46) 39 All 134 *Gohind v Emperor*

(63) 7 All 672 (673) 1885 All W N 177 *Queen Empress v Durga Charan*

(65) 10 Bom 176 (180) (FB) *Queen Empress v C P Fox*

(3) The enhancement of the sentence passed, even though it be at the request of the accused himself in order to make his case appealable ⁴

(4) The addition of a sentence of imprisonment in default of payment of fine even though it had been omitted to be passed by oversight ⁵

In the last mentioned case the Court can only report the matter to the High Court under S 438 ⁶ Even in cases where the Court finds that the conviction and sentence passed by it are illegal ⁷ or where the innocence of the accused is discovered from facts which come to light subsequent to the conviction and sentence passed by the Court ⁸ the only remedy would be to report the matter to the High Court under S 438 or to refer the matter to the Provincial Government for necessary action under chapter XXIX and not to review or re consider the matter itself Similarly, where a mistake is pointed out to the Magistrate subsequent to his passing an order under S 488 he cannot amend the order but can only submit the proceedings to the Sessions Judge for submission to the High Court for rectification ⁹

This rule against review of judgments applies only to cases where the portion of the judgment or order sought to be reviewed forms an integral part of the judgment which cannot be treated as *separate and distinct* from such judgment ¹⁰ Where however the judgment contains damaging observations against a witness who at the time had no opportunity of explaining or defending himself, it has been held that the Judge has power to re consider that portion of it for the purpose of expunging such observations if thereby the *judgment against the accused* is not affected, reviewed or varied ¹¹ Similarly where the Magistrate accidentally omits to pass an order regarding the disposal of property at the time of the judgment, he or his successor can subsequently pass an order for its disposal as such an addition is not an alteration of the judgment ¹² A judgment cannot be said to be altered within the meaning of this section in the following cases

(1) Where the Sessions Judge sentences the accused to transportation in ignorance of

enact immediately *

(2) Where the Court adds a direction as to costs in a proceeding under S. 145 ¹⁴

4 (83) 1883 All W N 16 (16) *Qurban Ali v Arsuuddin* (See however S 413 Note 4)

5 See cases in foot note (6)

6 (21) 8 AIR 1921 Bom 368 (368) 22 Cri L Jour 608 *In re Dhondi Nathaji Raut*

7 (17) 10 AIR 1923 All 473 (474) 45 All 143 24 Cri L Jour 766 *Kale v Emperor*

(77) 1 Ind Jur N S 333 *Reg v Hart*

9 (40) 27 A I R 1940 Rang 222 (223) 41 Cri L Jour 833 190 Ind Cas 142 *Saw Guan Sheen v Ho*

10 (17) 4 A I R 1917 Lah 163 (164) 18 Cri L Jour 332 (333) 1916 Pun Re No 25 Cr Official

11 (10) 11 Cri L Jour 178 (179) 5 Ind Cas 611 (Lah) *In re Malik Umar Hayat*

Also see S 561A Note 7

12 (10) 11 Cri L Jour 178 (179) 5 Ind Cas 611 (Lah) *In re Malik Umar Hayat*

Also see S 438 Note 4

8 (23) 10 AIR 1923 All 473 (474) 45 All 143 24 Cri L Jour 766 *Kale v Emperor*

(77) 1 Ind Jur N S 333 *Reg v Hart*

9 (40) 27 A I R 1940 Rang 222 (223) 41 Cri L Jour 833 190 Ind Cas 142 *Saw Guan Sheen v Ho*

10 (17) 4 A I R 1917 Lah 163 (164) 18 Cri L Jour 332 (333) 1916 Pun Re No 25 Cr Official

11 (10) 11 Cri L Jour 178 (179) 5 Ind Cas 611 (Lah) *In re Malik Umar Hayat*

Also see S 561A Note 7

12 (10) 11 Cri L Jour 178 (179) 5 Ind Cas 611 (Lah) *In re Malik Umar Hayat*

Also see S 561A Note 7

14 (20) 7 A I R 1920 Cal 320 (320) 47 Cal 974 21 Cri L Jour 751 *Nafar Chandra Pal v Sudhartha*

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14 (20) 7 A I R 1920 Cal 320 (320) 47 Cal 974 21 Cri L Jour 751 *Nafar Chandra Pal v Sudhartha*

14 (20) 7 A I R 1920 Cal 320 (320) 47 Cal 974 21 Cri L Jour 751 *Nafar Chandra Pal v Sudhartha*

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As to the inherent power of the High Court in such cases see Note 6

6 "Save as otherwise provided by this Code" — The provisions of this section should be read as subject to any provision of the Code which provides specifically for a review of judgment. The following provisions admit of review of judgments in particular cases

- (1) Section 395 providing for review of the sentence of whipping
- (2) Section 432 providing for review of a case where questions of law are referred for decision by the High Court.
- (3) Section 484 providing for review of judgment in contempt cases where the accused tenders an apology¹
- (4) Section 436 providing for a District Magistrate making further inquiry himself in respect of an order passed by himself²
- (5) Section 489 (9) providing for cancellation or variation of an order passed under Section 498³
- (6) Judgments and orders passed by an appellate Court are final except in cases provided for in Chapter XXXII. See S 430. As to whether S 430 which saves the right of revision in respect of appellate orders has application to orders of appeal passed by the High Court itself, see S 439 Note 32

The inherent powers of the High Court as stated in S 561A, do not include the power to review an order made by the High Court in its criminal jurisdiction. This section merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. It does not confer on the Court any new powers such as any power to review or alter orders passed by itself⁴

370.* Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars —

- (a) the serial number of the case,
- (b) the date of the commission of the offence,
- (c) the name of the complainant (if any),

¹ 1882 S 370, 1872 and 1861 — Nil

Note 6

- 1 (30) 22 AIR 1935 All 60 (61) 56 All 990 35 Cri L Jour 1435, *Kunja Lal v Emperor*
- 2 (01) 28 Cal 102 (104) *Bidhu Chandani v Mat. Shauk*
- (06) 11 Cal W N xi, *Dedar v Emperor*
- Also see S 436 Note 4a
- 3 (37) 24 AIR 1937 Cal 334 (335) 39 Cri L Jour 381 *Bhagubhai Panchhodas v Bai Arunda*
- 4 (98) 15 AIR 1928 Lah 462 (463) 10 Lah 1 29 Cri L Jour 669, *Raju v Emperor* (AIR 1927 Lah 139 29 Cri L Jour 239 overruled)
- (39) 26 AIR 1939 Lah 244 (245) 40 Cri L Jour 763, *Edward Few v Emperor* (The only authority that can interfere is the Provincial Government)
- (38) 25 AIR 1938 Nag 74 (75) 39 Cri L Jour 116 11R (1940) Nag 267, *Laxmanrao Parashram v Emperor* (AIR 1928 Oudh 400 3 Luck 680 29 Cri L Jour 893 dissented from)
- (33) 20 AIR 1933 Cal 879 (874) 61 Cal 155 34 Cri L Jour 1100 *Dahu Raut v Emperor* (Reversed)

law discussed.)

- (31) 18 AIR 1931 Nag 169 (169) 27 Nag L R 163 32 Cri L Jour 1222, *Ganpat v Emperor*
- (35) 22 AIR 1935 All 60 (61) 56 All 990 35 Cri L Jour 1435, *Kunja Lal v Emperor*
- Also see S 561A, Note 2

[But see (28) 15 AIR 1928 Oudh 402 (403) 29 Cri L Jour 893 3 Luck 680 *Emperor v Shree Datta* (Following AIR 1927 Lah 139 29 Cri L Jour 239 which was overruled by AIR 1923 Lah 462 10 Lah 1 29 Cri L Jour 669)]

appeal,⁶ or on a reference to it under S 432 or S 431,⁷ or S 433,⁸ or in its original criminal jurisdiction

Where the High Court dismisses a criminal revision application for default or where it passes an order to the prejudice of a party without providing such party an opportunity for being heard in support of his case, has the High Court power to restore the case and hear the matter again on its merits? The answer to this question depends upon the nature of the order passed by the Court. The powers of revision vested in the High Court under S 439 can only be exercised at the discretion of the Court if the circumstances require it and ordinarily no party has a right to be heard in support of his case.⁹ But where such a right is expressly given to the accused as under sub s (2) to S 439 the High Court is bound to provide an opportunity to the accused before passing any order to his prejudice. It has therefore, been held that where an order is passed to the prejudice of an accused and by mistake or inadvertence, no opportunity had been given to him to be heard in his defence, such an order being *without jurisdiction* is not a judgment contemplated by this section and that the High Court has power to entertain a fresh revision application to re-consider the matter.¹⁰ Where, however, the sentence against an accused is reduced without notice to the Crown the Court has no power to re-consider the matter as the Crown has no right to be heard in the matter of sentence.¹¹ In all other cases where a criminal revision application is dismissed for default of the petitioner the High Court has no right to entertain a fresh application for the same relief.¹² It has however been held by the High Courts of Lahore,¹³ Rangoon¹⁴ and Calcutta¹⁵ that even in such cases the High Court has power to set aside the order of dismissal as an order of dismissal for default is not a judgment (which is presumably a judgment on merits) contemplated by this section. See also Section 435 Note 20

- (28) 15 AIR 1928 Lah 462 (464) 10 Lah 1 29 Cri L Jour 669 *Raju v Emperor*
[See (16) 8 AIR 1918 Mad 516 (517) 16 Cri L Jour 697, *In re Kanakasabhai* (Revision petition dismissed on merits—No fresh petition on same matter lies)]
[But see (27) 14 AIR 1927 All 724 (726) 29 Cri L Jour 88 *Sripat Narain Singh v Gahbar Rai* (Dissented from in AIR 1935 All 466 57 All 867 36 Cri L Jour 1286)]
6 (39) 26 AIR 1939 Lah 244 (245) 40 Cri L Jour 763 *Edward Few v Emperor* (The only authority that can interfere with the sentence is the Provincial Government)

an Singh v Emperor

materials had been discovered which if they had been placed before Court the Court might have come to a different conclusion the Court has no power of review and the only remedy is to apply to Government)

peror (Even if any new

reference under S 433 by

viz "No order on refer-

ence — Order amounts to judgment — Subsequent revision application by party at whose instance the reference was made—Revision application is barred as in effect it seeks to alter or review previous judgment of High Court)

9 (24) 11 AIR 1924 Mad 640 (644) 47 Mad 428 26 Cri L Jour 370 *In re Somu Naidu*

10 (24) 11 AIR 1924 Mad 640 (644) 47 Mad 428 26 Cri L Jour 370 *In re Somu Naidu*

(27) 14 AIR 1927 Cal 702 (703) 55 Cal 417 28 Cri L Jour 831 *Ramesh Pada v Kadambini Das*

Also see S 439 Note 45

v Emperor

is on rejected for

non payment of printing charges — Held Court had no power to re-hear)

(Revision dis-

14 (28) 15 AIR 1929 Rang 288 (288) 30 Cri L Jour 749 *Ibrahim v Emperor*

15 (09) 10 Cri L Jour 287 (288 289) 3 Ind Cas 393 (Cal) *Bibhuty Mohan v Dasmoni Dass* (Application dismissed not heard and determined on merits — It can be restored to file and heard)

As to the inherent power of the High Court in such cases see Note 6

6 "Save as otherwise provided by this Code" — The provisions of the section should be read as subject to any provision of the Code which provides specifically for a review of judgment. The following provisions admit of review of judgments in particular cases

- (1) Section 395 providing for review of the sentence of whipping
- (2) Section 432 providing for review of a case where questions of law are referred for decision by the High Court
- (3) Section 484 providing for review of judgment in contempt cases where the accused tenders an apology¹
- (4) Section 436 providing for a District Magistrate making further inquiry himself in respect of an order passed by himself²
- (5) Section 489 (2) providing for cancellation or variation of an order passed under Section 489³
- (6) Judgments and orders passed by an appellate Court are final except in cases provided for in chapter XXXII. See S 430. As to whether S 430 which saves the right of revision in respect of appellate orders has application to orders in appeal passed by the *High Court itself* see S 430 Note 22

The inherent powers of the High Court as stated in S 561A do not include the power to review an order made by the High Court in its criminal jurisdiction. That section merely declares that such inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code. It does not confer on the Court any new powers such as any power to review or alter orders passed by itself.⁴

370.* Instead of recording a judgment in manner hereinbefore

Presidency Magistrate's judgment provided a Presidency Magistrate shall record the following particulars —

- (a) the serial number of the case,
- (b) the date of the commission of the offence
- (c) the name of the complainant (if any)

* 1882 S 370 1672 and 1861 — N1

Note 6

1 (3) 22 AIR 1935 All 60 (61) 56 All 990 35 Cr L Jour 143a *Kunj Lal v Emperor*

2 (01) 28 Cal 102 (104) *Bidhu Chandakins v Mat, Shauk*

(06) 11 Cal W N xi, *Dedar v Emperor*

Also see S 436 Note 4a

3 (37) 24 AIR 1937 Cal 334 (335) 39 Cr L Jour 381 *Bhagubhas Panchhodas v Bai Arvinda*

4 (28) 15 AIR 1928 Lah 467 (463) 10 Lah 1 29 Cr L Jour 669 *Raju v Emperor* (AIR 1927 Lah 139 28 Cr L Jour 239 overruled)

(39) 26 AIR 1939 Lah 244 (245) 40 Cr L Jour 763 *Edward Few v Emperor* (The only authority that can interfere is the Provincial Government.)

(38) 25 AIR 1938 Nag 74 (75) 39 Cr L Jour 116 ILR (1940) Nag 967 *Laxmanrao Parashram v Emperor* (AIR 1928 Oudh 407 3 Luck 680 29 Cr L Jour 893 dissented from)

(33) 20 AIR 1933 Cal 870 (874) 61 Cal 155 34 Cr L Jour 1100 *Dahu Raut v Emperor* (Reversed in AIR 1935 P C 89 62 Ind App 129 67 Cal 983 36 Cr L Jour 838 (PC) on another point.)

(29) 10 AIR 1929 Lah 797 (799) 10 Lah 241 30 Cr L Jour 815 *Emperor v Dhanna Lal* (Overruled in AIR 1945 Lah 130 ILR (1944) Lah 391 46 Cr L Jour 566 (SB) on another point.)

(35) 22 AIR 1935 All 466 (467 468) 36 Cr L Jour 1986 57 All 867, *Danwari Lal v Emperor* (Case law discussed)

(31) 18 AIR 1931 Nag 169 (169) 27 Nag L B 163 33 Cr L Jour 1227 *Ganpat v Emperor*

(37) 22 AIR 1935 All 60 (61) 56 All 990 35 Cr L Jour 1435 *Kunj Lal v Emperor*

Also see S 561A Note 2

[But see (28) 15 AIR 1928 Oudh 402 (403) 29 Cr L Jour 893 3 Luck 680 *Emperor v Shirda Datta* (Following AIR 1927 Lah 139 28 Cr L Jour 239 which was overruled by AIR 1923 Lah 462 10 Lah 1 29 Cr L Jour 669)]

- (d) the name of the accused person, and (except in the case of an European British subject) his parentage and residence
- (e) the offence complained of or proved,
- (f) the plea of the accused and his examination (if any),
- (g) the final order,
- (h) the date of such order, and
- (i) in all cases in which the Magistrate inflicts imprisonment or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction

Synopsis

- 1 Scope of the section
- 2 Record of particulars
- 3 Plea and examination of the accused — Clause (f)
- 4 Recording reasons — Clause (i)
- 5 Imprisonment

NOTE to the Synopsis See the Notes indicated for the following topics

Imprisonment — Refers only to substantial sentence See Note 5

Magistrate — Referring to document on record — No serious objection See Note 4

Omission to record particulars — Only irregularity See Note 2

Reasons — To be recorded briefly — Omission to do so not seriously prejudicing accused — Irregularity cured by S 537 See Note 4

Section — No application to proceedings under Workman's Breach of Contract Act See Note 1

1 Scope of the section — This section is an exception to S 367 and enacts that a Presidency Magistrate shall record the particulars specified instead of recording judgment as provided by S 367¹ This section has no application to proceedings started under S 2 subs (1) and S 3 of the Workman's Breach of Contract Act 1859²

2 Record of particulars — The direction to record particulars should be strictly followed¹ The various particulars should be recorded in the form prescribed by the various High Courts² Where however all the important particulars have been recorded the omission to record all the particulars in the form prescribed is only an irregularity which can be cured under S 537³

3 Plea and examination of the accused — Clause (f) — The words "if any" in clause (f) do not control the provisions of S 342 under which the Magistrate is bound to record the examination of the accused¹ No hard and fast rule is contemplated as to how the plea and examination of the accused are to be recorded the entry therefore denies² in the column was held sufficient compliance with the section where when the plea was taken and the accused was examined he merely denied having committed the offence³

As to the effect of non compliance with the clause see S 537 Note 12

4 Recording reasons — Clause (i) — In all cases where the Magistrate passes a sentence of imprisonment or fine exceeding Rs 200 he should record briefly his reasons.

Section 370 — Note 1

1 (21) 8 AIR 1921 Bom 374 (375) 45 Bom 672 22 Cr L Jour 17 *G S Fernandes v Emperor*

2 (1900) 27 Cal 181 (130 133) 4 Cal WN 201 *Averam Das v Abdul Halim*

Note 2

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Also see S 537 Note 12

Note 3

1 (21) 8 AIR 1921 Bom 374 (375 376) 45 Bom 672 22 Cr L Jour 17 *G S Fernandes v Emperor*

Also see S 342 Note 4

2 (29) 16 AIR 1923 Cal 406 (406 407) 55 Cal 1067 30 Cr L Jour 526 *Sadagar v Emperor*

for the conviction. It is enough if the reasons are briefly stated,¹ but it should be done in such a manner that the High Court may in revision be in a position to judge whether there were sufficient materials before the Magistrate to support the conviction.² Thus, a mere statement that the offence is proved,³ or that the accused has no defence to make⁴ or that the Magistrate believes the prosecution witnesses,⁵ is not a compliance with the provisions of the section where however, the omission to record the reasons has not seriously prejudiced the accused,⁶ as where the trying Magistrate has made a record of the evidence and other important matters and the records are made available to the Court,⁷ the irregularity will be cured under S 537. Section 411 further enables the Magistrate to submit a statement of reasons where the records are called for by the High Court (under S 435) even in cases where no reasons are recorded at all by the Presidency Magistrate in his judgment. But where the conviction is passed without proper reasons therefor, on evidence of which no record is taken and which is, therefore, not available to the High Court, the omission to record the reasons in such cases is a grave irregularity which will be a sufficient ground for interference by the High Court.⁸ See also section 537, Note 12.

The Presidency Magistrate is not bound to give any statement of reasons in case he inflicts a fine of less than Rs. 200 but if he chooses to write a judgment in such a case it is his duty to give his findings on the facts proved.⁹

5 "Imprisonment"—The word imprisonment contemplated by this section refers to the substantive sentence passed, it does not include the sentence of imprisonment ordered in default of payment of fine.¹

Note 4

- 1 (42) 29 AIR 1942 Mad 603 (604) 43 Cri L Jour 859 202 Ind Cas 603 *In re Dashnamurthis* (Magistrate should give brief statement of reasons for conviction which would necessitate reference to prosecution as well as defence evidence)
 (04) 1 Cri L Jour 839 (841) 31 Cal 933 8 Cal WN 839 *Emamdu v Emperor*
 (26) 13 AIR 1928 Cal 1109 (1111) 27 Cri L Jour 1131 *Dishnu Pada Deb v Emperor* (Under S 370 there is no serious objection to the Magistrate referring to a document on the record instead of taking the trouble to re-write those portions of it which should have been included in his final order)

- 3 (1900) 27 Cal 461 (462) 4 Cal WN 467 *Natabar v Provash*
 (86) 13 Cal 272 (273) *Yacoub v Adamson*
 [See (26) 13 AIR 1926 Cal 692 (697) 27 Cri L Jour 110 *Ismael Sha v Emperor*]
 4 (1900) 27 Cal 461 (461, 462) 4 Cal WN 467 *Natabar Ghose v Provash Chunder*
 5 (42) 29 AIR 1942 Mad 603 (604) 43 Cri L Jour 859 202 Ind Cas 603 *In re Dashnamurthis* (Magistrate merely saying that he believed prosecution witnesses without noting their evidence and without any reference to defence evidence—S 370 () is not complied with)
 (15) 2 AIR 1915 Bom 137 (137) 16 Cri L Jour 771 (771) *Shankar v Emperor*
 6 (24) 11 AIR 1924 Mad 799 (800) 25 Cri L Jour 1084 *In re Thurman* (Accused found guilty of assault in public street—No prejudice by failure to record finding as to breach of the peace)
 (1900) 27 Cal 461 (462) 4 Cal WN 467, *Natabar Ghose v Provash Chunder*
 (30) 19 AIR 1932 Cal 655 (656) 33 Cri L Jour 729 *Shamlal Kheltry v Emperor* (Where evidence and statements of the accused were recorded failure to give reasons did not prejudice the accused)
 [See (15) 2 AIR 1915 Bom 137 (137) 16 Cri L Jour 771 (771), *Shankar v Emperor*]
 7 (23) 10 AIR 1923 Mad 185 (186) 46 Mad 253 24 Cri L Jour 84 *In re Derwish*
 8 (23) 10 AIR 1923 Mad 185 (186) 46 Mad 253 24 Cri L Jour 81, *In re Derwish*
 (04) 1 Cri L Jour 527 (528) 8 Cal WN 537, *Toolsey v Emperor*
 (29) 1909 Mad WN 892 (893) *Mahabooob Khan v Emperor* (Evidence meagre)
 (86) 13 Cal 272 (274) *Yacoub v Adamson* (Prejudice is presumed)
 9 (33) 20 AIR 1933 Cal 532 (533) 60 Cal 656 31 Cri L Jour 1059 *Nishikant Chatterjee v Behari Kahar*

Note 5

- 1 (87) 14 Cal 174 (175) *Motiram v Dalaseeram*

371.* (1) On the application of the accused a copy of the judgment

Copy of judgment etc or, when he so desires, a translation in his own
to be given to accused on language, if practicable, or in the language of the Court
application shall be given to him without delay Such copy shall
in any case other than a summons case, be given free of cost.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost

(3) When the accused is sentenced to death by a Sessions Judge

Case of person sen such Judge shall further inform him of the period within
tenced to death which, if he wishes to appeal, his appeal should be preferred

1 "On the application of the accused" — Under this section the accused is entitled to a copy of the judgment only on his application The undermentioned cases decided under the Code of 1872 wherein the grant of copies has been held to be compulsory and independent of any request on the part of the accused are no longer of any importance¹ See also Notes on Section 519

2 Court fees — Where a copy is granted under this section free of cost it is not also necessary to affix any court fee stamp on it when preferring an appeal¹

3 Limitation for appeal against sentence of death — The period of limitation prescribed for an appeal from a sentence of death passed by a Court of Session is seven days from the date of the sentence See Art 150 of Sch I of the Limitation Act

372.† The original judgment shall be filed with the record of

Judgment when proceedings, and, where the original is recorded in a different
to be translated language from that of the Court, and the accused so requires
a translation thereof into the language of the Court shall be added to such
record

1 Scope of the section. — The Court is bound where the accused so requires to furnish a translation of the judgment where it is recorded in a different language from that of the Court¹ but this section applies only to judgments and final orders in the nature of a judgment and has no application to orders on interlocutory applications or to administrative orders² See also Sect on 369 Note 2

Court of Session to send copy of finding and sentence to District Magistrate

373.‡ In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held

* 1882	S 371	1872	S 464	1861 — N 1
† 1882	S 372	1872	S 464	1861 S 429
‡ 1882	S 373	1872	S 302	1861 S 384

Section 371 — Note 1

1 (73) 1873 Rat 73 (73)

(68) 9 Buth W R Cr 19 (19) *In re Ram Chunder*

Note 2

1 (88) 1888 Rat 364 (364) *Queen-Empress v Ragba*

Section 372 — Note 1

1 See (1863) 1 Bom H C R Cr 17 (19) *Reg v Ratanji Bhukan*

2 (72) 1872 Rat 61 (61) *Reg v Pandurang* (Case under Code of 1861 — Sect on applies to final orders passed)

CHAPTER XXVII

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION

374.* When the Court of Session passes sentence of death, the

Sentence of death
to be submitted by
Court of Sess on

proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court

1 Scope and object — The Legislature has provided in the confirmation proceedings a final safeguard of the life and liberty of the subject in cases of capital sentences. The High Court has been given wide powers under this chapter in order to prevent any possible miscarriage of justice¹. Similar reference is also provided under special laws in the case of sentences of death passed thereunder².

References for confirmation can be made only in cases of sentences of death³.

The records transmitted to the High Court in a confirmation case must be complete⁴.

As to the time within which reference should be made see the undermentioned case⁵.

The section does not make it a condition precedent to the confirmation of a death sentence that the proceedings shall be submitted by the Court of Session. If it is brought to the notice of the High Court that the Sessions Judge had omitted to send the record for confirmation the High Court can in the exercise of its powers of revision call for the record and deal with it according to law⁶. See also S 439 and Notes thereon.

375.† (1) If when such proceedings are submitted the High Court

Power to direct
further inquiry to be
made or additional
evidence to be taken

thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session

* 1882 S 374, 1872 S 287, para 1 1861 S 380

† 1882 S 375, 1872 S 289, 1861 S 400

Section 374 — Note 1

1 (21) 8 AIR 1921 Sind 84 (85-89) 23 Cri L Jour 33 15 Sind L R 103 (FD) *Gul v Emperor*

(95) 1895 Rat 806 (814) *Queen Empress v Kallappa*

2 (44) 31 AIR 1944 FC 1 (12-13) 1944 FCR 61 1LR (1944) Nag 300 23 Pat 159 1LR (1944) Kar

Emperor (Death sentence passed by Special Judge under Ordinance 2 of 1942—S 3 (1) of Special Criminal Courts (Repeal) Ordinance makes it incumbent on High Court to consider confirmation of death sentence in the same way as it should consider the confirmation of a death sentence passed by a Sessions Judge under the Criminal Procedure Code)

v Emperor (Ses S 3 (2) Bengal

) *Monoranjan Bhattacharyya v*

Emperor (Do)

from such sentence.))

Also see S 376 Note 1

4 (71) 15 Suth W R Cr 16 (17), *In re Gopal Hajjau* (The record of the defence set up in the Sessions Court was wanting in this reference.)

5 (84) 7 Mad II O R App xxi (xxi)

6 (44) 31 AIR 1944 Sind 83 (85) 45 Cri L Jour 598 213 LC 352(FD), *Parcho Kewalram v Emperor*

371.* (1) On the application of the accused a copy of the judgment,

Copy of judgment etc., or, when he so desires, a translation in his own language, if practicable, or in the language of the Court shall be given to him without delay. Such copy shall in any case other than a summons-case, be given free of cost.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost.

(3) When the accused is sentenced to death by a Sessions Judge

Case of person sentenced to death such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

1 "On the application of the accused" — Under this section the accused is entitled to a copy of the judgment only on his application. The undermentioned cases decided under the Code of 1872 wherein the grant of copies has been held to be compulsory and independent of any request on the part of the accused are no longer of any importance¹ See also Notes on Section 548

2 Court fees — Where a copy is granted under this section free of cost it is not also necessary to affix any court fee stamp on it when preferring an appeal.¹

3 Limitation for appeal against sentence of death — The period of limitation prescribed for an appeal from a sentence of death passed by a Court of Session is seven days from the date of the sentence. See Art 150 of Sch I of the Limitation Act

372.† The original judgment shall be filed with the record of

Judgment when to be translated proceedings, and, where the original is recorded in a different language from that of the Court, and the accused so requires, a translation thereof into the language of the Court shall be added to such record

1 Scope of the section. — The Court is bound where the accused so requires to furnish a translation of the judgment where it is recorded in a different language from that of the Court¹ but this section applies only to judgments and final orders in the nature of a judgment and has no application to orders on interlocutory applications or to administrative orders² See also Section 369 Note 2

Court of Session to send copy of finding and sentence to District Magistrate **373.‡** In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held

*	1882	S 371,	1872	S 464	1861 — Nil
†	1882	S 372,	1872	S 464,	1861 . S 429
‡	1882	S 373,	1872	S 302,	1861 S 384

Section 371 — Note 1

1 (73) 1873 Rat 73 (73)

{ 68) 9 Suth W R Cr 19 (19) *In re Ram Chunder*

Note 2

1 (88) 1888 Rat 364 (364) *Queen-Empress v Ragba*

Section 372 — Note 1

1 See (1863) 1 Bom H C R Cr 17 (19) *Reg v Balanji Bhukan*

2 (72) 1872 Rat 61 (61) *Reg v Pandurang* (Case under Code of 1861 — Section applies to final orders passed)

CHAPTER XXVII

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION

374.* When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court

Sentence of death
to be submitted by
Court of Session

1 Scope and object — The Legislature has provided in the confirmation proceedings a final safeguard of the life and liberty of the subject in cases of capital sentences. The High Court has been given wide powers under this chapter in order to prevent any possible miscarriage of justice¹. Similar reference is also provided under special laws in the case of sentences of death passed thereunder².

References for confirmation can be made only in cases of sentences of death³.

The records transmitted to the High Court in a confirmation case must be complete⁴.

As to the time within which reference should be made see the undermentioned case⁵.

The section does not make it a condition precedent to the confirmation of a death sentence that the proceedings shall be submitted by the Court of Session. If it is brought to the notice of the High Court that the Sessions Judge had omitted to send the record for confirmation the High Court can in the exercise of its powers of revision call for the record and deal with it according to law⁶. See also S 439 and Notes thereon.

375.† (i) If when such proceedings are submitted the High Court

thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session

* 1882 S 374, 1872 S 287, para 1 1861 S 380

† 1832 S 375, 1872 S 289, 1861 S 400

Section 374 — Note I

1 (21) 8 AIR 1921 Sind 84 (85-89) 23 Cr L Jour 33 15 Sind L R 103 (FB) *Gul v Emperor*

(95) 1895 Rat 806 (914) *Queen Empress v Kallappa*

2 (44) 31 AIR 1944 FC 1 (12-13) 1944 FCR 61 ILR (1944) Nag 300 23 Pat 159 ILR (1944) Kar 8 45 Cr L Jour 413 211 Ind Cas 56 (FC) *Piars Dusadh v Emperor* (Death sentence passed by Special Court under Special Criminal Courts Ordinance 2 [II] of 1942 — Case has to be reviewed by a review Judge under S 8 (a) compulsorily and automatically — Ordinance 19 of 1943 coming into force thereby repealing Ordinance 2 [II] of 1942 — Judge passing the sentence or the Sessions Judge for the time being can still refer it for confirmation on High Court under Chap XXVII Cr P C)

(44) 31 AIR 1944 Sind 83 (85) 45 Cr L Jour 598 212 Ind Cas 352 (FB) *Parcho Kewalram v Emperor* (Death sentence passed by Special Judge under Ordinance 2 of 1942—S 3 (1) of Special Criminal Courts (Repeal) Ordinance makes it incumbent on High Court to consider confirmation of death sentence in the same way as it should consider the confirmation of a death sentence passed by a Sessions Judge under the Criminal Procedure Code)

v Emperor (See S 3 (2) Bengal

) *Monoranjan Bhattacharyya v*

Emperor (Do)

3

from such sentence}}

Also see S 376 Note I

4 (71) 15 Suth W R Cr 16 (17) *In re Gopal Hajjam* (The record of the defence set up in the Sessions Court was wanting in this reference.)

5 (84) 7 Mad II C R App xxi (xxi)

6 (44) 31 AIR 1944 Sind 83 (85) 45 Cr L Jour 593 212 IC 352 (FB), *Parcho Kewalram v Emperor*

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court

Synopsis

- | | |
|-----------------------|---------------------------|
| 1 Further enquiry | 3 Presence of the accused |
| 2 Additional evidence | 4. Appeal |

NOTE to the Synopsis See the Notes indicated for the following topics

- | | |
|--|---|
| Comparison with S 423 See Note 2 | Further enquiry—Additional evidence not needed See Note 1 |
| Confession tutored by Magistrate—Examination of Magistrate directed See Note 1 | Insanity of accused — Direction for medical observation and report See Note 1 |
| Confession wrongly rejected by Sessions Court See Note 2 | Reference to prior statements to police See Note 2 |

1 Further enquiry — If on the reference under S 374, the High Court thinks that a further enquiry is to be made, or additional evidence is to be taken regarding the guilt or innocence of the accused, it may make such further enquiry, or take such additional evidence itself, or direct the Court of Session to do so. Further enquiry would ordinarily be ordered, when there is any defect in the procedure adopted in the Court of Session. Thus, where the question was, if the accused was insane at the time he committed the murder of his wife and where there was evidence that the accused spoke like an insane man on the day previous to the murder, and there was no evidence of any reasonable or probable cause for any jealousy on his part by reason of any evil conduct on the part of his wife, and the assessors found that the accused was not of sound mind, the High Court held that it was a "defect of enquiry" not to have placed the accused under medical observation. The High Court consequently directed the Court of Session to place the convicted person under medical observation for a month, and then forward the case to them, with the evidence of the medical officer and opinion of the Sessions Judge¹. Where again the prisoner was convicted on the sole evidence of his confession, which he alleged had been tutored by the Magistrate who recorded it, the High Court directed the examination of that Magistrate on the question of the alleged tutoring². The words "further enquiry should be made into or additional evidence taken upon" show that "further enquiry" does not always involve the taking of additional evidence. "Further enquiry" also includes the consideration of the evidence already taken³.

2 Additional evidence — Additional evidence will be directed to be taken or taken by the High Court itself when such evidence has been improperly rejected by the Court of Session as in the case of a confession wrongly rejected,¹ or when the evidence already on record is insufficient for arriving at a proper decision. Thus when the evidence as to the prisoner's state of mind was insufficient additional evidence was called for².

Where during the course of the trial, the accused applied to be allowed to call for certain evidence material to his defence, and the Court of Session improperly refused to

Section 375 — Note 1

- 1 (1864) 1 South W R Cr 1 (1) *Queen v Sherif Mustafa*
 2 (95) 19 Bom 195 (199) *Empress v Pahuji*
 3 (91) 14 Mad 334 (337, 341) 1 Mad L Jour 343 2 Weir 557 (FB) *Queen Empress v Dalasim-natambi* (Case under S 436)
 [See also (88) 15 Cal 608 (620, 621) (FB), *Hari Das Sanyal v Sarvulla* (Do)]
 Also see S 436 Note 8

Note 2

- 1 (01) 25 Bom 168 (174) 2 Dom L R 761, *Queen Empress v. Basavanta*
 2 (86) 1886 Rat 229 (236 237), *Queen-Empress v Nepal*

grant his application the High Court permitted him under this section to produce such evidence³

Under this section additional evidence can be taken on any point bearing on the guilt or innocence of the accused while under S 428 additional evidence can be taken whenever the appellate Court thinks it necessary. Thus under S 428 an appellate Court may test the value of a statement made by a defence witness by taking additional evidence in appeal⁴ while under this section testimony of witnesses cannot be tested by admitting additional evidence. Thus the High Court cannot refer to the earlier statements made by the witnesses to the police with a view to discredit such witnesses⁵

Where the circumstances called for the re opening of the whole case owing to a grave irregularity in procedure it was held that the proper course was to set aside the conviction and order a re trial instead of directing additional evidence to be taken under this section⁶

3 Presence of the accused—The presence of the accused could be dispensed with when the High Court is recording additional evidence¹

4 Appeal—Where on a reference the High Court had pronounced its decision it was held that the accused had no further right of appeal though at the time of reference he could have preferred an appeal¹

Power of High Court **376.*** In any case submitted under section 374, to confirm sentence or whether tried with the aid of assessors or by jury, the annul conviction **High Court**—

(a) may confirm the sentence, or pass any other sentence warranted by law, or

* Code of 1882 S 376—Same

Code of 1872 S 288

288 In any case so referred whether tried with assessors or by jury the High Court may either confirm the sentence or pass any other sentence warranted by law or may annul the conviction and order a new trial on the same or an amended charge or may acquit the accused person

Code of 1861 S 399

399 In any case so referred the Sudder Court may either confirm the sentence or pass any other sentence warranted by law or may annul the conviction and order a new trial on the same or an amended charge. If the case shall have been tried by the Court of Session with the aid of assessors it shall further be competent to the Sudder Court to acquit the accused person and order his discharge

3 (11) 12 Cri L Jour 412 (420) 11 Ind Cas 596 (Lah) *Bhagwan Kaur v Crown*
(25) 12 AIR 1925 Mad 106 (109) 25 Cri L Jour 401 *In re Narayana Menon*
4 (28) 15 AIR 1928 Mad 1174 (1175) 30 Cri L Jour 133 *Subramania Iyer v Emperor*
(25) 12 AIR 1925 Mad 106 (109) 25 Cri L Jour 401 *In re Narayana Menon*
5 (17) 4 AIR 1917 P O 25 (29) 44 Cal 876 18 Cri L Jour 471 44 Ind App 137 13 Nag L R 100 (PC) *Dal Singh v Emperor*
[See however (43) 30 AIR 1943 Cal 521 (527) 1 I L R (1943) 1 Cal 543 45 Cri L Jour 99 209 Ind Cas 206 *Emperor v Lal Ma* (Where in a case in which there is a reference under S 374 and also an appeal by the accused the Sessions Judge in his letter of reference brings to the notice of the High Court that certain valuable materials such as statements to police which did not implicate the name of the accused which could and should have been put in evidence in favour of the accused were

Note 3

1 (06) S All L Jour 1174 *Sheo Achal Singh v Emperor*

Note 4

1 (67) 1867 Pun Re No 33 Cr p 55 (55) *Crown v Soojun Singh*.

Also see S 410 Note 1

(b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him or order a new trial on the same or an amended charge or

(c) may acquit the accused person

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired or if an appeal is presented within such period, until such appeal is disposed of

Synopsis

- | | |
|----------------------------|--------------------------------------|
| 1 Scope | 4 May annul the conviction |
| 2 May confirm the sentence | 5 Convict the accused of any offence |
| 3 Commutation of sentence | 6 New trial |

NOTE to the Synopsis See the notes indicated for the following topics

- | | |
|--|--|
| Age or sex—Reduction of sentence See Note 2 | Judge's summary up enforcing his own view—Retrial See Note 6 |
| Circumstantial evidence—Death sentence—Or transportation for life See Note 2 | Jury verdict—High Court's power See Notes 1 and 4 |
| Compared with Ss 423 and 418 See Note 1 | Non-compliance with S 297—Retrial See Note 6 |
| Compared with Ss 374 See Note 1 | Physical condition of convict See Note 3 |
| Conviction annulment and acquittal See Note 4 | Proof of motive See Note 2 |
| Dead body not found—Lesser sentence See Note 3 | Reduction of sentence See Note 3 |
| Delay—No confirmation of death sentence See Notes 2 and 3 | Several convictions for one offence—No ground for commutation See Note 3 |
| Doubt as to part taken by accused—Lesser sentence See Note 3 | Section 84 Penal Code See Note 3 |
| Insufficient grounds for refusal of confirmation See Note 2 | Wrong and improper—Sentence not confirmed. See Note 2 |

1 Scope—In dealing with an appeal the High Court cannot interfere with the verdict of the jury unless such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by the Judge. But in the case of a reference under S 374 the powers of the High Court are not so limited and it is open to the High Court to go into the facts and to come to the conclusion that the finding of the jury is an unsafe finding or is not justified by the evidence on record.¹ The High Court is thus empowered in such cases to substitute its own finding in the place of the verdict of the jury even though the verdict is unanimous.² There seems to be no

Section 376—Note 1

- 1 (45) 32 AIR 1945 Lah 105 (113) 1 L R (1945) Lah 290 47 Cr L Jour 4 220 Ind Cas 467 (FB) *Abdul Rahim v Emperor*
 (37) 24 AIR 1937 Snd 162 (164) 33 Cr L Jour 808 31 Snd L R 82 *Khadin v Emperor* (Section 376 is to be read with S 418 (2))
 (36) 23 AIR 1936 Cal 73 (83) 37 Cr L Jour 394 63 Cal 999 *Benoyendra v Emperor*
 (31) 18 AIR 1931 Cal 178 (183) 32 Cr L Jour 190 (FB) *Emperor v Panchu Shaukh*
 (27) 14 AIR 1927 Cal 631 (633) 28 Cr L Jour 710 *Emperor v Rajab Ali Fakir* (Entire case is open to the High Court)
 (21) 8 AIR 1921 Snd 84 (87 88) 15 Snd L R 103 23 Cr L Jour 33 (FB) *Gul v Emperor*
 (32) 19 AIR 1932 Pat 307 (302) 34 Cr L Jour 83 *Emperor v Rash Belari Lal*
 (98) 2 Cal W N 49 (50) *Queen Empress v Chattrajari Goala* (Some accused sentenced to death and "and

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Also see S 418 Note 4

- 2 (46) 48 Bom L R 163 (170) (DB) *Emperor v Narhari Gaspal* (Reference under S 374—Whole case is reopened and High Court is bound to go into facts as well as law even though conviction is based on unanimous verdict—AIR 1915 Bom 243 16 Cr L Jour 818 approved)
 (15) 15 AIR 1915 Bom 243 (244) 16 Cr L Jour 818 *Daji Yesaba v Emperor* (In cases of references under S 374 Bombay High Court's practice is to re-open the case both on facts and law—Per Batchelor J)
 (21) 8 AIR 1921 Snd 84 (87 88) 15 Snd L R 103 23 Cr L Jour 33 (FB) *Gul v Emperor*

statutory limit to the power of the High Court in this behalf. The whole broad question of the guilt or innocence of the accused is before the High Court and not merely the question of law as to evidence as in an appeal under S 418 or questions of misdirection by the Judge or of misunderstanding on the part of the jury as under S 423 (2).³ As a matter of fact it has been held that in the case of a reference under S 374 the question of misdirection is not of much importance as the High Court is obliged to come to its own independent conclusion as to the guilt or innocence of the accused independently of the verdict of the jury or even of the opinion of the Judge.⁴ Indeed the Legislature has provided in a reference under S 374 a final safeguard analogous to the functions of the Home Office in England and has laid this duty on the High Court.⁵ Of course the High Court has got this power only in cases where the sentence of death has been passed.⁶

But the High Court will act with great circumspection before it sets aside the verdict of the jury. It will generally interfere where the evidence which might have materially affected the finding has been improperly rejected or admitted or where the jury were improperly charged or where they misunderstood the trial Judge's directions or where the proved facts are wholly insufficient to support their verdict.⁷

The section empowers the High Court to confirm the sentence only after the disposal of appeal if any by the accused. Thus the power conferred on a High Court under this section is subject to the result of appeal under S 418. If the appeal itself succeeds on its own grounds its result should not be allowed to be affected by the exercise of any power conferred on the High Court by ss 374 to 376. In such a case it has been held that it is not open to the High Court to convict the accused on its own appreciation of facts. An order of retrial by the jury is the only course left to the High Court if it does not acquit or discharge the accused.⁸ But it has been held that in an appeal under S 440 in a case tried by a jury under Chapter XXXIII the High Court on finding instances of misdirection or non-direction of jury in the lower Court or that inadmissible evidence has been admitted by such Court is not bound to order a retrial but may maintain the conviction if on its own appreciation of the evidence after excluding the inadmissible part of it it considers the guilt of the accused as established.¹⁰

2 May confirm the sentence — Before the High Court confirms the sentence of death it will see if the verdict of the jury is supported by the evidence on record¹ and is right on the facts before it.² As a matter of fact the death sentence will not be

- 3 (21) 8 AIR 1921 Sind 84 (88) 15 Snd LR 103 23 Cri L Jour 33 (FB) *Gul v Emperor*
 4 (34) 25 AIR 1938 Cal 6 (10) 39 Cri L Jour 308 *Emperor v Durga Charan Sing*
 (36) 23 AIR 1936 Cal 73 (83) 37 Cri L Jour 394 63 Cal 929 *Benoyendra Chandra v Emperor*
 (It should however attach greatest possible weight to verdict of jury if answering reasonable test)
 (28) 15 AIR 1928 Cal 490 (432) 29 Cr L Jour 515 *Hazrat Gul Khan v Emperor*
 5 (21) 8 AIR 1921 Sind 84 (89) 15 Sind LR 103 23 Cri L Jour 33 (FB) *Gul v Emperor*
 6 (73) 5 N W P H C R 130 (132) *Queen v Aman*
 Also see S 374 Note 1
 7 (38) 25 AIR 1938 Cal 220 (221) 39 Cri L Jour 541 *Kumarash Chandra v Emperor* (Unanimous verdict of jury — High Court reluctant to interfere)
 (36) 23 AIR 1936 Cal 73 (83) 37 Cri L Jour 394 63 Cal 929 *Benoyendra v Emperor*
 8 (21) 8 AIR 1921 Sind 84 (88) 15 Sind LR 103 23 Cri L Jour 33 (FB) *Gul v Emperor*
 9 (40) 29 AIR 1942 Cal 574 (527) 43 Cri L Jour 860 90 Ind Cas 604 (DB) *Emperor v Nasibulla* (Obiter)
 10 (45) 32 AIR 1945 Lah 105 (128) 1 L R (1945) Lah 290 47 Cri L Jour 4 220 Ind Cas 467 (FB), *Abdul Rahim v Emperor*

Note 2

- 1 (26) 27 Cri L Jour 378 (379) 90 Ind Cas 890 (Cal) *Arshed Ali v Emperor*
 (26) 13 AIR 1926 Nag 368 (370) 27 Cri L Jour 731 *Dadi Lodhi v Emperor*
 2 (24) 11 AIR 1924 Cal 625 (628) 26 Cri L Jour 5 *Hassanulla Sheikh v Emperor*
 (86) 1886 Rat 200 (230) *Queen Empress v Nepal* (It is the duty of the High Court to examine the facts of the case and consider the circumstances if any in favour of the accused to see whether they tend to acquittal or commutation of capital sentence)

- (b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or
- (c) may acquit the accused person

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of

Synopsis

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|----------------------------|--------------------------------------|
| 1 Scope | 4 May annul the conviction |
| 2 May confirm the sentence | 5 Convict the accused of any offence |
| 3 Commutation of sentence | 6 New trial |

NOTE to the Synopsis See the notes indicated for the following topics

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|--|---|
| Age or sex—Reduction of sentence See Note 2 | Judge's summing up enforcing his own view— |
| Circumstantial evidence—Death sentence—Or | Re-trial See Note 6 |
| transportation for life See Note 2 | Jury verdict—High Court's power See notes 1 |
| Compared with Ss 493 and 418 See Note 1 | and 4 |
| Compared with Ss 374 See Note 1 | Non-compliance with S 297—Re trial See note 6 |
| Conviction annulment and acquittal See Note 4 | Physical condition of convict See Note 3 |
| Dead body not found—Lesser sentence See Note 3 | Proof of motive See Note 2 |
| Delay—No confirmation of death sentence See | Reduction of sentence See Note 3 |
| Notes 2 and 3 | Several convicts for one murder—No ground for |
| Doubt as to part taken by accused—Lesser sen- | commutation See Note 3 |
| tence See Note 3 | Section 84 Penal Code See Note 3 |
| Insufficient grounds for refusal of confirmation | Wrong and improper—Sentence not confirmed |
| See Note 2 | See Note 2 |

1 Scope — In dealing with an appeal the High Court cannot interfere with the verdict of the jury unless such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by the Judge. But in the case of a reference under S 374 the powers of the High Court are not so limited and it is open to the High Court to go into the facts and to come to the conclusion that the finding of the jury is an unsafe finding or is not justified by the evidence on record¹. The High Court is thus empowered in such cases to substitute its own finding in the place of the verdict of the jury, even though the verdict is unanimous². There seems to be no

Section 376 — Note 1

- 1 (45) 32 AIR 1945 Lah 105 (113) 1 L R (1945) Lah 290 47 Cri L Jour 4 220 Ind Cas 467 (FB) *Abdul Rahim v Emperor*
- (37) 24 AIR 1937 Sind 162 (164) 38 Cri L Jour 808 31 Sind L R 82 *Khadim v Emperor* (Section 376 is to be read with S 418 (2))
- (36) 23 AIR 1936 Cal 73 (83) 37 Cri L Jour 394 63 Cal 999 *Benoyendra v Emperor*
- (31) 18 AIR 1931 Cal 178 (183) 37 Cri L Jour 190 (FB) *Emperor v Panchu Shaikh*
- (27) 14 AIR 1927 Cal 631 (633) 28 Cri L Jour 742 *Emperor v Rajab Ali Fakir* (Entire case is open to the High Court)
- (21) 8 AIR 1921 Sind 84 (87 88) 15 Sind L R 103 23 Cri L Jour 33 (FB) *Gul v Emperor*
- (32) 19 AIR 1932 Pat 302 (302) 34 Cri L Jour 83 *Emperor v Rash Behari Lal*
- (20) 20 AIR 1926 Pat 350 (350) 31 Pat L R 103 23 Pat L R 103 23 Pat L R 103 and

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Also see p 418 Note 4

- 2 (46) 49 Bom L R 163 (170) (DB) *Emperor v Narhari Ganpati* (Reference under S 374—Whole case is reopened and High Court is bound to go into facts as well as law even though conviction is based on unanimous verdict—AIR 1915 Bom 243 16 Cri L Jour 818 approved)
- (15) 2 AIR 1915 Bom 213 (244) 16 Cri L Jour 818 *Daji Yesaba v Emperor* (In cases of references under S 374, Bombay High Court's practice is to re-open the case both on facts and law—Per Batchelor J)
- (21) 8 AIR 1921 Sind 84 (87, 88) 15 Sind L R 103 23 Cri L Jour 33 (FB) *Gul v Emperor*

statutory limit to the power of the High Court in this behalf. The whole broad question of the guilt or innocence of the accused is before the High Court and not merely the question of law as to evidence as in an appeal under s 418 or questions of misdirection by the Judge or of misunderstanding on the part of the jury as under s 423 (2).³ As a matter of fact it has been held that in the case of a reference under s 374 the question of misdirection is not of much importance as the High Court is obliged to come to its own independent conclusion as to the guilt or innocence of the accused independently of the verdict of the jury or even of the opinion of the Judge.⁴ Indeed the Legislature has provided in a reference under s 374 a final safeguard analogous to the functions of the Home Office in England and has laid this duty on the High Court.⁵ Of course the High Court has got this power only in cases where the sentence of death has been passed.⁶

But the High Court will act with great circumspection before it sets aside the verdict of the jury. It will generally interfere where the evidence which might have materially affected the finding has been improperly rejected or admitted or where the jury were improperly charged or where they misunderstood the trial Judge's directions, or where the proved facts are wholly insufficient to support their verdict.⁸

The section empowers the High Court to confirm the sentence only after the disposal of appeal if any by the accused. Thus the power conferred on a High Court under this section is subject to the result of appeal under s 418. If the appeal itself succeeds on its own grounds its result should not be allowed to be affected by the exercise of any power conferred on the High Court by ss 374 to 376. In such a case it has been held that it is not open to the High Court to convict the accused on its own appreciation of facts. An order of retrial by the jury is the only course left to the High Court if it does not acquit or discharge the accused.⁹ But it has been held that in an appeal under s 440 in a case tried by a jury under chapter XXXIII the High Court on finding instances of misdirection or non-direction of jury in the lower Court or that inadmissible evidence has been admitted by such Court is not bound to order a retrial but may maintain the conviction if on its own appreciation of the evidence after excluding the inadmissible part of it, it considers the guilt of the accused as established.¹⁰

2 May confirm the sentence — Before the High Court confirms the sentence of death it will see if the verdict of the jury is supported by the evidence on record¹ and is right on the facts before it.² As a matter of fact the death sentence will not be

- 3 (21) 8 AIR 1921 Sind 84 (88) 15 Sind L R 103 23 Cri L Jour 33 (FB) *Gul v Emperor*
 4 (38) 25 AIR 1938 Cal 6 (10) 39 Cri L Jour 308 *Emperor v Durga Charan Sing*
 (36) 23 AIR 1936 Cal 73 (83) 37 Cri L Jour 394 63 Cal 929 *Benoyendra Chandra v Emperor*
 (It should however attach greatest possible weight to verdict of jury if answering reasonable test)
 (28) 15 AIR 1928 Cal 430 (432) 29 Cri L Jour 516 *Hasrat Gul Khan v Emperor*
 5 (21) 8 AIR 1921 Sind 84 (89) 15 Sind L R 103 23 Cri L Jour 33 (FB) *Gul v Emperor*
 6 (73) 5 N W P H C R 130 (132) *Queen v Aman*
 Also see S 374 Note 1
 7 (38) 25 AIR 1938 Cal 220 (221) 39 Cri L Jour 541 *Kumarish Chandra v Emperor* (Unanimous verdict of jury — High Court reluctant to interfere)
 (36) 23 AIR 1936 Cal 73 (83) 37 Cri L Jour 394 63 Cal 929 *Benoyendra v Emperor*
 8 (21) 8 AIR 1921 Sind 84 (88) 15 Sind L R 103 23 Cri L Jour 33 (FB) *Gul v Emperor*
 9 (42) 29 AIR 1942 Cal 524 (527) 43 Cri L Jour 860 20 Ind Cas 604 (DB), *Emperor v Naibulla* (Obiter)
 10 (45) 32 AIR 1945 Lah 105 (123) 1 I L R (1945) Lah 290 47 Cri L Jour 4 220 Ind Cas 467 (FB), *Abdul Rahim v Emperor*

Note 2

- 1 (26) 27 Cri L Jour 378 (379) 92 Ind Cas 890 (Cal) *Arshed Ali v Emperor*
 (26) 13 AIR 1906 Nag 368 (370) 27 Cri L Jour 731 *Dadi Lodhi v Emperor*
 2 (24) 11 AIR 1924 Cal 625 (628) 26 Cri L Jour 5 *Hassanulla Sheikh v Emperor*
 (86) 1886 Rat 229 (230) *Queen Empress v Nepal* (It is the duty of the High Court to examine the facts of the case and consider the circumstances if any in favour of the accused to see whether they tend to acquittal or commutation of capital sentence)

confirmed unless the High Court feels completely satisfied about the guilt of the accused even though the trial has been with the aid of a jury. In confirming the sentence the High Court should scrutinise the evidence and see whether the verdict of the jury is perverse whether the evidence has been improperly excluded or improperly admitted and whether the trial Judge has properly directed the jury on the points of decision and has pointed out to them how far those points in his opinion are established or not by admissible and relevant evidence and has otherwise directed the jury properly.³ Where inadmissible evidence has been admitted in a jury trial under Chap XXXIII the High Court may in appeal after excluding the inadmissible evidence maintain the conviction provided the admissible evidence remaining on record clearly establishes the guilt of the accused and is not bound to order a re trial.⁴

Where the evidence is totally *circumstantial* some Judges have been averse to confirming the sentence of death and have commuted it to one of transportation for life.⁵ There is however no rule of law that where the evidence is wholly circumstantial death sentence should not be awarded.⁶ In the undermentioned case⁷ where the evidence was entirely circumstantial and the accused was a young man of nineteen years the sentence of transportation for life awarded by the Sessions Judge was not enhanced to one of death.

There seems to be some difference of opinion on the question if the age or sex of the accused can of itself be a sufficient reason for reducing the sentence. It may however be safely said that the age of the accused is a fact which might well be taken into consideration and has been in fact taken into consideration in determining the sentence to be passed in cases of murder.⁸

- 3 (21) 8 AIR 1921 Snd 84 (86) 15 Snd L R 103 23 Cri L Jour 83 (FB) *G I v Emperor*
 (22) 9 AIR 1922 Cal 124 (127) 23 Cr L Jour 567 *Emperor v Durga Charan* (Misdirection in the charge to the jury causing failure of justice — Verdict of murder and sentence of death set aside)
 4 See (45) 82 AIR 1945 Lah 105 (123) 1 L R (1945) Lah 290 47 Cr L Jour 4 290 Ind Cas 487 (FB) *Abdul Rahim v Emperor* (Jury trial under Chap xxx — Accused sentenced to death — Inadmissible evidence admitted before jury — Reference under S 374 and appeal under S 419 — High Court may after excluding inadmissible evidence maintain conviction if remaining evidence clearly establishes guilt of accused)
 5 (36) 23 AIR 1936 Cal 78 (80) 27 Cri L Jour 394 63 Cal 929 *Benoyendra v Emperor*
 (90) 13 Mad 426 (436) 1 Weir 290 *Empress v Sami*

or]

- (15) 2 AIR 1915 Mad 821 (824) 16 Cri L Jour 70 *In re Rasammal* (Accused woman of 60 years — Evidence circumstantial — Sentence of transportation for life enhanced to death sentence)
 7 (15) 2 AIR 1915 Mad 542 (543 544) 10 Cr L Jour 28 *Misra v Emperor*
 8 (37) 1937 Mad WN 728 (728) *Sankaran Nayar v Emperor* (Old age is a point to be taken into consideration in awarding sentence on the accused but in itself is not sufficient for not awarding the death penalty)

used death

- not wholly deliberate or cold blooded — Sudden provocation — Lesser sentence to be passed)
 (16) 5 AIR 1918 Low Bur 59 (59) 9 Low Bur Rul 165 19 Cri L Jour 648 *Chit Tia v Emperor* (Ordinary youth is in itself an extenuating circumstance except in cases of extreme depravity)
 (28) 15 AIR 1923 Nag 108 (111) 29 Cri L Jour 400 *Sheobalak Prasad v Emperor* (That the age of

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Emperor (Where a young girl was ill treating her the Court

sentenced her to transportation for life)

- (28) 15 AIR 1923 Lah 805 (856) 29 Cri L Jour 692 *Harnamun v Emperor* (Youthful accused mere tool in the hands of third persons — Death sentence not called for)

One view is that the age or sex of the accused is not of itself a sufficient reason for awarding the lesser sentence* 'If there are other reasons which very nearly justify the passing of the lesser sentence but do not quite do so or when it is doubtful whether they do so or not, then the youth or sex of the criminal may certainly tip the scale to the side of mercy.'¹⁰ This view has been dissented from in the undermentioned cases¹¹

See also Section 27, Note 14.

(29) 16 AIR 1922 Lah 64 (66) 30 Cri L Jour 63 *Thakar Singh v Emperor* (Age of discretion not attained — Death penalty not to be given)

(31) 18 AIR 1931 Lah 177 (178) 32 Cri L Jour 642 *Mohan Lal v Emperor* (Extreme youth is sufficient reason for not hanging a murderer)

(33) 20 AIR 1933 Rang 134 (136) 34 Cri L Jour 835 *M. Hein v Emperor* (Murder by youth of

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(Accused being woman not conclusive reason for not awarding death penalty)

(40) 27 AIR 1940 Mad 710 (716) 1 L R (1940) Mad 254 43 Cri L Jour 582 194 Ind Cas 527, *In re Chenna Reddi*.

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The following cases deal with the question of age in respect of sentence for the offence of murder
(33) 20 AIR 1933 Cal 1 (2-3) 33 Cri L Jour 837 (7D), *Prodhot Kumar v Emperor* (Age is a circumstance to be taken into consideration along with other facts)

(28) 29 Cri L Jour 540 (541) 109 Ind Cas 364 (Lah), *Imam v Emperor* (Murder of a very brutal nature by a youth — Death sentence confirmed.)

(23) 29 Cri L Jour 211 (212) 107 Ind Cas 99 (Lah) *Muhammad Sultan v Emperor* (In case of brutal and ruthless crime the fact that the murderer is 18 years of age is wholly insufficient reason for not

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(33) 20 AIR 1933 Lah 305 (306) 34 Cri L Jour 720 *Hari Kishan v Emperor* (Youth led astray by

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(28) 15 AIR 1928 Lah 655 (656) 29 Cri L Jour 682, *Harnamun v Emperor*

(31) 18 AIR 1931 Lah 536 (537) 32 Cri L Jour 645 *Sikandar v Emperor* (Youth not necessarily sufficient ground for reducing sentence — But youth possibly influenced by elder associates — Sentence reduced.)

[See (15) 2 AIR 1915 Lah 237 (239) 16 Cr L J 167, *Wadhawa Singh v Emperor* (Held that the accused was guilty of a foul murder which in spite of his youth called for the extreme penalty of the law)]

10 (22) 9 AIR 1922 Nag 65 (66) 22 Cri L Jour 757 18 Nag L R 101 *Kacharia v Emperor*

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however says in the case of an ordinary murder the delay in confirming a sentence of death may perhaps be taken into consideration.⁷ Where an accused was once sentenced to death but the High Court quashed the conviction on the ground of want of territorial jurisdiction and the accused was for a second time sentenced to death by a Court of competent jurisdiction the High Court of Lahore commuted the sentence of death to one of transportation for life on the ground that the second trial was for an offence committed four and a half years ago.⁸ See also the unmentioned decision of the Federal Court.⁹

Where murder is committed under *grave provocation* but not under grave and sudden provocation the accused will not be free from legal responsibility for murder, yet the High Court in such a case will commute the sentence of death to one of transportation for life.¹⁰ An accused killed his brother-in-law a lad of eight years under the belief that the deceased was helping in the infidelity of his wife. Yet the murder not having been committed under the immediate influence of provocation induced by that belief the High Court of Calcutta¹¹ confirmed the sentence of transportation for life but expressed the view that the Government might consider the question of reduction of sentence.

Where the accused at the time of the murder was suffering from mental derangement of some sort but was not by reason of such unsoundness of mind incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law, it was held that he was entitled to every indulgent consideration though guilty of murder.¹² Thus where, because they cried and vexed him the accused killed his own

7 (30) 17 AIR 1930 Sind 225 (244) 31 Cr L Jour 1026 *Mohammad Yusuf v Emperor*

8 (26) 13 AIR 1916 Lah 590 (594) 7 Lah 396 27 Cr L Jour 1169 *Dula Singh v Emperor*

9 (44) 31 AIR 1941 F C 1 (14) 1941 F C R 61 1LR (1941) Nag 300 23 Pat 153 1LR (1944) Kar 8 43 Cr L Jour 413 211 Ind Cas 506 (FC) *Piara Dasadh v Emperor* (The Federal Court has power where there has been inordinate delay in executing death sentences in cases which come before it to allow the appeal in so far as death sentence is concerned and substitute a sentence of transportation for life on account of the time factor alone however right the death sentence was at that time when it was originally imposed)

10 (16) 8 AIR 1916 Oudh 138 (138) 17 Cr L Jour 190 *Puran v Emperor*

(39) 19 AIR 1932 Lah 369 (370) 33 Cr L Jour 339, *Abdulla v Emperor* (Grave provocation sufficient to justify lesser penalty)

(23) 10 AIR 1923 Lah 408 (409) 25 Cr L Jour 298 *Parloba v Emperor* (Requirement as to grave and sudden provocation not satisfied — But accused having lost his temper and in view of his youth sentence reduced to transportation for life)

(33) 20 AIR 1933 All 533 (535) 35 Cr L Jour 232 *Sheo Dharan Singh v Emperor* (Accused having illicit connection with deceased for 11 years—Deceased changing paramour—Provocation held sufficient to commute sentence to one of transportation for life)

(16) 3 AIR 1916 Mad 833 (833) 16 Cr L Jour 611 *In re Krishno Kariko* (A provocation though insufficient to bring the case within except on to S 306 Penal Code may still be sufficient for the reduction of sentence)

(66) 1866 Pun Re No 105 Cr p 103 (104) *Crown v Soularoo* (Want of premeditation absence of deadly weapon and a violent altercation on which made him excessively angry between the accused and the deceased his wife whose death was caused, were held to be good grounds for the Court commuting the sentence of death into one of transportation for life)

[See (20) 7 AIR 1920 All 199 (200) 21 Cr L Jour 607, *Goshain v Emperor* (Deciding factor between murder and culpable homicide is suddenness of provocation)

(32) 19 AIR 1932 Lah 302 (303) 33 Cr L Jour 577, *Hars Singh v Emperor* (Provocation though not sufficient to reduce guilt of accused to offence under S 304 held sufficient ground for not sentencing him to death)]

[See also (32) 19 AIR 1932 Lah 438 (440) 34 Cr L Jour 94 *Jamma Fateh Mohamad v Emperor* (Mother with young daughter behaving shamelessly in running away with her paramour — Paramour suspected and killed — Provocation held not to be grave and sudden in spite of pangs of shame and humiliation—Death sentence confirmed)

(30) 17 AIR 1930 Mad 972 (973) 53 Mad 661 32 Cr L Jour 261 *Kolanda Nayakan v Emperor* (Where the murder by a juvenile was not wholly deliberate or cold blooded and there was some legitimate provocation rankling in his mind lesser sentence was passed)]

11 (61) 28 Cal 613 (620) 5 Cal W N 665 *Ghatu Pramank v Emperor*

12 (96) 23 Cal 604 (609), *Queen Empress v Kadar Nayer Shah*

children of whom he was very fond, at a time when he was suffering from fever and was consequently irritable and sensitive to sound, it was held that he was guilty of murder and that the sentence of transportation for life would satisfy the ends of justice¹³ Similarly where the medical opinion was that the murder was perhaps committed in *post febrile* lunacy under the foolish belief that some one had done an injury to the accused, the sentence of death was commuted¹⁴

Akin to these is the case where a person who is not suffering from any mental derangement brought about by provocation or disease, commits a murder in the honest and strong belief, though superstitious, "absurd and unfounded," that witchcraft was practised upon his wife or children as a result of which they took ill, and that it is only the murder of the supposed witch that will cure them. In such cases it cannot be said that the accused was by reason of unsoundness of mind incapable of knowing what he was doing was wrong, or contrary to law. They are cases of deliberate and intentional murder. But such belief is to be taken into account and some distinction should be made "between such cases as these and cases in which deliberate murder has been committed from *base motives*." The distinction that is made is in the sentence passed and the death sentence will be commuted to one of transportation for life¹⁵

Where the dead body has not been found, some Judges have awarded the lesser sentence "As the body was not actually found, we think the Judge exercised a proper discretion in not passing the sentence of death," said their Lordships in *Queen v Budduruddeen*¹⁶ In the undermentioned case¹⁷ the Allahabad High Court altered a conviction under s 302 into one under s 307 of the Penal Code on the ground that the dead body not having been recovered, the fact of death was not proved beyond doubt. In a later case decided by the same High Court where the corpse was not found and the fact of death was proved by the retracted confession of the accused and by no other substantial evidence Mukerji, J., was for commutation, while the other two learned Judges were for confirmation of the sentence of death¹⁸

Where the evidence was enough to convict the accused of murder, yet there was doubt as to the precise part taken by the accused in the murder, it was thought "safer" to remit the capital sentence and pass one of transportation for life¹⁹ But the guilt of an

(31) 1931 Mad W N 719 (723), *Narayanawamy v Emperor* (Accused not insane, but committing murder when said to have been possessed and inspired by God and whirling round — Death sentence reduced to transportation for life)

— — — — — *Ida v Emperor* (Mental unbalance though justifying reduction of sentence)
 — — — — — *peror v Pancha* (Accused, a person of weak intellect subject to fits and not possessed of a normal mind committing murder — Sentence reduced to transportation for life)

— — — — — (Accused)

— — — — — *peror*
 — — — — — *Accused*
 — — — — — *ting the*

— — — — — *mperor*
 — — — — — *murders*

13. (85) 10 Bom 512 (516), *Queen Empress v Lakshman Dagdu*

14. (89) 12 Mad 459 (461) • 1 Weir 42, *Queen Empress v Venkataswami*

accused cannot be considered greater than that of his accomplices merely because he has struck the fatal blow or blows²⁰

Where the condition of the convict was such that if he were hanged decapitation would ensue owing to an aperture in the neck communicating with the larynx, the High Court commuted the sentence of death into one of transportation for life²¹. Lapse of time between commission of an offence and arrest of the accused does not entitle him to a lesser sentence, although it may be taken into account in fixing the appropriate sentence²²

See also the undermentioned cases²³

20 (66) 1866 Pun Be No 3 Cr p 4 (5) *Crown v Dittloo* (Sentence of death passed against the accused commuted to one of transportation for life)

21 (78) 2 Cal L Rep 215 (216) *In re Boodhoo Jolaha*

22 (37) 1937 Mad W N 571 (571) *Narasimhaya v Emperor*

23 (45) 48 Bom L R 163 (170) (DB), *Emperor v Narhar Gangali* (Accused under influence of liquor committing murder with hardly any premeditation — Sentence of death reduced to one for transportation)

(38) 25 AIR 1938 Rang 448 (448) 40 Cri L Jour 67, *Nga Po Than v The King* (Crime committed in a state of drunkenness, as result of provocation — Although provocation is very slight, sentence of death should not be passed — Sentence reduced to one of transportation for life)

(37) 1937 Mad W N 571 (571, 572), *Narasimhaya v Emperor*. (Where the deceased accused's wife was a termagant and there were constant quarrels between the deceased and the accused and the murder took place during one such quarrel without premeditation, death sentence was reduced to transportation for life)

(35) 22 AIR 1935 Cal 591 (595) 36 Cri L Jour 1254, *Mominuddi v. Emperor* (Accused overcome getting into offence into

cient punish-

ment where murder is unpremeditated)

(66) 5 Suth W R Cr 20 (20), *Queen v Khoas Shesh* (No intention to cause death but merely a reckless assault with a deadly weapon — Sentence reduced.)

(66) 5 Suth W R Cr 46 (47), *Queen v Tanoo* (Murder committed in retaliation for an injury rather than under the influence of any worse passion — Death sentence commuted)

(27) 14 AIR 1927 All 103 (106) 27 Cri L Jour 1392 *Abdul Alim v Emperor* (Where there has been some provocation and there is no premeditation, and the crime is committed in the heat of passion, sentence of transportation for life is enough)

(11) 12 Cri L Jour 214 (216) 10 Ind Cas 119 (Lab) *Rakhia v Emperor* (Misconduct of wife who was murdered for same — Sufficient doubt about the immediate circumstances under which the crime was committed — Death penalty not awarded)

(24) 11 AIR 1924 All 233 (251) 27 Cri L Jour 193, *Abdullah v Emperor* (Accused ignorant peasants guilty under Ss 149, 302 by misrepresentations made by one whom they believed was a worker of miracles — Lesser sentence is sufficient)

(39) 19 AIR 1930 Cal 818 (820) 39 Cri L Jour 722 (89) *Memonnawaz v Emperor* (The fact that a murder was committed in his desire to escape, when the offender a dacoit was being brought to bay is not an extenuating circumstance)

(28) 15 AIR 1928 Oudh 221 (223) 29 Cri L Jour 230, *Madaru v Emperor* (When a man rushes into a brawl with a heavy hatchet and sinks with all his force one of his neighbours, who is unable to defend himself, upon the head with the hatchet and kills him, then it is not a case for the exercise of clemency and capital sentence should not be reduced)

(14) 1 AIR 1914 Sind 136 (136) 7 Sind L R 118 15 Cri L Jour 501, *Emperor v Rahim Khan* (The so-called Baluch custom justifying murder for suspicion as to unchastity is no ground for mitigation of sentence)

(33) 20 AIR 1933 Rang 61 (61) 34 Cri L Jour 699, *Nga Sein Tun v Emperor*. (Dacoity — Death caused by one of the dacoits other than appellant — General disregard of human life not present — Sentence reduced)

Emperor (Brutal

re a woman in
circumstances

sufficient to reduce the penalty of death very much below transportation for life, so also father killing illegitimate child born of him to his own sister — Sentence of death commuted.)

4 May annul the conviction — The High Court will annul the conviction though the verdict of the jury was unanimous and there was no misdirection if the evidence is not enough to sustain a conviction for murder¹ Thus, where there were no eye witnesses to the murder, and there was a real doubt as to the identification of the accused and the retracted confession of the accused did not appear to be free and voluntary the High Court annulled the conviction and acquitted the accused² Where, again the sole evidence on which the conviction was based was the uncorroborated testimony of an accomplice, the conviction was annulled³ Similarly, where suspicion fell upon the accused on account of certain ill feeling between them and the deceased and the case depended solely

- (23) 10 AIR 1923 Nag 251 (254 255) 24 Cri L Jour 570 *Manjoo v Emperor* (Where appellant constituted himself a tribunal and decided that making a charge of paternity against him was an offence punishable with death and he carried out the sentence himself a sentence of death was confirmed as being proper one)
- (28) 15 AIR 1928 Lah 93 (94) 28 Cri L Jour 966 *Preman v Emperor* (Sudden and unpremeditated attack—Fatal blows inflicted in heat of passion upon a sudden quarrel—Lesser sentence awarded)
- (28) 15 AIR 1928 Lah 913 (914) 30 Cri L Jour 571, *Gaman v Emperor* (Murder occurring suddenly after mutual abuse—Accused not belonging to a turbulent class—Lesser sentence substituted.)
- (27) 14 AIR 1927 Lah 516 (518) 29 Cri L Jour 35 *Nihal Singh v Emperor* (Sudden quarrel—Elements of premeditation or preparation absent—Lesser sentence proper)
- (22) 23 Cri L Jour 140 (141) 65 Ind Cas 572 (573) (Lah) *Ghaji v Emperor* (Woman of depraved character — Refusal to allow husband to have sexual intercourse — Murder by husband — Lesser punishment awarded)
- (30) 17 AIR 1930 Lah 154 (155) 31 Cri L Jour 731 *Bhana Mal v Emperor* (Assault followed sudden quarrel without premeditation — Accused belonging to peaceful trading class — Extenuating circumstances—Death sentence commuted)
- (30) 17 AIR 1930 Lah 171 (172) 31 Cri L Jour 759 *Khanun v Emperor* (Murder of wife who continued intimacy with paramour in spite of repeated reprimands—Sentence commuted to transportation for life)
- (25) 12 AIR 1925 Lah 584 (586) 26 Cri L Jour 1133 *Gulab v Emperor* (Two accused—One striking blow — Other not striking but present and acting under the influence of former — Latter's sentence reduced to one of transportation for life)
- (62) 10 AIR 1932 Lah 500 (501) 33 Cri L Jour 497 *Lachminarayan v Emperor* (No immunity from capital punishment on ground of accused belonging to a particular community or sect)
- (33) 20 AIR 1933 Lah 434 (435) 34 Cri L Jour 711 *Bhagwana v Emperor* (Party fight not started by accused—Sentence reduced)
- (33) 20 AIR 1933 Lah 718 (720) 34 Cri L Jour 1251 *Mt Sardaran v Emperor* (Illiterate woman causing death of child being urged by anperstition—Lesser penalty to be imposed)
- (29) 1929 Mad W N 789 (790) *Subbiah Thevan v Emperor* (Sentence of death commuted into one of transportation for life as crime was result of sudden quarrel and some provocation.)
- (31) 18 AIR 1931 Lah 538 (539) 32 Cri L Jour 1083 *Sher Singh v Emperor* (Origin of the assault being in obscurity death sentence was commuted into one of transportation for life)
- (32) 19 AIR 1932 Lah 5 (7) 33 Cri L Jour 184 *Bhawal v Emperor* (Complainant's side deliberately provoking conflict and no previous intention on the part of the accused to kill anybody — Proper sentence would be one of transportation for life)
- (32) 19 AIR 1932 Lah 14 (16) 32 Cri L Jour 1118 *Rahman v Emperor* (Wife going to father's house to inquire after his health but without husband's permission and refusing to depart with him at once—Husband annoyed and murdered her—No provocation)
- (32) 19 AIR 1932 Lah 189 (192) 33 Cri L Jour 457 *Tara Singh v Emperor* (When all the accused joined in beating the deceased mercilessly but it was not shown who inflicted the fatal blow, the accused may be sentenced to transportation for life instead of death)
- (17) 4 AIR 1917 Lah 226 (230 231) 1917 Pun Re Nu 28 Cr 18 Cri L Jour 868 *Pal Singh v Emperor* (Drunkenness may be sufficient ground for not awarding death penalty)
- (66) 1866 Pun Re No 41 Cr p 47 (47) *Crown v Boodh Das* (Do)
- (18) 5 AIR 1918 Bom 212 (214) 19 Cri L Jour 593 *Hari Ramji v Emperor* (Substantial part of the evidence which the prosecution relied upon was evidence recorded without an oath or affirmation as required by the Oaths Act—Death sentence was commuted to one for transportation for life)

Note 4

- 1 (33) 20 AIR 1933 Cal 46 (429) 34 Cri L Jour 533 (SD) *Emperor v Asraf Ali* (Retrial need not be ordered)
- 2 (28) 29 Cri L Jour 833 (834) 111 Ind Cas 385 (Cal) *Emperor v Panchu Mondal*
- 3 (73) 20 Suth W R Cr 19 (20 21) *Queen v Ramsodoy Chuckerbutty*

on the evidence of the servant of the deceased it being doubtful whether the servant could recognize the assailants the High Court annulled the conviction and set the accused free.⁴

See also the undermentioned cases⁵

5 "Convict the accused of any offence"—Under s 268 of the Code of 1872, the High Court was empowered to annul the conviction and order a new trial. This was interpreted to mean that the High Court could only order a new trial after annulling the conviction but could not convict the accused for any other offence of which the Sessions Court might have convicted him.¹ But under the present section the High Court is empowered to annul the conviction and convict the accused of any other offence of which the Sessions Court might have convicted him and which the evidence on record would warrant. Thus when the evidence on record showed that the accused took no actual part in the murder but that he helped in the disposal of the dead body and other articles the High Court acquitted him of the charge of murder, but convicted him under s 201 of the Penal Code.² Where the intention to kill was not clearly proved, the conviction for murder was annulled and altered into one for an offence under s 326 of the Penal Code.³ See also the undermentioned cases⁴

The opinion has been expressed⁵ that clause (b) really has in view the circumstances mentioned in s 237

6 New trial.—After annulling the conviction the High Court may order a new trial and send the case to the Court of Session. Where the evidence is incomplete and further evidence is felt necessary for giving judgment a new trial may be ordered.¹ Where an accused was tried for murder without any pleader or advocate having been appointed to defend him and where the difficulties appearing in the evidence had not been cleared up in the course of cross examination either by the accused himself or by the Judge, and the High Court felt it difficult to confirm the sentence of death on the evidence before it a re-trial was ordered.² Where the Judge practically withdrew the case from the jury by so

4 (38) 25 AIR 1938 Cal 220 (221, 222) 39 Cri L Jour 541, *Kumarish Chandra v Emperor*

5 (45) 32 AIR 1945 Oudh 74 (79) 46 Cri L Jour 389 218 Ind Cas 70 (DB) *Ram Pratap v Emperor* (When a unanimous opinion that the accused is guilty is given by assessors in a murder trial the High Court is entitled to lay some stress upon it)

(43) 30 AIR 1943 Cal 521 (525) 1LR (1943) 1 Cal 543 45 Cri L Jour 99 209 Ind Cas 206 *Emperor v Lal Mia* (Appeal against conviction and reference under S 374—Valuable materials in favour of accused not brought on record—High Court can make full use of materials)

Note 5

1 (77) 1 Bom 639 (640 641) *Reg v Balappa*

(66) 5 South W R Cr 41 (47) *Queen v Sheikh Solim* (Case under the Code of 1861)

2 (13) 14 Cri L Jour 278 (280) 19 Ind Cas 710 1913 Pun Re No 8 Cr *Molamunad Shah v Emperor*

3 (28) 15 AIR 1928 Cal 430 (432 435) 29 Cri L Jour 546 *Hassrat Gul Khan v Emperor*

4 (37) 24 AIR 1937 Rang 466 (467) 39 Cri L Jour 137, *Nga Saw v Emperor* (Husband stabbing his wife fatally on the latter's affirmation as to her cohabitation with another man—Provocation held to be grave and sudden—Conviction altered from s 302 to s 301 Penal Code)

(19) 6 AIR 1919 Lah 256 (259) 1919 Pun Re No 21 Cr 20 Cri L Jour 635 *Harnam Singh v Emperor* (Conviction altered from s 302 to s 394 Penal Code)

(19) 6 AIR 1919 Lah 375 (380) 1919 Pun Re No 24 Cr 20 Cri L Jour 711 *Bahal Singh v Emperor* (Conviction altered from ss 302/34 to 325/109 Penal Code)

5 (42) 29 AIR 1942 Cal 594 (597) 43 Cri L Jour 860 202 Ind Cas 604 (DB) *Emperor v Naibulla* (Submission of sentence under s 374 and also appeal—On appeal High Court holding that trial was vitiated by misdirection to jury—High Court should direct re-trial and not record conviction on its own appreciation of facts)

Note 6

1 (36) 23 AIR 1936 Cal 73 (84) 37 Cri L Jour 394 63 Cal 929 *Deviyendra Chandra v Emperor*.

(02) 6 Cal W N 921 (921) *King Emperor v Daulat Kunjra*

(94) 2 Weir 302 (302) *In re Savari Ayee* (New trial on a different charge directed.)

2 (16) 3 AIR 1916 Cal 79 (79 80) 16 Cri L Jour 421 *Emperor v Mahab Ali*

summing it up as to make the jury register merely his own opinion, it was held that there was no proper trial and that there should be a new trial.³ See also the undermentioned cases⁴

377.* In every case so submitted, the confirmation of the sentence, Confirmation of new or any new sentence or order passed by the High Court, sentence to be signed shall, when such Court consists of two or more Judges, by two Judges. be made, passed and signed by at least two of them

1. Non-compliance with the section—Effect. — Where the Court consists of two or more Judges and the order of confirmation of sentence of death is only passed by one of them, the sentence of death is not validly confirmed but remains submitted to the Court which has to dispose of the same under ss 375 to 379.¹

2. "New sentence or order."—The new sentence or order referred to in this section refers to the powers of variation of the sentence etc., conferred by s 376.¹

378.† When any such case is heard before a Bench of Judges and Procedure in case of such Judges are equally divided in opinion, the case, difference of opinion. with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Synopsis

1. Scope.
2. Difference of opinion as to the guilt of the accused.
3. Difference of opinion as to the sentence to be passed.

NOTE to the Synopsis See the Notes indicated for the following topics :

Anomalous results in working the rule See Note 2

Difference as to guilt—Enhancement of sentence by third Judge See Note 2,

Judicial etiquette on difference of views See Notes 2 and 3

Points of difference See Note 1.

Re-trial ordered by the third Judge See Note 1

1. Scope. — Section 377 enacts that any order made on a reference under s 371 shall be by a Bench consisting of at least two Judges This section provides that, when

* 1882 : S 377, 1872 S. 290, 1861 S 401.

† 1882 : S 378, 1872 and 1861 — Nil

3. (27) 14 AIR 1927 Cal 631 (632, 633) : 28 Cr L Jour 42, *Emperor v. Raja Ali Fakir*.

4

evidence admitted at the trial)

(37) 24 AIR 1937 Cal 269 (273) : 38 Cr L Jour 1018, *Sanyash Gain v. Emperor* (Accused convicted of murder and conspiracy — Conviction on murder charge set aside — Occurrence of murder two years before — Likelihood of witnesses confusing what they saw at time of occurrence — Accused convicted separately for conspiracy and sentenced to transportation for life — Case not sent back for retrial on charge of murder)

(05) 9 Cal W N ccxxviii (ccxxviii), *Kangal Mah v. Emperor* (Same officer committing accused and holding trial in Sessions Court — Commitment order showing that before trial in Sessions Court the Judge had formed a strong opinion in the case—Conviction set aside and re trial ordered)

Section 377 — Note 1

this section) 7) Bom 711 (PC), if from Resident at ally the same as

Note 2

1. (37) 24 AIR 1937 F C 119 (121) : 38 Cr L Jour 498 : 64 Ind App 148 : ILR (1937) Bom 711 (PC)—*Fakira v. Emperor*. (Obiter)

the Judges constituting the Bench are equally divided in their opinion, the case with their opinions shall be laid before another Judge. The Judge to whom the case is referred on a difference of opinion is required to deliver his opinion 'after such examination and hearing as he thinks fit, and the order or judgment in the case shall follow such opinion. The difference of opinion may be either as regards the guilt or innocence of the accused or as to the appropriate sentence to be passed. In either of these cases, the section requires the reference to be made to another Judge¹ who is entitled to pass any order he thinks proper including an order directing re-trial of the accused².

2. **Difference of opinion as to the guilt of the accused** — Where a Bench was equally divided in its opinion as to the guilt of the accused, Mr Justice Mahmood of the Allahabad High Court felt that the order should be one of acquittal "without the necessity of either a remand or a dissentient opinion being recorded." While admitting that this section rendered it necessary for the case to be placed before another Judge in this circumstance he observed

'I cannot help feeling that, as a matter of judicial etiquette, when one Judge differs from his brother Judge on a pure question of the weight of evidence as to the propriety of a conviction, the opinion of the Judge who is in favour of acquittal should prevail — at least as a general rule.

I have always felt that the deliberate opinion of one Judge in favour of acquittal upon a *grave* question of the weight of evidence in a case heard by a Bench consisting of only two Judges should, *ipso facto*, constitute in most cases a sufficient reason for creating such a serious doubt that the benefit of that doubt should be given to the prisoner."³

In the undermentioned case,⁴ Edge, C J, disagreeing with the above view observed that the view of Mahmood, J, involved the subordination of the opinion of the Judge who was for conviction to that of the Judge who was for acquittal, apart from its being opposed to the statute, as admitted by that learned Judge himself. He further observed

"I know of no rule of judicial etiquette which prescribes that a Judge, in a capital or any other case, should subordinate his judgment to that of his brother Judge."

The working of this section has often led to anomalous results. Where, on the evidence of a lad of 18 years, Subramaniya Iyer, Offg C J, was for confirming the conviction for murder, Boddam, J, was for acquitting the accused. Bhashyam Aiyangar, J, to whom the case was referred on account of this difference of opinion, agreed with Subramaniya Iyer, Offg C J, as regards the conviction, but differed from him as regards the sentence. The Officiating Chief Justice was for commuting the sentence of death to one of transportation for life on the ground that the accused committed the murder in consequence of the deceased attempting to blackmail him, but Bhashyam Aiyangar, J, passed the sentence of death without even considering the extenuating circumstance referred to by Subramaniya Iyer, Offg C J.⁵ Thus, it is submitted, is a very hard case. If Boddam, J, had agreed entirely with Subramaniya Iyer, Offg C J, both as regards the conviction and the sentence, thus taking a more unfavourable view to the accused, the lesser sentence of transportation would undoubtedly have been passed. The fact that one of the learned Judges took a view entirely favourable to the accused resulted in a reference to the third who passed the sentence of death. While the sentence passed by Bhashyam Aiyangar, J, was perfectly legal under the Code, it is most respectfully submitted that it

Section 378 — Note 1

1. See (86) 1886 Rat 229 (241) *Queen Empress v Nepal*

2. (21) 8 AIR 1921 Mad 679 (681) 23 Cr L Jour 697, *In re Nannamalai Konan*

Note 2

1. (86) 1886 All W N 275 (276, 277), *Empress v Debiangh*

2. (87) 1887 All W N 125 (127) *Empress v Bundu*

3. (104) 27 Mad 271 (290). 1 Cr L Jour 641 2 Weir 203 : 14 Mad L Jour 226, *Ramaswamy Goundan v. Emperor*

gives rise to the anomaly that a more unfavourable view to the accused on the part of Boddam, J, would have saved his life. Indeed, the accused in this case lost the benefit of the Officiating Chief Justice's judgment as regards the sentence, and the benefit of Boddam, J's judgment as regards the conviction. The course adopted by Carnduff, J, in similar circumstances, of passing the sentence of transportation for life, even when the Judge who confirmed the conviction was for passing the sentence of death, is, it is submitted, a very salutary one⁴

3 Difference of opinion as to the sentence to be passed. — It has been held that when the difference of opinion is as to the appropriate sentence to be passed, one Judge favouring the death penalty, and the other recommending that transportation for life would meet the ends of justice, the difference of opinion itself would be a sufficient ground for holding that the death sentence should not be passed¹. It has, however, been said that it is not an inflexible rule and the third Judge to whom the case is referred is entitled to award the death sentence if he thinks it proper. The rule of "judicial etiquette and practice" strongly advocated by Mahmood, J, (see Note 2) can be more easily followed in this case than in a case where the difference is as to the guilt of the accused.

379.* In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order, under the seal of the High Court and attested with his official signature, to the Court of Session

380. Where proceedings are submitted to a Magistrate of the first class or a Sub-divisional Magistrate as provided by section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken

Synopsis

1 Legislative changes

2 Power of the first class Magistrate or Sub divisional Magistrate to remand

3 Power of the first class Magistrate or Sub divisional Magistrate to acquit

3a Power of the first class Magistrate or Sub-divisional Magistrate to refer under S 435

4 Appeal. See S 408 Note 5

1 Legislative changes — Section 380 of the Code of 1862 which dealt with the confirmation by Sessions Judges of sentences of imprisonment for a term exceeding four years and transportation passed under S 34, by the Assistant Judges and Magistrates has now been omitted, such sentences now come before the High Court on appeal under S 408 clause (b). The present S 380 is entirely a new one

* 1882 S 379, 1872 S 301, para 1, 1861 S 383

4 (18) 14 Cr L Jour 642 (646, 649, 653) 21 Ind Cas 892 (Cal) *Autar Singh v Emperor*
Note 3

1. (30) 17 AIR 1930 Cal 193 (198) 31 Cr L Jour 817, *Emperor v Dulari Chandra*
Also see S 429, Note 3

2. Power of the first class Magistrate or Sub-divisional Magistrate to remand — The first class Magistrate or Sub-divisional Magistrate is not empowered to remand the case to the second class or third class Magistrate who submitted the case to him under s 562. Thus, where a second class Magistrate finding the accused guilty of voluntarily causing grievous hurt under s 325, Penal Code, sent the case to the District Magistrate under the proviso to s 562, it was held that the order of the District Magistrate sending the case back to the second class Magistrate on the ground that s 562 did not apply to the case was illegal. This section enacts that the District Magistrate should pass such order as he would have passed *if he had originally heard the case*, and a District Magistrate could not have sent the case to a second class Magistrate if he had originally heard it himself¹.

3 Power of the first class Magistrate or Sub-divisional Magistrate to acquit — There is a difference of opinion on the question if the first class or Sub-divisional Magistrate to whom a case is sent under the proviso to s 562 is empowered to acquit the accused.

It may be noted that in the analogous s 349, where the trying Magistrate who is not empowered to pass a sufficiently severe sentence is required to submit the proceedings and forward the accused to the superior Magistrate, the trying Magistrate is to "record the opinion" that the accused deserves a more severe sentence than he can pass. But in s 562 the accused is "convicted" before he is forwarded to the superior Magistrate. Under s 349, the Magistrate is empowered to pass "such judgment, sentence or order as he thinks fit and as is according to law." Under this section such Magistrate "may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him." In the undermentioned case² their Lordships of the Madras High Court observed as follows:

"When a Magistrate of the second or third class submits proceedings under s 349, he does not convict but merely expresses the opinion that an accused person is guilty. But when a case is submitted under s 562 a conviction has first of all to be recorded and so when the proceedings reach the Magistrate for disposal under s 380, that Magistrate has to deal with a person who has been convicted and it is not a case of the referring Magistrate having merely recorded the opinion that he ought to be convicted. Such opinion as the referring Magistrate expresses being that on the conviction, action should be taken under section 562. It is our opinion that when an accused person comes before a Magistrate under s 380, he can be treated only as a convicted person and that it is not permissible for the Magistrate acting under that section to set aside the conviction and to acquit him."

This view has been followed in subsequent decisions³ of the same High Court.

It has, however, been held in Upper Burma Judicial Commissioner's Court⁴ that

Section 380 — Note 2

1. (1908) 7 Cri L Jour 449 (450) : 4 Low Bur Bul 150, *Emperor v. Abdul Lal Shein*
Also see S 562, Note 15

Note 3

1. (1933) 20 AIR 1933 Mad 728 (729) : 57 Mad 85 - 34 Cri L Jour 1045, *Public Prosecutor v. Gurappa Naidu*
2. (1945) 32 AIR 1945 Mad 302 (302) - 1 L R (1945) Mad 891 - 221 Ind Cas 421, *In re Doraiswami Naidu* (Under s 380 conviction cannot be set aside — AIR 1933 Mad 728 57 Mad 85 34 Cri L Jour 1045 followed)

this section)

- (1942) 29 AIR 1942 Mad 657 (657) : 44 Cri L Jour 91 : 203 Ind Cas 500, *In re Venkataswami Naicken*
3. (1915) 2 AIR 1915 Upp Bur 12 (12) : 29 Ind Cas 663 (663) : 2 Upp Bur Bul 55 : 16 Cri L Jour 535, *M. Th. Illa v. M. K. N.*

the power given to the Magistrate to pass such sentence as he would have passed if he had heard the case originally himself, enables him to acquit the accused. The same view is expressed, though as *obiter*, in an earlier case of the Lower Burma Chief Court⁴ and the Nagpur Judicial Commissioner's Court⁵ has adopted the view of the Burma Courts. Support is sought for this latter view in the power given to the Magistrate to take additional evidence or make further enquiry. On this point the Madras High Court in the undermentioned case⁶ observed as follows:

"It may be for the purpose of satisfying the Magistrate that it really is a case for applying S 562 and possibly such evidence (additional evidence) might be taken with a view to seeing whether the conviction was correct. Even so in our view, S 380 does not allow of a Magistrate who acts under it to set aside a conviction."

3a Power of the first class Magistrate or Sub divisional Magistrate to refer under Section 435. — Under this section, a Sub divisional Magistrate to whom proceedings are submitted can only dispose of the case in the manner provided by the section. He is not competent to make a reference to the District Magistrate under Section 435¹.

4 Appeal — See Section 408, Note 5

CHAPTER XXVIII

OF EXECUTION

381.* When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court passed under S 376 of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

1 Form of warrant of execution — As to the form of a warrant of execution of a sentence of death see Form 35 Schedule V. As to the form of a warrant where the sentence is commuted to one of transportation or imprisonment see Form 36 Schedule V.

382.† If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.

Postponement of capital sentence on pregnant woman

* 1882 S 381, 1872 S 301, para 2, 1861 S 383

† 1882 S 382, 1872 S 306 1861 — Nil

4 (08) 8 Cr L Jour 476 (477, 478) 4 Low Bar Bul 277 *Morah v Emperor*

Prosecu

Doran

sicam Naidu (The kind of inquiry or nature of additional evidence contemplated by S 380 is clearly such inquiry or evidence as may assist the Magistrate to whom the accused has been forwarded to exercise his discretion properly under S 562—AIR 1933 Mad 728 57 Mad 85 34 Cr L Jour 1045 (1046) (42) 29 AIR 1942 Mad 657 (657) 44 Cr L Jour 91 203 Ind Cas 500, *In re Venkataswami Narayan* (Section 380 empowers the Magistrate to make further enquiries so that he may decide whether or no it is a fitting case for the passing of an order under S 562, or whether on the other hand he ought to impose some substantial sentence under the Penal Code — AIR 1933 Mad 728 57 Mad 85 34 Cr L Jour 1045 relied on))

Note 3a

1. (41) 42 Cr L Jour 89 (90) 191 Ind Cas 149 (Mad), *Maula Gowda v Emperor*

1 Power to postpone.—The power of postponing the execution of the sentence of death passed on a woman found to be pregnant shall be exercised only by the High Court¹ It may either postpone the execution till after the delivery of the child² or if it thinks fit commute the sentence to one of transportation for life³

383.* Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by

Execution of sentences of transportation or imprisonment in other cases—
 section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be, confined, and, unless the accused is already confined in such jail, shall forward him to such jail, with the warrant

Synopsis

- | | |
|--|---|
| 1 Sentenced to transportation | 2a Accused on bail—Procedure |
| 2 Shall forthwith forward a warrant to the jail ¹ | 3 When a sentence of transportation or imprisonment commences |

NOTE to the Synopsis See the Notes indicated for the following topics

Sections 59 and 511 Penal Code See Note 1

Sentence for period already undergone in police custody—Illegal See Note 3

Sentence of imprisonment in police lock-up—Illegal See Note 2

Sentence to follow and not precede conviction See Note 3

1 "Sentenced to transportation" — A sentence for transportation may, under various sections of the Penal Code be either for life or for a lesser period See also ss 59 and 511 of the Penal Code and the undermentioned cases¹

When an offender is sentenced to transportation he should under this section be forwarded with a warrant to the jail in which he is or is to be confined and by virtue of s 58 of the Penal Code he will be deemed to be undergoing the sentence of transportation during the period of his imprisonment prior to actual transportation

Under s 383 sub s (2) of the Code a sentence of transportation should not specify the place to which the person sentenced is to be transported

2 "Shall forthwith forward a warrant to the jail" — Under s 541 sub s. (1) the Provincial Government has to appoint the place wherein any person liable to be imprisoned or committed to custody under the Code is to be confined and under this section the Court passing the sentence should forthwith forward a warrant to the jail in which the accused is or is to be confined¹ The words jail and prison do not include a

* 1892 S 383 1872 S 302 para 2 1851—Nil

Section 382 — Note 1

1 (79) 2 Weir 441 (442)

(1864) 1864 Suth W R Cr 1 (1) *Queen v Mt Ghurbhurnee*

2 (1864) 1864 Suth W R Cr 1 (1) *Queen v Mt Ghurbhurnee*

(71) 15 Suth W R Cr 66 (66) *Queen v Panhee Aurut*

(79) 2 Weir 441 (442)

3 (1865) 3 Suth W R Cr 15 (15) *Queen v Tepoo*

[See (78) 1878 Pun Re No 34 Cr p 83 (83) *Mt Malali v Crown*]

Section 383 — Note 1

1 (04) 1 Cri L Jour 89 (89) 1903 Pun Re No 31 Cr *Arura v Emperor*

(82) 5 Mad 28 (28) 1 Weir 30 *Kunhussa v Empress*

(01) 1901 Pun Re No 27 Cr p 86 (97) *Salar Baksh v Emperor*

(1865) 2 Suth W R Cr 1 (1) *Queen v Moothoo Kora* (S 59 Penal Code)

(1865) 3 Suth W R Cr 44 (44) *Queen v Tonooram Malu* (Do)

(66) 5 Suth W R Cr 44 (44) *Queen v Shonaullah* (Do)

[See (1864) 1864 Suth W R Cr 35 (35) *Queen v Premchund*]

Note 2

1 (02) 29 Cal 286 (297) 6 Cal W R 254 (FB) *In re Horace Lyall* (Court as Court of reference may forward offender to any jail within its jurisdiction as Court of reference)



police lock up, and the Magistrate has no power to sentence an offender to suffer imprisonment in a police lock up²

2a Accused on bail—Procedure — Where the accused is on bail and is not present when the Court upholds a sentence of imprisonment, the procedure is for the Court to issue a warrant for his arrest to a police officer under S 77¹ There is no procedure laid down by the Code that the Court should ask the sureties to ask the accused to surrender³

3 When a sentence of transportation or imprisonment commences — There are three cases under the Code in which a sentence of imprisonment or transportation may commence on a future date

- (1) Where a person is convicted of two offences at one trial and the Court sentences him to suffer imprisonment or transportation for each of the offences the sentences to run consecutively (S 35)
- (2) Where a sentence of imprisonment or transportation is passed on an escaped convict and the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped (S 396)
- (3) Where a sentence is passed on a person already undergoing a sentence of imprisonment or transportation (S 397)

In all other cases, a sentence of transportation or imprisonment will commence from the time it is passed¹ and the Court has no power to direct that such sentence should commence on a future date² Nor has the Court power to make a sentence precede a conviction³ The reason is that a sentence should *follow* and not *precede* a conviction⁴ Thus it is illegal to sentence an offender for the period already undergone by him in the police custody⁵

A sentence of transportation or imprisonment should be definite in respect of each offence⁶

2 (14) 1 AIR 1914 Low Bur 156 (157) 7 Low Bur Ral 62 15 Cri L Jour 10 *Emperor v Po Thun*
Also see S 32 Note 4

Note 2a

1 (40) 27 AIR 1940 All 388 (386) 41 Cri L Jour 741 1 L R (1940) All 507, *Mumtas v Chhutiwa*
2 (40) 27 AIR 1940 All 388 (387) 41 Cri L Jour 741 1 L R (1940) All 507, *Mumtas v Chhutiwa*

Note 3

1 (69) 12 Suth W R Cr 47 (48) 8 Beng L R App Cr 50 *In re Kishen Soondar Bhattacharjee*
(80) 7 Cal L Rep 393 (395) *In re Okhoy Kumar* (Magistrate after sentencing accused admitted them to bail — Held such admission to bail did not make sentence one to commence at a future time)
(17) 4 AIR 1917 Low Bur 159 (159) 17 Cri L Jour 460 (480) *Shin Taung v Emperor* (Sentence of imprisonment under the Prisons Act must commence from date on which it is passed—See also S 541)
2 (68 69) 4 Mad H C R App (u) (The Court cannot suspend its own sentence pending appeal)
(68 70) 5 Mad H C R App (u) (Do)

(23) 10 AIR 1923 Lah 104 (105) 23 Cri L Jour 593 *Dangar Khan v Emperor* (Half the period of custody as undertrial prisoner ordered to be counted as part of sentence—Illegal)
(08) 7 Cri L Jour 453 (453) 4 Low Bur Ral 152 *Emperor v Tha Hmun*
5 (97) 1897 Rat 892 (893) *Empress v Sadu*
(07) 5 Cri L Jour 217 (218) (Lah) *Baghel Singh v Emperor* (But sentence of imprisonment until rising of Court good)
(03) 7 Cri L Jour 453 (453) 4 Low Bur Ral 152 *Emperor v Tha Hmun*
6 (68 69) 4 Mad H C R App xxvii (xxvii) (Single sentence passed on conviction of three separate offences — Illegal)
(1864) 1861 Suth W R Gap Cr 35 (35 36) *Queen v Premchund*

384.* Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail or other place in which the prisoner is, or is to be, confined

1 Warrant for execution of a sentence (*Orissal*)

Warrant with whom to be lodged **385.†** When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor

386 : (1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may —

- (a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender,
- (b) issue a warrant to the Collector of the District authorizing him to realize the amount by execution according to civil process against the movable or immovable property, or both, of the defaulter

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so

(2) The [Provincial Government] may make rules regulating the manner in which warrants under sub section (1), clause (a) are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant

(3) Where the Courts issue a warrant to the Collector under sub section (1), clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree holder, within the meaning of the Code of Civil Procedure, 1908 and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender

a Substituted by A O for Local Government

* 1882 S 384 1872 S 303 1851 S 222

† 1882 S 385 1872 S 304 1851 S 223

‡ Code of 1898 original S 386

386 Whenever an offender is sentenced to pay a fine the Court passing the sentence may in its Warrant for execution issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender although the sentence directs that in default of payment of the fine the offender shall be imprisoned

1882 S 386 1872 S 307, 1851 S 61

Synopsis

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| 1 Amendments in 1923 | 9 Death of offender |
| 2 Recovery of fine. | 10 Attachment of movable property — Clause (a) |
| 3 "Has been sentenced to pay a fine." | 11. "Belonging to the offender." |
| 4 Offender undergoing whole term of imprisonment in default — Levy of fine | 12 Claims to property attached under sub-section (1) (a) |
| 5 "Court passing the sentence." | 13 Execution according to civil process — Sub-section (1) (b) |
| 6 "May take action" | 14. Revision. |
| 7 Execution against immovable property. | |
| 8 Priority over other debts. | |

NOTE to the Synopsis See the Notes indicated for the following topics :

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|--|--|
| Ability but unwillingness to pay fine — Sufficient special reason See Note 4 | Direction of payment to complainant—Still Crown debt See Note 8 |
| Applicability to S 16 Punjab Land Alienation Act See Note 13 | Executing Court not to question warrant See Note 13 |
| Applicability to all Acts, Regulations, Rules or by-laws See Note 2 | Fine, to be specific as to each offender See Note 3 |
| Applicability to recoveries under Local Boards Act See Note 2 | Fine written off — Effect of See Note 2 |
| Applicability to S 438 See Note 2. | Joint fines on several accused See Note 3 |
| Comparison with S 547 — Discretion See Note 6 | Non applicability to Dekkhan Agriculturists Relief Act, S 22 See Note 13 |
| Death of person fined and liability of his property See Notes 9 and 11 | Refund of fine See Note 4 |
| Deposit by surety for appearance not liable for fine See Note 11 | Section 64, Penal Code — When bar to recovery of fine See Note 2 |
| | Simultaneous execution See Note 7 |
| | Suspension of imprisonment in default of fine See Note 2 |

1 Amendments in 1923 — This section has been substituted for the old s 385 by the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923 The material changes introduced are as follows

- (1) The word "attachment" has been used in place of the word "distress"
- (2) A warrant for the levy of the fine may now be issued for execution according to civil process against the movable as well as the immovable property of the defaulter
- (3) Where the offender has undergone the whole of the imprisonment awarded in default of payment of fine, no warrant against his properties should issue unless for special reasons recorded in writing

2 Recovery of fine — Section 64 of the Penal Code provides that whenever an offender is sentenced to pay a fine, with or without imprisonment, it is competent to the Court to direct that, in default of payment of such fine, the offender shall suffer imprisonment for a certain period The undergoing of such imprisonment does not, however, operate as a discharge or satisfaction of the order for payment of the fine, which may, nevertheless, be levied in the manner prescribed by this section,¹ i e —

- (1) by attachment and sale under the provisions of this Code of the movable property of the offender, or
- (2) by execution by civil process against his movable or immovable property or both, or
- (3) by both the above methods

Section 385 — Note 2

- 1 (1) 23 All 497 (498) 1901 All W N 176, *Emperor v Sagwa*
 (1875) 1875 Rat 91 (92), *Reg v Gulab Chand* (Award of imprisonment in default of payment of fine imposed under enactments passed after General Clauses Act 1 [I] of 1868 came into operation is legal)
 (1865) 3 Sath W R Cr Letters 19 (19)
 (1865) 3 Sath W R Cr Letters 21 (21)
 (1865) 3 Sath W R Cr 61 (62) *Queen v. Afodoodundey* (Per Kemp and Jackson, JJ, Seton Kerr, J., dissenting)

There are, however, two limitations subject to which the above procedure is to be adopted, viz., —

- (1) Where the offender has *undergone the whole term of imprisonment* in default, no warrant should be issued for levy of the fine except for *special reasons* to be recorded
- (2) No fine can be levied after the period of *six years* after the passing of sentence, or, where, under the sentence, the offender is liable to imprisonment for a longer period than six years, then after the expiration of the period.² The mere fact, however, that the Court has written off a fine as irrecoverable is no bar to its taking action under this section within the said period if it subsequently appears that the offender has acquired the means of paying it.³

Where an offender is sentenced to *pay fine only* and to imprisonment in default of payment thereof the imprisonment may be *suspended* to enable the offender to pay the fine in instalments or on a future date.⁴

The provisions of this section have been declared to apply —

- (1) to the levy of all fines imposed under the authority of any Act Regulation, Rule, or bye law, in the absence therein of any specific provision to the contrary.⁵
- (2) to the recovery of the amount of maintenance ordered to be paid under s 488.⁶
- (3) to the recovery of all moneys ordered under this Code to be paid but for which no method is otherwise expressly provided for.⁷ Thus the recovery of compensation amount ordered to be paid under s 250, or of costs ordered to be paid under s 143 or of the court fees or process fees ordered to be paid under s 546A, may all be recovered in the manner provided by this section,
- (4) to the recovery by the Local Board under s 221 of the Madras Local Boards Act, 14 [XIV] of 1920, of any fee, toll compensation or damages due to it.⁸

Where money found on an accused person at the time of his arrest is taken and placed in the custody of the Court, it has been held that the Court at the time of convicting and sentencing him can impose a fine and order that the fine should be recovered by confiscation of the money under Section 517.⁹

² See Section 70 of the Penal Code

⁽⁴¹⁾ 28 AIR 1941 Bom 158 (159) 1 L R (1941) Bom 147 42 Cr L Jour 534 194 Ind Cas 217 (DB), *Collector of Broach and Panch Mahals v Ochhaslal Bhikatal* (Section 386 is procedural and does not affect substantive law contained in s 70 Penal Code, for purpose of limitation)

⁽⁸⁴⁾ 1884 Rat 207 (207), *Queen Empress v Ganu Sakharam* (The liability for any sentence of imprisonment awarded in default of payment of fine continues however after the expiration of the six years)

³ (06) 4 Cr L Jour 404 (404) 1906 All W N 275 3 All L Jour 818 *Latiful Husain v Mumtaz Ali Khan*

⁴ See Sect on 389

The Punjab General Clauses Act (Act 1 [I] of 1898) s 23

The Burma General Clauses Act (Act 1 [I] of 1898) s 25

[See however (72) 17 Suth W R Cr 7 (8), *Government v Junglee Beldar* (Section 5 of General Clauses Act, 1868, applies to fines imposed under any Act thereafter to be passed and has no application to the Abkari Revenue Act of 1856)]

⁶ See Section 488, sub section (3)

⁷ See Section 547

⁸ (23) 10 AIR 1923 Mad 275 (275) 24 Cr L Jour 464 *Punaya Syamala v Emperor*

⁹ (34) 21 AIR 1934 Bom 193 (194) 35 Cr L Jour 1341, *In re Samant*

3. "Has been sentenced to pay a fine." — Before a warrant can be issued under this section it is necessary that the Court issuing the warrant should have *sentenced the offender to pay a fine*. So, a Court cannot, for instance, issue a warrant, merely on a report of a Railway Traffic Inspector to the effect that damage has been done to the railway carriage and that it should be recovered.¹

A sentence of fine should be *specific* as to *each offender* fined.² It is not proper to sentence two or more offenders to pay a fine jointly.³

See also ss 63 to 70 of the Penal Code

4. Offender undergoing whole term of imprisonment in default—Levy of fine. — Under the section, as it stood before the amendment of 1923, the Court could issue a warrant for the levy of fine even though the offender had undergone the *whole* term of the imprisonment in default of fine. Under the present section as now amended, a warrant should *not* issue for the levy of fine in such cases unless for *special reasons* to be recorded the Court considers it necessary to issue such a warrant. But where the offender has been committed to jail for failure to pay the fine but the full term of imprisonment for default has *not* been completed, the proviso does not apply and a warrant can be issued.¹ Moreover, the proviso only forbids the issue of a warrant after the imprisonment in default of fine has been served, it does not require that where a warrant has been issued it must be *withdrawn* if the imprisonment in default of fine has been served for the full period.² But in dealing with such warrants the Court should follow the policy underlying the proviso, so that, if there are special reasons for not withdrawing the warrant the Court should refuse to withdraw it.³ The special reasons for issuing the warrant or for not withdrawing it should be reasons accounting for the fact that the fine has not been recovered before the sentence in default has been served and any reasons which are directed to that point would be relevant.⁴ The facts that the offence is a serious one and that the complainant has been allotted part of the fine are irrelevant.⁵ But it has been said that where an offender *having the means* of paying the fine chooses to undergo imprisonment rather than pay the fine, it is a sufficient special reason which will enable the Court in its discretion to order that the fine may be levied, notwithstanding that the offender has served the full term of imprisonment ordered for default of payment of the fine.⁶

Note 3

- 1 (29) 18 AIR 1929 Pat 108 (108, 109) 30 Cr L Jour 635, *Abdul Majid v N E Mukherji*
2 (69 70) 5 Mad H C R App v (v) 1 Weir 30 (Fine imposed on prisoners individually and collectively
— Illegal)
3 (17) 4 AIR 1917 Cal 348 (356, 359, 361) 18 Cr L Jour 915 41 Cal 1025 (1060, 1063) (FB) *Amrita*
Lal v Corporation of Calcutta
(69 70) 5 Mad H C R App v (v) 1 Weir 30
[But see (75) 1875 Rat 90 (90) (In this case it is assumed that a fine can be levied jointly)]

Note 4

- 1 (39) 26 AIR 1939 Cal 337 (338) 40 Cri L Jour 654 I L R (1939) 1 Cal 471, *Emperor v Smt Sarojini De* (Warrant issued without reasons before the accused has undergone the whole imprisonment in default is not illegal although the property is sold after the accused has undergone the full imprisonment)
- (35) 22 AIR 1935 Cal 546 (547) 36 Cri L Jour 1267, *Nil Kantha Pal v Bisakha Pal*
- 2 (35) 22 AIR 1935 Bom 160 (161) 59 Bom 350 36 Cri L Jour 1034 *Digambar Kannath v Emperor*
- 3 (35) 22 AIR 1935 Bom 160 (161) 36 Cri L Jour 1034 69 Bom 350, *Digambar Kannath v Emperor*.
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6. See Statement of Objections and Reasons 1021.

Where an offender sentenced to fine and to imprisonment in default paid a portion of the fine, but the fact not having been communicated to the jailor he had to serve the whole term it was held that the Court had no jurisdiction to refund the fine but that the party should apply to the Local Government for a refund.⁷

5 "Court passing the sentence" — The power to levy a fine is restricted to the Court *passing the sentence*.¹ It may be exercised either by the Judge or Magistrate who passed the sentence or by his successor in office.² See the unmentioned case.³ See also section 389.

6 "May take action" — Where an offender has been sentenced to fine and to imprisonment in default of payment of the fine it is not *imperative* that the Court should take action in all cases. The words *may take action* show that it is in the *discretion* of the Court to do so or not. But where an order for payment of money has been made under the Code, s. 547 provides that the amount *shall* be recoverable as if it were fine and it has been held that the Court has no discretion in such cases to refuse to take action under this section for the recovery of the amount.⁴

7 Execution against immovable property — Prior to the substitution of this section for the old one in 1923 there was no provision for attachment and sale of *immovable* property of the offender for the purpose of realising a fine and it was held that a sale of immovable property for recovering a fine conferred no title on the purchaser as the sale itself was without jurisdiction.¹ Clause (b) now enables the Court to proceed against the immovable properties belonging to the offender. This however can only be according to *civil process* and not as provided in this Code. The Court also has power to issue a warrant for attachment and sale of movable property and *simultaneously* to order execution against immovable property according to civil process.

8 Priority over other debts — A fine imposed or an order for payment of money passed by a criminal Court is a debt due to the Crown—and as a *Crown debt* it takes precedence over ordinary contract debts.¹ The character of Crown-debt is not lost even though there is a direction that it should be paid over to the complainant.²

7 (66-67) 4 Bom H C R Cr 37 (38) *Reg v Natha Mula*

Note 5

1 (70) 1870 Rat 35 (35) *Satara Sessions Judge's Letter*

(68) 9 Suth W R Cr 50 (50) (FB) *Chunder Coomar Mitter v Madoosooden Dey*

2 (68) 9 Suth W R Cr 50 (50) (FB) *Chunder Coomar Mitter v Madoosooden Dey*

3 (36) 23 AIR 1936 Cal 149 (150-151) 37 Cri L Jour 524 63 Cal 1139 *Jadabendranath Panja v Emperor* (Special Magistrate appointed under Ordinance XI of 1931 passing sentence — After termination of special powers another Magistrate succeeding him as Sub-divisional Magistrate — Such Magistrate cannot execute sentence of fine as he cannot be deemed to be successor in office of the special Magistrate.)

Note 6

1 (23) 10 AIR 1923 Pat 57 (57) 24 Cri L Jour 126 *Harendra Krishna v Ballumar* (Costs ordered under S. 148 (3).)

(72-92) 1872 1892 Low Bur Rul 606 (606-607) *Empress v Alexander Augustus St Clair Miller*

Note 7

1 (21) 22 Cri L Jour 399 (400) 61 Ind Cas 527 (527) (Lab) *Madari v Mehra*

(68) 5 Bom H C R Cr 63 (64) *Reg v Lallu Karwar*

[See also (9*) 20 Cal 478 (481) *Queen Empress v Sutanath Mitra*]

Note 8

1 (1876) 2 Fx D 47 (48) 46 L J Ex 73 35 L T 858 *In re Arthur Heavens Smith* (Appellant in

Vadhiar v Secy of State

2 (16) 5 A I R 1918 Mad 1111 (1112-1115) 40 Mad 767 (775) 18 Cri L Jour 496 *Pichu Vadhiar v Secy of State*

9. Death of offender. — Section 70 of the Penal Code provides that the death of the offender shall not discharge from the liability for fine, any property which would, after his death, be legally liable for his debts, and therefore a warrant for the levy of the fine may be issued under this section, even after the death of the offender, against properties in the hands of his legal representatives¹

10. Attachment of movable property — Clause (a) — Prior to the substitution of this section for the old one in 1923, the section used the word "distress" and Form No 37 of Schedule V contained the words "make distress by seizure". As the words "movable property" were used in the section as being the subject of 'distress' that is, *actual seizure*, it was held that only *tangible or corporeal* movable property capable of being seized could be proceeded against by way of distress and not such property as debts or choses in action¹ which could not be 'seized.' It was also held that a share or interest in joint movable property could not be seized and therefore could not be distrained under the section² though a share or interest in joint property could be *attached* under S. 83 by the issue of a prohibitory order or the appointment of a receiver.³ The substitution in the present section of the word "attachment" for the word "distress" shows that even a debt due to, or a share in joint movable property belonging to an offender could be attached.⁴ Sub section (2) provides that the Provincial Government may make rules for regulating the manner in which the attachment is to be made. In the absence, however, of any such rules the question arises as to the mode in which an attachment of a debt or share in joint movable property is to be effected. It has been held that seizure and sale of the property in which the offender has an undivided fractional interest are not legal.⁵ According to the

Note 9

1. ('78) 2 Bom 564 (567), *Imperatrix v. Dongaji*.

The following cases which were decided with reference to old S 356 are no longer of any importance
(193) 20 Cal 478 (481) *Queen Empress v. Sitnath Mitra*
(56 59) 5 Bom H C R Cr 63 (64), *Reg v. Lallu Karwar*.
(1665) 4 Suth W R Cr L 6 (8) (Under S 70, Penal Code, even immovable properties of offender will be liable for payment of fine after the death of offender)

Note 10

1. ('17) 4 AIR 1917 Mad 748 (748, 749): 18 Cr L Jour 1, *Secy of State v. Sengammal*. (It may however include negotiable instruments, bonds and title-deeds)

(16) 5 A I R 1918 Mad 1111 (1113, 1114) 40 Mad 767 (768, 772) 18 Cr L Jour 426, *Pichu Vadhar v. Secy of State* (Surplus sale proceeds in the hands of a mortgagee under power of sale is not a debt but tangible movable property and could be attached under S 386)

2. (92) 20 Cal 478 (479), *Queen-Empress v. Sitnath Mitra* (Only movable property of which the offender was the sole owner could be attached under S 386)

(76) 2 Weir 442 (443)

3. (17) 4 A I R 1917 Mad 366 (367): 39 Mad 631 (633) • 17 Cr L Jour 296 (FB), *Secretary of State v. Rangaswamy Iyengar*

4. See (26) 13 A I R 1926 Bom 103 (104, 105): 49 Bom 906 27 Cr L Jour 652, *Shulingappa Nijappa v. Gurlingata Basappa* (Per Fawcett, J; Madgaonkar J being doubtful reserved his opinion on the point)

[But see ('33) 20 A I R 1933 Nag 248 (248, 249): 29 Nag L R 320: 34 Cr L Jour 1263, *Shrawan v. Emperor*]

5. (39) 26 A I R 1939 All 373 (374): 183 Ind Cas 134, *Bansraj Das v. Secy of State*. (Fine imposed upon a coparcener cannot be recovered by attachment and sale of joint movable property belonging to the family — In such a case the property cannot be said to belong to the offender)

(33) 20 A I R 1933 Cal 402 (403, 404): 60 Cal 932: 34 Cr L Jour 503, *Pramatha Bhushan v. Emperor*

(73) 20 AIR 1933 Cal 401 (402) • 60 Cal 651: 34 Cr L Jour 579, *Manmathanath Kundu v. Emperor*

(32) 19 AIR 1932 Mad 538 (540) • 55 Mad 1041 • 33 Cr L Jour 622, *Narasanna v. Emperor*

(32) 19 A I R 1932 Pat 292 (293) • 12 Pat 29 • 33 Cr L Jour 672 (SB), *Rajendra Prasad Misser v. Emperor*

(33) 20 AIR 1933 Nag 248 (248, 249): 29 Nag L R 320: 34 Cr L Jour 1263, *Shrawan v. Emperor*
[See also ('36) 23 A I R 1936 Mad 560 (560): 37 Cr L Jour 636, *Kollivenkataratnam v. Collector of Ksina*. (Attachment by seizure of standing crops of joint Hindu family is illegal — Case under clause (b))]

High Court of Madras⁶ the proper course in such cases is to follow the principle adopted in the Civil Procedure Code and to proceed under O 21 Br 46 and 47

The High Court of Patna⁷ and the Judicial Commissioners Court of Sind⁸ have expressed the view that the latter method to adopt in such cases would be to proceed under clause (1) rather than clause (a) of the section

Under sub s. (1) clause (a) of this section *any* movable property belonging to the offender can be attached. The provisions of the Civil Procedure Code exempting certain property from attachment and sale do not apply to criminal Courts⁹

Salary not yet drawn by the offender is not movable property within the meaning of this section¹⁰

11 "Belonging to the offender" — The Court has power under sub s (1) (a) to attach only movable property *belonging to the offender* and therefore cannot order the attachment of the money deposited by a surety for the appearance of the offender, in execution of a sentence of fine passed against the offender¹ Similarly, where joint movable property passes by *survivorship* to the other members of the family on the death of the person, such property cannot be attached as it is no longer property of the person in the hands of the other members² It has been held that a sentence of fine against a coparcener cannot be executed by attachment and sale of joint movable property of the family as the property cannot be said to belong to the coparcener who has got only an unascertained interest therein³

It is the duty of an officer entrusted with the execution of a warrant of attachment to ascertain by all possible means whether the property belongs to the offender⁴

12 Claims to property attached under sub-section (1) (a) — Under the section before the amendment of 1923, there was no provision for the determination of claims which might be preferred to the property attached¹ but the Court had, however, to satisfy itself that the property attached *belonged to the offender*² In cases of doubt it was held that the proper procedure was to stay the sale to enable the claimant to establish his title to the property in a civil Court³

6 (32) 19 AIR 1932 Mad 538 (540) 55 Mad 1041 33 Cri L Jour 62² *Narasanna v Emperor*
7 (32) 19 AIR 1932 Pat 212 (213) 33 Cri L Jour 671 *Sahadeo Singh v Ram Kishun Singh* (Proceedings under S 145)

8 (33) 20 AIR 1933 Sind 43 (44) 34 Cri L Jour 354 *Pritam Das Mangaram v Emperor*

9 (37) 24 AIR 1937 Lah 367 (367) 169 Ind Cas 944 *Natha Singh v Ut Bachint Kaur* (Order of maintenance under S 488—Jagir money collected by revenue authorities of person against whom order is made can be taken and attached for realization of amount due under order)

(189) 1889 Pun Re No 3 Cr p 7, *Sirdar Raghubir Singh v Meta Singh*

10 (34) 21 A 1 R 1934 Rang 82 (83) 36 Cri L Jour 800 *Maung See Hlaing v Ma Thein Khin* (Salary in this case was not earned also)

Note 11

1 (24) 11 A 1 R 1924 Oudh 396 (396) 26 Cri L Jour 113 83 I C 673 *Raghunandan v Emperor*
— *Emperor* (Even though the surety

v Pandey v Emperor

ALSO SEE S 310 Note 1

hander Pandey v Emperor
v Secy of State
v Emperor

Note 12

1 (39) 26 AIR 1939 Cal 337 (337) 40 Cri L Jour 651 11LR (1939) 1 Cal 471, *Emperor v Sarojini De*
(15) 2 AIR 1915 Lah 2²⁷ (228) 16 Cri L Jour 166 (166 167), *Hira Lal v Emperor*

Sub section (2) of the present section now provides that the Provincial Government may make rules for the *summary determination* of any claims that may be made in respect of the property attached under subs (1) (a) and it is the duty of the Court in such cases to hold a proper inquiry into the title of the claimant⁴. In the absence of such rules, it has been held that the procedure prescribed for the inquiry into claims under s 88 of this Code should be adopted⁵.

The summary procedure for the determination of claims under subs (2) applies only during the *subsistence* of the attachment. Where, therefore, money is attached and credited to the Government an application for the refund of the money by the Government does not lie, the reason being that the attachment must be deemed to be put an end to as soon as the money is credited to the Government⁶.

13 Execution according to civil process—Sub section (1) (b)—Where it is sought to execute a sentence of fine against the immovable property of the offender or against such movable property as cannot be attached by seizure under sub-s. (1) (a) the better procedure is to issue a warrant as provided under subs (1) (b) for execution according to *civil process*. Sub section (3) provides that such a warrant shall be deemed to be a decree and the Collector to be the decree holder and the nearest civil Court can execute the decree in accordance with the provisions of the Code of Civil Procedure relating to the execution of decrees (see O XVI of the Civil Procedure Code). A warrant issued by a Magistrate to a Collector must, therefore, be accepted as a decree by the civil Court to which it is sent for execution¹. The Bombay High Court has held that a warrant under this section is deemed to be a decree of the civil Court *only* for the purposes of execution and therefore the exemption of agriculturists' lands from *execution of decrees* under s 22 of the Dekkhan Agriculturists' Relief Act does not extend to *such warrants*². The Lahore High Court has however, held that by virtue of sub s (3) the warrant *becomes* a decree of the civil Court and therefore the land of an agriculturist cannot be attached and sold in execution of such "decree" by virtue of s 16 of the Punjab Land Alienation Act³.

It is not permissible for the executing Court to go behind the warrant sent for execution or to question the validity of the warrant in respect of some antecedent defect in proceedings before the criminal Court⁴.

14 Revision—An order of the Magistrate passed under this section in his *judicial capacity* is subject to revision under s 435¹. But an order of the Magistrate directing

(98) 1898 Rat 976 (976) *Queen Empress v Chhagan Jagannath*

(97) 20 Mad 88 (89) 2 Weir 42 *Queen Empress v Kandappa Goundan* (Case under S 89 Cr P O —Principle stated in judgment to be applicable to this section)

(81) 2 Weir 445 (445)

4 20 AC 119 (120) 227 228 120 121 — — — — — *Emperor v Sarojini De*
—Services of police officers
—Services of police officers

cannot be utilized by Magistrate nor can he rely simply on report of police-officer)

(33) 20 AIR 1933 All 135 (135) 34 Cr L Jour 847 *Harimal v Emperor*

(Magistrate dismisses)

1 v Emperor
1 In re Pandurang
raj Narain Prasad
contra)

Note 13

1 (38) 25 AIR 1938 Pesh 40 (40) 177 Ind Cas 162 *Collector of Peshawar v Abdul Majid*
2 (26) 13 AIR 1926 Bom 592 (593 584) 60 Bom 844 99 Ind Cas 310, *Collector of Salara v Mahadu*

3 (29) 16 AIR 1929 Lah 667 (669) 30 Cr L J 1006 119 Ind Cas 227, *Emperor v Milkha Singh*

4 (29) 16 AIR 1929 Mad 383 (384) 119 Ind Cas 53 *Kuppaswamy Iyer v Secretary of State*

Note 14

1 (96) 23 Cal 421 (423) *Queen Empress v Aswini Kumar Ghose*

recovery of an amount ordered to be paid (see S 547), such as an amount due to the Port Trust, though passed under this section, is only an *executive order* and is, therefore, not open to revision²

See also S 435 For Form see Sch V, Form No 57

387. * [A warrant issued under section 386, sub-section (1),
Effect of such warrant clause (a), by any Court] may be executed within the local limits of the jurisdiction of such Court, and it shall authorize the^b[attachment] and sale of any such property without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found

a Substituted for the words 'such warrant' by the Code of Criminal Procedure (Amendment) Act 18 (XVIII) of 1923

b Substituted for distress *ibid*

1 Scope of the section.—As to jurisdiction of criminal Courts' see S 177

The Court has no power to levy a fine against property situate outside British India¹

388. † (1) When an offender has been sentenced to fine only and

Suspension of execution of sentence of imprisonment to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may —

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and

(b) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made, and if the amount of the fine or of any

* 1882 S 387, 1872 S 307, 1861 S 61

† Code of 1898 original S 388

388 (1) When an offender has been sentenced to fine only and to imprisonment in default of
Suspension of execution of sentence of imprisonment payment of the fine and the Court issues a warrant under section 386 it may suspend the execution of the sentence of imprisonment and may release the offender on his executing a bond with or without sureties as the Court thinks fit conditioned for his appearance before such Court on the day appointed for the return to such warrant such day not being more than fifteen days from the time of executing the bond, and in the event of the fine not having been realized the Court may direct the sentence of imprisonment to be carried into execution at once

(2) In any case in which an order for the payment of money has been made on non recovery of which imprisonment may be awarded and the money is not paid forthwith the Court may require the person ordered to make such payment to enter into a bond as prescribed in sub-section (1) and in default of his so doing may at once pass sentence of imprisonment as if the money had not been recovered

1882 S 388, 1872 and 1861 — Nil

[See also (33) 20 AIR 1933 All 135 (135) 31 Cr L Jour 847 *Harimal v Emperor*]

2 (26) 13 AIR 1926 Sind 57 (57 58) 20 Snd L B 63 26 Cr L Jour 1263 *Yusuf Ali Lookmanji v Emperor*

[See also (26) 13 AIR 1926 Bom 103 (106) 49 Bom 906 27 Cr L Jour 652 *Shitalingappa Nijappa v Gurlingata Basappa* (Execution of order under S 488 Cr P C)]

Section 387 — Note 1

1 (79) 2 Weir 441 (411, 415)

instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and, if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.

Synopsis

- 1 Legislative changes
- 2 Scope of the section.
- 3 Order for payment of money on non-recovery of which imprisonment may be awarded — Sub section (2).

NOTE to the Synopsis See the Notes indicated for the following topics :

Form of bond See Schedule V, Form 37A

Warrant for levy of fine — Not needed before imprisonment See Note 3

1 Legislative changes.

- (1) This section was substituted for the original s 388 by the Code of Criminal Procedure (Second Amendment) Act 37 [XXXVII] of 1923 Under the section as it stood previously, the Court could not suspend a sentence of fine unless a *warrant for the recovery thereof had been issued under s 388*¹ This is not necessary now.
- (2) Under the old section a suspension of the sentence could not exceed a period of fifteen days from the date of executing a bond under the section Under the present section there can now be an order for payment in two or three *monthly instalments* and suspension of the sentence during that period

2. Scope of the section — In order that the section may apply, two conditions are necessary, namely, that the offender must have been sentenced,

(1) to *fine only*, and

(2) to imprisonment in *default of payment of such fine*

The section has, therefore, no application to cases where an offender has been sentenced to fine in *addition* to a sentence of imprisonment¹ or where he is not sentenced to imprisonment in *default* of the payment of the fine²

3. Order for payment of money on non-recovery of which imprisonment may be awarded — Sub-section (2) — Under s 64 of the Penal Code, whenever a sentence of *fine* is passed the Court can order that in default of payment of such fine, the defaulter shall suffer imprisonment for a certain period There is no such general provision as to orders for payment of money *other than* fine Sub section (2) of this section refers to an order made by a criminal Court for the payment of money but which is not a punishment inflicted on an offender for a criminal offence¹ The Court has

Section 388 — Note 1

- 1 ('08) 7 Cr L Jour 452 (452) : 4 Low Bur Rul 151, *Emperor v. The Mya*
Note 2

"
Mohamed (Even if
of sentence of impr-

1. ('34) 21 AIR 1934 Rang 11 (12) : 35 Cr L Jour 608 : 11 Rang 451, *Emperor v. Mohamed*.

no power to order imprisonment in default of payment of any such amount unless it is specifically provided for by a statute.² The Code contains the following provisions for payment of money on the non recovery of which imprisonment may be awarded

- (i) Payment of compensation under S 250, sub s (2A)
- (ii) Payment of maintenance under S 489, sub s (3)
- (iii) Payment of the penalty due on a bond under S 514 sub s (4)
- (iv) Payment of process fees, etc., under S 516A, sub s (1)

In such cases if the money is not paid forthwith the Court may require the person to enter into a bond as provided by sub s (1) and on his failure to do so may at once pass a sentence of imprisonment

See S 250, S 514, sub s (4), S 489 and S 516A

It is not necessary that a warrant for the levy of such amount should be issued, and the undermentioned cases³ decided before the amendment to sub s (1) are no longer of any practical importance

389.* Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office

Who may issue warrant

1. Successor in office — A sentence was passed by a Special Magistrate appointed under Ordinance 11 [X] of 1931. The Special Criminal Court came to an end in 1932 with the expiry of the Ordinance. It was held that the Sub divisional Magistrate who succeeded the Special Magistrate was not a successor in office of the Special Magistrate and that he had no power to issue the warrant.¹

390.† When the accused is sentenced to whipping only, the sentence shall subject to the provisions of section 391 be executed at such place and time as the Court may direct

Execution of sentence for whipping only

Synopsis

- 1 Legislative changes
- 2 When the accused is sentenced to whipping only
- 3 "At such place and time as the Court may direct"
- 4 Postponement of sentence of whipping when accused is under sentence of imprisonment in another trial

* 1882 S 389 1872 S 307, para 4, 1861 — Nil

† 1882 S 390, 1872 S 302, para 2, 1861 — Nil

2 (93) 18 Bom 440 (441), *Queen Empress v Kutappa* (Railways Act 1890 S 113 does not provide for imprisonment in default of payment of excess charge and fare due)

(97) 20 Mad 395 (386) 1 Weir 871, *Queen Empress v Subramania Iyer* (Do)

(96) 19 Mad 239 (239) 2 Weir 461 *Queen Empress v Lakshmi Nayakan* (Imprisonment in default of payment of compensation under Cattle trespass Act (Act 1 [I] of 1871) is illegal)

(97) 11 C P L R Cr 10 (11) *Karim Khan v Nathooa* (Do)

(79) 1 Weir 711 (711) (Do)

warrant for levy

Magistrate had jurisdiction to make an order for imprisonment in default of payment of compensation)

Section 389—Note 1

1 (36) 23 AIR 1936 Cal 149 (150) 37 Cr L Jour 424 : 63 Cal 1139, *Jadabendranath Panja v. Emperor*

NOTE to the Synopsis See the Notes indicated for the following topics

Amendment of S 391 See Note 3

Fixing a future date See Note 3

Whipping Act (4 [IV] of 1909) See Note 2

1 **Legislative changes.**—The words “subject to the provisions of S 391” was added by the Criminal Law Amendment Act, 12 [XII] of 1923 See Note 3

2 **When the accused is sentenced to whipping only**—This section applies when the accused is sentenced to *whipping only*. Sentences of whipping are passed under the provisions of the Whipping Act (4 [IV] of 1909). Sections 3 and 5 of that Act deal with offences for which whipping can be given in *lieu* of other punishments prescribed under the Penal Code, while S 4 deals with offences for which whipping can be given in *addition* to the other punishments prescribed therefor.

Section 3 of the Whipping Act, 4 [IV] of 1909, enacts that (a) in the cases of theft under S 378, Penal Code, and aggravated forms of it under Ss 380 and 382, and (b) in the cases of lurking house trespass or house breaking under Ss 443 and 445, Penal Code, and aggravated forms of them under Ss 444 and 446 Penal Code, respectively, whipping may be awarded in lieu of the other punishments.

Section 5 of the said Whipping Act provides that the punishment of whipping may be inflicted upon juvenile offenders in lieu of other punishments in the following cases:

- (i) All offences punishable under the Penal Code, except those specified in Chapter VI and in Ss 153A and 505 and offences punishable with death.
- (ii) Offences punishable under any other law with imprisonment, which the Provincial Government may specify in this behalf.

Thus, this section applies only in those cases where sentences of whipping are passed under Ss 3 and 5 of the Whipping Act.

Where a youthful offender for one offence is ordered to be detained in a Training School or a Borstal Institution and for another offence tried at the same trial is sentenced to whipping, the Magistrate must act under the provisions of this section¹. The reason is that a person sentenced to detention in a Borstal Institution is not sentenced to imprisonment.

3 **“At such place and time as the Court may direct”**—According to the High Court of Bombay the sentence of whipping need not necessarily be executed on the same day as the sentence was passed, but the Court can fix a day *in the future* for that purpose¹.

Before the amendment of S 391 in 1923, it was held by the High Court of Madras that a Magistrate had no power to suspend or postpone the execution of a sentence of whipping only, even in cases where such sentence was appealable (as where a second class Magistrate passed a sentence of whipping only)². This practically rendered the right of appeal nugatory. The Chief Court of Lower Burma, on the other hand, held that whenever a sentence of whipping was passed by a Magistrate, against whose sentence an appeal lay, the Magistrate was bound to ask the prisoner whether he intended to appeal and if the prisoner said that he intended to do so, to suspend the execution of the sentence on the analogy of S 391³. The addition of clause (a) to sub s (1) of S 391 now makes it clear that

Section 390 — Note 2

1 (36) 23 A I R 1936 Rang 485 (486, 487) 39 Cri L Jour 83 14 Rang 625 (FD) *Emperor v Nga Pyu*

Note 3

1 (28) 15 AIR 1928 Bom 138 (139, 139) 29 Cri L Jour 573 *Emperor v Gopal Murgis* (A direction that whipping should be inflicted as soon as practicable is a proper order—1897 Rat 906 held obsolete)

2 (02) 26 Mad 465 (468) 2 Weir 447, *Meyyan v Emperor*

3 (93 1900) 1893 1900 Low Bur Rul 310, *Empress v Chan Tha Aung*

if the accused furnishes bail for his appearance, the sentence may be suspended for fifteen days or, if an appeal is made within that time, until after the sentence is confirmed

4 Postponement of sentence of whipping when accused is under sentence of imprisonment in another trial—The direction in this section, that the sentence shall be executed at such place and time as the Court may direct, is intended for the case where the accused is *not* already under another sentence and is not also at the same time sentenced to imprisonment. It, therefore, does not apply where he is already under another sentence of imprisonment. In such a case the Court should, when passing the order required by this section, follow the analogy of s 391 (1) as far as may be. It cannot, therefore, postpone a sentence of whipping only till after the accused has undergone a sentence of imprisonment in another case¹

391.* (1) When the accused—

Execution of sentence of whipping in addition to imprisonment (a) is sentenced to whipping only and furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, or

(b) is sentenced to whipping in addition to imprisonment, the whipping shall not be inflicted until fifteen days from the date of the sentence, or, if an appeal is made within that time, until the sentence is confirmed by the Appellate Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

(2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

(3) No accused person shall be sentenced to whipping in addition to imprisonment when the term of imprisonment to which he is sentenced is less than three months.

Synopsis

- | | |
|--|---|
| 1 Legislative changes | 5 Postponement of the execution of sentence of whipping in addition to imprisonment |
| 2 When accused is sentenced to whipping only See Section 390 Note 2 and S 32 | 6 Double sentence of whipping |
| 3 Execution of sentence of whipping only See S 390 Note 3 | 6a Officer in charge of the jail |
| 4 When accused is sentenced to whipping in addition to imprisonment | 7 Whipping in addition to imprisonment for less than three months—Sub-s (3) |

NOTE to the Synopses See the Notes indicated for the following topics

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|---|---|
| No provision for calling back accused for whipping See Note 5 | Whipping for separate offences See Note 5 |
| Section 4 of Whipping Act 4 [IV] of 1909 See Note 4 | Whipping not executed within statutory time—Effect See Note 5 |
| Whipping before statutory period See Note 5 | Whipping to be executed immediately after statutory period See Note 5 |

* Code of 1898, original S 391

Sub sections (2) and (3) were the same sub s (1) ran as follows

391 (1) When the accused is sentenced to whipping in addition to imprisonment in a case which is subject to appeal the whipping shall not be inflicted until fifteen days from the date of the sentence or if an appeal is made within that time the sentence is confirmed by the Appellate Court but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days or in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence

1882 S 391, 1872 Ss 310, 311, 1861—Nil

Note 4

1 (1900 02) 1 Low Bur Bal 53 (53), *Empress v Aga Po Kye*

imprisonment in addition to which whipping was given, has expired.² Indeed it is illegal to order a sentence of whipping to be inflicted on the prisoner at the time of his release from the jail.³ There is no provision of law under which an accused who has been released after having undergone his sentence of imprisonment could be called back to undergo the sentence of whipping.⁴ In such cases the sentence of whipping should be cancelled as having become inoperative.⁵

Where, again an accused is sentenced on three separate convictions, first to a term of imprisonment second to a certain number of lashes to be inflicted at the expiry of the period of imprisonment, and third to a term of imprisonment after whipping the postponement of whipping to the expiry of the term of imprisonment under the first conviction is illegal and hence the second term of conviction will begin on the expiry of the first.⁶

A sentence of whipping not inflicted within the statutory period or within the period prescribed therefor, becomes inoperative.⁷

While Magistrates have no power to postpone the execution of sentence of whipping, they are also not entitled to inflict it before the expiry of the period specified in the section. Thus, where a Magistrate of the first class convicted an accused of theft and sentenced him to one month's rigorous imprisonment and twenty lashes, the District Magistrate took the case in revision and holding that whipping could not be added to imprisonment, directed the accused to be whipped and submitted the case for the orders of the Chief Court. The Chief Court held that the sentence being an appealable one to the Court of Session the District Magistrate acted illegally in taking up the case in revision and directing the accused to be whipped, before the expiry of the period allowed for appeal.⁸

Where, however an accused is convicted of two offences for one of which he is sentenced to imprisonment and for the other to whipping, it is not open to the Magistrate to postpone the sentence of whipping on the ground that the accused has preferred an appeal against the sentence of imprisonment.⁹ Before S 390 was amended, it was not illegal to execute the sentence immediately when it was given as a separate sentence for a separate offence and not in addition to imprisonment.¹⁰ See also Section 35 Note 9

(1901) 1900 P. L. R. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

(02) 4 Bom L R 929 (930), *Emperor v Jagannath Sagar*

(34) 21 AIR 1934 Pat 551 (551) 36 Cr L Jour 100, *Emperor v Rashbehari Singh*

(1901) 1900 P. L. R. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

breach of duty whipping is not inflicted at the statutory time it does not thereby become inoperative 1)

8 (02) 1902 Pun L R No 43 Cr p 170 (172) *Crown v Rura*

9 (02) 4 Bom L R 436 (437) *Emperor v Jaisankar*

10 (78) 2 Weir 446 (447)

6 Double sentence of whipping — Under the Whipping Act of 1864 it was held that when a person, who has been previously convicted within the meaning of s 4 of that Act is convicted at one time of two or more offences, he may be punished with one but only one whipping in addition to any other punishment to which under s 46 of the Code of Criminal Procedure of 1861 (now s 35) he may be liable¹. The said s 4 has been repealed but it is submitted that under this section also it would not be legal to pass a double sentence of whipping. Thus, where an accused was convicted under ss 454 and 380 Penal Code, and was sentenced to two years rigorous imprisonment and fifteen stripes for each of the offences the High Court doubted if this double sentence of whipping was legal and altered the sentence to fifteen stripes for both the offences². See also Note 4 on s 39³.

6a Officer in charge of the jail — A Borstal Institution is not a jail under this section and therefore the Superintendent thereof is not an officer in charge of a jail and hence a sentence of whipping cannot be carried out in his presence⁴.

7 Whipping in addition to imprisonment for less than three months — Sub section (3) — When the term of imprisonment to which the accused is sentenced is less than three months it is illegal to award the sentence of whipping in addition to the imprisonment⁵.

392.* (1) In the case of a person of or over sixteen years of age

Mode of inflicting punishment shall be inflicted with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the '[Provincial Government] directs, and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person, and with such instruments, as the '[Provincial Government] directs

(2) In no case shall such punishment exceed thirty stripes^b [and, in

Limit of number of stripes the case of a person under sixteen years of age, it shall not exceed fifteen stripes]

a Substituted by A O for Local Government

b Inserted by the Whipping Act 1909 (4 [IV] of 1909) S 7 See Note 1

Synopsis

1 Legislative changes

2 Mode of inflicting punishment on persons of or over sixteen years of age

3 Mode of inflicting punishment on persons under sixteen years of age

4 Maximum sentence of whipping

NOTE to the Synopsis See the Notes indicated for the following topics

Directions by various Provincial Governments See Notes 2 and 3

Double whipping See Note 4
Stripes on hand — Illegal See Note 2

1 Legislative changes — Section 311 of the Code of 1872 corresponded to this section. Under that section punishment of whipping was to be inflicted in the case of a

* 1882 S 392 1872 S 311, 1861 — Nil

Note 6

1 (68) 9 Suth W R Cr 41 (49 50) Beng L R Sup Vol 951 (FD) *Nasir v Chunder*

(68) 9 Suth W R Cr Cir 3 (4)

(70) 14 Suth W R Cr 7 (7) *Rattan Bewa v Buhur*

Note 7

1 (02) 2 Weir 447 (449), *In re Subban Chetty*

(02) 4 Bom L R 436 (437) *Emperor v Jaiwant*

(1900) 2 Bom L R 51 (55) *Queen Empress v Bhica Trimbak*

1 (36) 23 AIR 1936 Rang 485 (487, 489) 38 Cr L Jour 33 14 Rang 625 (FD) *Emperor v Nga Pyu*

person of or over sixteen years of age, "with such instrument, in such mode and on such part of the person as the Local Government directs" and in the case of a person under sixteen years of age, it was to be inflicted "in the way of school discipline with a light rattan." It also limited the number of lashes to one hundred and fifty, if whipping was inflicted with the cat of nine tails and to thirty if it was inflicted with a rattan.

Section 392 of the Code of 1882 substituted the words "with a light rattan not less than half an inch in diameter," for the words "with such instrument" and further enacted that in no case shall the punishment of whipping exceed thirty stripes. Section 392 of the present Code has amended the portion relating to persons under sixteen years of age from "in the way of school discipline with a light rattan" into "in such mode and on such part of the person and with such instrument as the Provincial Government directs" and S 7 of Act 4 (IV) of 1909 has added "and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes" to sub section (2).

2 Mode of inflicting punishment on persons of or over sixteen years of age. — The mode of inflicting the said punishment and the part of the body on which it is to be inflicted have been left to be determined by the Provincial Government. The various Provincial Governments have provided as follows in this behalf.

Bengal — The punishment of whipping should, in the case of an adult, be inflicted on the breech, with a rattan not exceeding half an inch in diameter, and on all occasions precautions should be taken to prevent the blows from falling on any other part of the person (Wilkins, 148).

Bombay — In the case of a person of sixteen years of age, whipping shall, when inflicted in private, that is, within the precincts of prison, be inflicted on the bare buttocks, and when inflicted in public, that is, without the precincts of prison, across the bare shoulders (Bom G R No 608 of 1897).

Madras — In the case of a person of or over sixteen years of age, the whipping is to be inflicted on the posterior and care is to be taken that the person undergoing the punishment is tied up to a triangle, or his immobility under punishment is otherwise secured—in order to preclude the possibility of the rattan falling on any other part of the body (Gaz Not No 4, 1st Jan 1893).

A thin cloth soaked in antiseptic should be spread over prisoner's buttocks.

Punjab — (1) It is to be inflicted on the buttocks with a rattan not more than four feet in length, and one and a half inches in circumference, not in public or in front of court houses, but always within some walled enclosure and in the presence of a Magistrate or the Superintendent of the jail, and when practicable, of a Medical Officer (Punjab Bk Cir Vol 2 S LV, p 269). (2) The triangle should be boarded on the side next to the offender, so as to prevent the possibility of the rattan curving round and touching the front or any other part of his person. (3) The punishment is never to be inflicted in public, or in front of catchery, but always within some walled enclosure, either the jail, lock up, treasury or any other convenient place, and in presence of a Magistrate, and, when practicable, of a Medical Officer. Superintendents of jails have been invested by the Local Government with powers of a Magistrate of third class, with a view to sentences of whipping being executed in their presence (Smyth 115 Gov Beng, Feb 29, 1864).

United Provinces of Agra and Oudh — The whipping shall be inflicted on the buttocks with a light rattan half an inch in diameter (G O No 1290, dated 12th May 1898).

Central Provinces — In the case of a person of or over sixteen years of age, the rattan shall be applied to the bare posterior, the offender being tied to a triangle and a leather apron fastened round his waist (G. P. Gaz Not No 20, 4th January 1900).

See also the undermentioned case¹

Burma — The punishment of whipping shall be inflicted with a light rattan on the breech in the way of school discipline (Burma Gaz Not No 193 dated 1st July 1893 Part I page 307)

It has been held illegal to inflict stripes on the hand²

3 Mode of inflicting punishment on persons under sixteen years of age — Under the Codes of 1872 and 1882 as seen in Note 1 above the whipping was to be inflicted in the way of school discipline in the case of persons under sixteen years of age³ This phrase in the way of school discipline was held to connote the degree of severity with which the punishment was to be inflicted¹ Now that phrase has been omitted and the Provincial Government is empowered to prescribe the mode of punishment² The several Provincial Governments have provided as follows

Bombay — In the case of a person under sixteen years of age it shall be inflicted in private with a light rattan across the bare buttocks

Madras — In the case of juvenile offenders a lighter cane than that employed for persons of or above sixteen years of age shall be employed (G O No 59 Jud cal dated 10th January 1893)

Punjab — In the case of a person under sixteen years of age it shall be inflicted on the buttocks in the way of school discipline with a rattan not more than half an inch in diameter (Not No 677 dated 16th May 1899 Punjab Gazette 1899 Part I page 311)

Central Provinces — The whipping shall be inflicted on the bare buttocks or in the case of a boy under twelve on the hands at the discretion of the Magistrate The instrument used shall be a rattan lighter than that used for adults and while the whipping is being administered the prisoner shall be held but not tied to a triangle or in any other convenient way as the Magistrate or officer present may think fit

4 Maximum sentence of whipping — All the Codes have limited the maximum number of stripes to be inflicted with a rattan to thirty It is enacted that in no case shall this be exceeded The question arises if at the same time an accused is convicted of more than one offence can he be sentenced to more than one sentence of whipping? Referring to s 46 of the Criminal Procedure Code (in force at that time) Peacock C J said

The Code of Criminal Procedure did not intend to allow two punishments of whipping to be inflicted at the same time for two offences of which an offender might be convicted at the same time

His Lordship said in reference to the Whipping Act 6 [VI] of 1861

I do not believe that it was intended to sanction such a cruelty as to allow a double flogging to be inflicted upon a prisoner convicted of two offences at the same time¹

The words in no case in the Codes of 1872 1882 and 1893 clearly show that at one time not more than thirty stripes should be inflicted and it has been so held² under these Codes See also s 391 Note 6

Section 392 — Note 2

1 (01) 14 C P L R Cr 64 *Emperor v Gulab Musalman*

2 (92) 5 C P L R Cr 31 (31) *Empress v Sada Ganda*

Note 3

1 (90) 5 C P L R Cr 31 (31) *Empress v Sada Ganda*

2 (01) 14 C P L R Cr 64 (64) *Emperor v Gulab Musalman*

Note 4

1 30 C S L W R C 113 (50) *Nasser v Chander*

1
v *Nga Po Kyan*

Not to be executed by instalments
Exemptions

393.* No sentence of whipping shall be executed by instalments and none of the following persons shall be punishable with whipping, namely :—

- (a) females;
- (b) males sentenced to death or to transportation, or to penal servitude, or to imprisonment for more than five years,
- (c) males whom the Court considers to be more than forty-five years of age.

1. Execution of whipping by instalments — The sentence of whipping is not to be executed by instalments¹ Therefore, no enhancement of the sentence of whipping can be made in revision after it has been executed, as it would amount to executing the sentence by instalments. Thus where, an accused person convicted under s 382 Penal Code, and sentenced to whipping was whipped and an application was subsequently made to the High Court for enhancement of the sentence, this section was held to bar the awarding of any additional sentence of whipping²

2 Persons exempted from being punished with whipping — Section 7 of the Whipping Act, 6 [VI] of 1861, provided as follows

"No female shall be punished with the whipping nor shall any person who may be sentenced to death, or to transportation or to penal servitude, or to imprisonment for more than five years be punished with whipping"

This section has in addition to these persons exempted such males as the Court considers to be more than 45 years of age¹ The Burma Whipping Act, 8 [VIII] of 1927, has extended the period of imprisonment from five to seven years for purposes of this exemption. Persons sentenced to transportation² or imprisonment³ for seven years cannot be sentenced to whipping Nor can women or persons under sentence of death be so sentenced⁴ It is to be noted that the wording of this section none of the following persons shall be punishable," as compared with the words in s 391 sub s (b), shall be sentenced' refers to the execution of the sentence of whipping and not to its being passed⁵ However, a sentence the execution of which is prohibited by law is illegal and cannot be passed⁶ The word sentenced in clause (b), it was argued, means already sentenced and does not refer to the sentence passed in combination with the sentence of whipping This contention was rightly rejected⁷ and it was held that the word must be understood in a general sense and if a person is sentenced for any period exceeding that fixed by the Act,

* 1882 S 393, 1872 S 312 1861 — Nd

Section 393 — Note 1

1 (66) 1866 Pun Re No 82 Cr p 86 (87) *Banjus v Sookhrum* (Case under S 11 of Act 6 [VI] of 1864)

(1866) 1866 Pun Re No 82 Cr p 86 (87) *Banjus v Sookhrum*

2

also the accused was convicted

Note 2

1 (41) 28 AIR 1941 Sind 49 (48) 1 I L R (1940) Kar 477 (478) 42 Cri L Jour 403 193 Ind Cas 341, *Emperor v Achar Hamsa* (Provisions of Whipping Act and Criminal Procedure Code should be read together)

2. (76) 1 Mad 56 (56, 57) 2 Weir 448 (FB)

Emperor

4

6 (20) 7 AIR 1920 Lah 364 (367) 1919 Pun Re No 30 Cr 21 Cri L Jour 306 *Adbar v Emperor*

7 (30) 17 AIR 1930 Rang 138 (139) 7 Rang 769 31 Cri L Jour 176 *Nga Nya Gya v Emperor*

whether in conviction in one case, or more than one, he cannot be punished with whipping*.

But in computing the maximum period of imprisonment under this section, the period of imprisonment to which a man has already been sentenced before the commission of the offence for which the sentence of whipping is passed cannot be taken into account*.

394.* (1) The punishment of whipping shall not be inflicted unless

Whipping not to be inflicted if offender not in fit state of health

a medical officer, if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

(2) If, during the execution of a sentence of whipping, a medical officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

1 Scope — This section enacts that the sentence of whipping shall not be inflicted on an accused person unless a medical officer certifies, or in his absence, unless the Magistrate considers that the accused is in a fit state of health to undergo the punishment, and it should be finally stopped, if, during the course of its execution, it is found that the accused is not in a fit state of health to undergo the rest of the punishment. "A man, though sentenced to whipping, is not to be whipped unless in a fit state to suffer that punishment. The whipping is not to be commenced if he is unfit to bear it all, and then he is to be kept in custody till the Court can revise the sentence. But, if it be commenced, it is not to be continued longer than the man is fit to bear it, and when the man has had all he can bear (in the opinion of the medical officer), the executioner is to stay his hand, and the sentence has been fully satisfied, for, it cannot be executed by instalments."¹ It may be noted that when a sentence of whipping has been executed in the presence of the Magistrate, Rule 287 of the Madras Criminal Rules of Practice, 1931, requires the Magistrate to record the fact of such execution.

This section deals with the execution of a sentence of whipping which has been already passed. Where the question is whether such a sentence should be passed, it has been held that a Magistrate should not reject the punishment of whipping merely on the ground that the accused is too young and frail unless he has medical opinion in support of his own.²

2 Certificate of the medical officer — The medical officer can under sub s (1) certify, before the sentence is inflicted, that the accused is, or is not, in a fit state of health to undergo the punishment and under sub s (2) he can certify, during the execution

* 1962 S 394; 1972 S 312, paras 1 and 2, 1961 — Nil

8 (39) 26 AIR 1939 Pesh 17 (20) 40 Cr L Jour 681, *Karim Shah v Emperor*. (The cumulative sentence of imprisonment of more than five years cannot be maintained in the case of a person who has been ordered to undergo punishment of whipping and vice versa.)
(37) 24 AIR 1937 Lah 104 (106) 39 Cr L Jour 4, *Nur Ishaq v Emperor*. (The section applies even if the sentences aggregating more than five years imprisonment are passed in different cases.)
(76) 1 Mad 56 (57) 2 Weir 448 (FB) (Seven years transportation for one offence and whipping also for another.)

addition to—

Nya Nya

Section 394 — Note 1

1 (1864) 3 Mad II C R App I (i) (Ruling given under S 11 of Act 6 [VI] of 1864 wherein the words used were "execution shall be stayed")
2 (39) 26 AIR 1939 Rang 383 (384) 41 Cr L Jour 22, *Tin Hlaing My v. The King*

of the sentence that the accused cannot bear the rest of it. But it has been held that he is not empowered to certify before the whipping is commenced that the accused is fit to receive only a part of the sentence. Thus where before the whipping was inflicted, the medical officer certified that the accused could bear only six out of twenty lashes ordered to be inflicted on him it was held that (a) the medical officer not being authorized to grant such a certificate before the execution of the sentence it was not a valid certificate under sub s (1), and (b) the certificate not having been granted during execution was not a proper certificate under sub s (2). Hence the Magistrate's action in inflicting six out of the twenty lashes and awarding three months rigorous imprisonment in lieu of the fourteen lashes that were not inflicted was illegal and the imprisonment was set aside.¹ In such a case as this the accused should have been kept in custody with a view to revising the sentence of whipping under section 395.

395.* (1) In any case in which, under section 394, a sentence of

whipping is, wholly or partially, prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it, and the said Court may, at its discretion, either remit such sentence, or sentence the offender in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months, or to a fine not exceeding five hundred rupees, which may be in addition to any other punishment to which he may have been sentenced for the same offence.

(2) Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term or a fine of an amount exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.

Synopsis

- | | |
|-----------------------------------|---------------------------------|
| 1 Legislative changes | 4 Power of revision of sentence |
| 2 Scope and object of the section | 5 Solitary confinement |
| 3 Court which passed the sentence | |

NOTE to the Synopsis See the Notes indicated for the following topics

Absence of Magistrate — District Magistrate can act See Note 3

Commutation of thirty stripes for twelve months imprisonment under S 423 — No enhancement See Note 2

Conclusion thirty stripes Twelve months imprisonment — Wrong See Note 2

Fine instead of whipping See Note 4

No revision of illegal sentence See Note 4

Revision by original Court after confirmation on appeal See Note 3

Revision of whipping if maximum sentence already given See Note 4

Whipping and imprisonment in default — Illegal See Note 4

Whipping stopped under illegal certificate — Imprisonment illegal See Note 2

1. Legislative changes

Changes introduced in 1882 —

- (1) The words "order the discharge of the offender" in S 313 of the Code of 1872 were substituted by the words "remit such sentence".
- (2) The words "to imprisonment for any period" in S 313 were substituted by the words "to imprisonment for any period not exceeding twelve months".
- (3) The words "Provided that the whole period of imprisonment to which such offender is sentenced shall not exceed that to which he is liable by law etc." were altered.

* 1882 S 395, 1872 S 313 1861 — Nil

Note 2

1 (08) 7 Cri L Jour 5 (5 6) 31 Mad 84 17 Mad L Jour 555 *In re Public Prosecutor*
Also see S 395, Note 2



into "Nothing in this section shall be deemed to authorize any Court to inflict imprisonment for a term exceeding that to which the accused is liable by law," etc

Amendments in 1923 —

The words "or to a fine not exceeding five hundred rupees," were added in sub-s (1) between the words "twelve months" and "which may be, etc" and the words "or a fine of an amount" were added in sub s (2) between the words "for a term" and "exceeding that etc," by the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923

2. Scope and object of the section.—In cases where a sentence of whipping cannot be carried out at all, under sub s (1) of S 394, because the accused is not in a fit state of health to undergo the punishment, or where it is carried out only in part the accused not being in a state of health to undergo the rest of it,¹ this section requires the Court to keep the accused in custody with a view to revise the sentence of whipping. The sentence of whipping can be revised (a) either by remitting it, or, (b) by sentencing the accused to imprisonment for a term not exceeding twelve months in lieu of whipping, or, (c) by imposing a fine not exceeding five hundred rupees. It cannot be said that by reading S 392, sub s (2) which fixes the maximum sentence of whipping at thirty stripes, with this section which fixes the maximum sentence of imprisonment that can be given in lieu of whipping at twelve months, that sentences of thirty stripes and twelve months' rigorous imprisonment are of equal degree of severity². But it may be taken that the Legislature regarded a sentence of twelve months' imprisonment as the maximum sentence of imprisonment which could be substituted for whipping. Thus, it has been held by a Full Bench of the Rangoon High Court³ that a substitute of thirty stripes for a sentence of one year's rigorous imprisonment is not an "enhancement" within the meaning of S 423, sub s (1) (b). It has been seen in S 394 that a medical officer cannot certify before the sentence of whipping is executed that the prisoner is in a fit state of health to undergo only a portion of the sentence. If such an illegal certificate is given and in pursuance of it the sentence is partially executed, the Magistrate is not entitled under this section to sentence the prisoner to imprisonment in lieu of the unexecuted portion of the sentence of whipping⁴.

3. Court which passed the sentence — It is the Court that passed the sentence of whipping that can revise it¹. This power to revise the sentence is not taken away by the sentence being confirmed in appeal².

The words "Court which passed the sentence" do not mean the same officer who passed the original sentence of whipping. The word "Court" is impersonal, and its use instead of the words "Magistrate or officer" lends support to this view. Indeed, to confine the power of revision to the particular officer who passed the sentence would, in many cases, make the section unworkable. It certainly cannot be the intention of the

Section 395 — Note 2

1	passing
2	exceeding
3	rigorous
4	or that of 20
5	we]

Note 3

1 (89) 1889 Pan Re No 10 Cr, p 50 (53, 51), *Empress v. Chetu*.

2 (89) 1889 Pan Re No 10 Cr p 50 (53, 54), *Empress v. Chetu*.

Legislature that if at the time the sentence of whipping is to be revised under this section the particular officer who passed the sentence of whipping is not available he being either dead or transferred the accused should escape the commuted sentence under this section. It has consequently been held that when the Magistrate who passed the sentence of whipping is absent the District Magistrate can be held to be the Court which passed the sentence.³

4 Power of revision of sentence — As seen already the sentence may either be remitted or imprisonment or fine inflicted in lieu of it. The Court has however no power to take a bond under s 562 from the accused in lieu of it.¹ Before the amendment to this section in 1923 it was held that a sentence of fine cannot be passed in lieu of whipping.² Since the amendment those cases are not good law and now fine not exceeding Rs 500 can be levied.

The Court can remit the sentence altogether even though it is competent to inflict a term of imprisonment in lieu of whipping.³ The word imprisonment means a substantive sentence of imprisonment and not imprisonment in default of payment of fine.⁴ Sub section (2) enacts that where an accused is sentenced to whipping and imprisonment and where in lieu of such whipping imprisonment is inflicted the total term of imprisonment should not exceed that which the Court is competent to inflict.⁵ Therefore where imprisonment for the maximum period is inflicted in addition to whipping the entire sentence of whipping should be remitted for any further sentence of imprisonment will be beyond the competency of the Court.⁶

Where the sentence of whipping that has been passed is illegal as for example on a person above forty five years of age the Magistrate is not competent to revise such illegal sentence.⁷ The illegal sentence should be reported to the High Court for orders. But where at the time the sentence of whipping is passed it is ordered that if the sentence cannot be executed the accused shall undergo imprisonment it has been held that the conditional sentence of imprisonment is illegal and the Magistrate should act under this section.⁸

5 Solitary confinement — When imprisonment in lieu of whipping is awarded solitary confinement may be ordered though it is not specifically mentioned in the section.¹

396.* (1) When sentence is passed under this Code on an escaped

Execut on of sentences
on escaped convicts

convict, such sentence, if of death, fine or whipping,
shall subject to the provisions hereinbefore contained,

* 1882 S 396 1872 S 316 1861 S 47

3 (01) 1901 Pun Re No 53 Cr p 96 (97 93) 1902 Pun L R No 20 Chhajju v Emperor
Note 4

1 (38) 25 AIR 1938 Rang 218 (218) 39 Cri L Jour 707 King v Ba Kyau J

2 (89) 11 All 309 (309) 1889 All W N 93 Queen Empress v Sheodin

(97 96) 1 Upp Bur Bul 45 (45) Queen Empress v Nga E Aung

(1900 02) 1 Low Bur Bul 20 (203) Crown v Po Thut

3 (1900 02) 1 Low Bur Bul 20 (203) Crown v Po Thut

4 (89) 11 All 308 (310) 1889 All W N 93 Queen Empress v Sheodin

5 (98) 21 All 25 (26) 1898 All W N 156 Queen Empress v Ram Dhan Singh

(01) 1901 Pun Re No 11 Cr p 52 (33) 1901 Pun L R No 87 Crown v Barkat Ali (21 All 25 followed.)

7 (93 1900) 1893 1900 Low Bur Bul 41 Queen v Nga Pan Bon

8 (93 1900) 1893 1900 Low Bur Bul 631 Queen v Nga Chin.

Note 5

1 (99) 1899 Pun Re No 14 Cr p 38 (39) Queen Empress v Gaman

Also see S 32 Note 5

take effect immediately, and, if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say —

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped the new sentence shall take effect immediately

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation, as the case may be, for a further period equal to that which at the time of his escape, remained unexpired of his former sentence

Explanation — For the purposes of this section —

- (a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment,
- (b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement, and
- (c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement

Synopsis

- | | |
|-----------------------|-------------------------|
| 1 Legislative changes | 3 Sentence |
| 2 Escaped convict | 4 Execution of sentence |

NOTE to the Synopsis See the Notes indicated for the following topics

Custody during trial—Not a convict See Note 2

Criminal Circular Order No. 9 of Calcutta High Court See Note 4

Detention for security—Not imprisonment—Convict on under S 224 Penal Code Illegal See Note 9

Imprisonment under S 123 in default of security is sentence See Note 9

Place of trial for escaped convict See Note 2

Sentence overlooked — Executed after discovery See Note 4

Sentence under S 224 Penal Code is additional and section applies See Note 3

1 Legislative changes — Section 316 of Act 10 [X] of 1872 left it to the discretion of the Court to direct the sentence passed on an escaped convict to take effect immediately or after the expiration of the period of the imprisonment or transportation which the convict was undergoing at the time of his escape. But S 396 of the Code of 1882 and the present section enact—(a) that the sentence of death fine or whipping passed on an escaped convict shall be executed immediately and (b) the sentence of imprisonment penal servitude or transportation shall be deferred or executed immediately according as the new sentence is lighter or severer in quality than the sentence which the convict was undergoing at the time of his escape

2 Escaped convict — The word convict shows that the case of a person who escapes from custody *while under trial* is excluded from the operation of the section. There is a difference of opinion on the question if a person detained in custody for the purpose of giving security for good behaviour is not in custody for an offence though his detention may be lawful. Some cases have held that it is not a sentence of imprisonment though the detention is lawful and that his conviction under S 224 Penal Code is illegal¹. Other cases have held that the word sentence applies also to an order of

imprisonment passed under S 123, in default of furnishing security² It is submitted that the former view is correct having regard to the use of the word *convict* The place of trial under S 221, Penal Code, for an escaped convict is the place from where he escaped. Trial and conviction by a Magistrate of another district will be quashed³

3. Sentence. — The punishment under S 221, Penal Code, for escaping from lawful custody is to be in addition to the original sentence and the Court in passing such sentence must comply with the provisions of this section¹

4 Execution of sentence. — As far as the sentence of imprisonment, transportation or penal servitude is concerned, the principle of this section is that the severer in kind of the two sentences shall take effect immediately and the lighter deferred Thus, when a life convict under sentence of transportation was convicted under S 224 of the Penal Code and sentenced to four months' rigorous imprisonment, it was held that it was illegal to give priority to the sentence of rigorous imprisonment as the transportation is a severer punishment than imprisonment¹ Similarly, where an accused under sentence of transportation for seven years escaped from where he was confined before transportation, and was convicted and sentenced to two years' rigorous imprisonment, the latter punishment was directed to take effect after the period of transportation²

In the case of a sentence of death, fine or whipping, this section enacts that it shall be executed immediately When a person who escaped from custody while under sentence of death was convicted under S 221, Penal Code, the High Court directed the original sentence of death to be executed immediately.³

Criminal Circular Order No 9 dated the 15th July 1878 of the Calcutta High Court, required the Sessions Judges and the Magistrates in Bengal to carefully comply with the provisions of S 316 of the Code of 1872 and to specify in the warrant, the date from which the sentence is to take effect, whether at once or after the lapse of a period equivalent to the portion of the prisoner's original sentence which remained unexpired at the time of his escape, the date on which the original sentence, of which the currency was interrupted by the escape, being clearly shown This circular has now become obsolete as the present section makes statutory provision as to the execution of the two sentences

Where an accused was sentenced to three months rigorous imprisonment, and a certain fine or in default to twenty days rigorous imprisonment, the substantive term of imprisonment was overlooked through a mistake in the warrant of commitment to the jail, and he served only the twenty days imprisonment and was released The error was then discovered and five days after his release he was re-arrested and sent back to the jail to undergo the substantive term of imprisonment, it being directed that the imprisonment should begin on the day of re-arrest It was held that the order was a legal one⁴

2. (95) 1895 Rat 774 (774) *Queen Empress v Pandu Khandu*

[See also (04) 1 Cr L Jour 1114 (1114) 6 Bom L R 1098, *Emperor v Durga Bahirav* (Case under Section 397)]

(12) 13 Cr L Jour 849 (949) 37 Bom 178 17 Ind Cas 78, *Emperor v. Vishnu Balakrishna Ram* (Do)

(09) 8 Cr L Jour 402 (402) 31 Mad 515 (517), *In re Joghi Kantam* (Do)]

3 (1864) 1 Bom H C B Cr 139 (139), *Reg v Dossa Sera*

Note 3

1. (82) 1 Weir 203 (204), *In re Chinna Madakudamban*

(67) 8 Suth W R Cr 85 (86), *Queen v Dhoonda Bhooya*

Note 4

1. (98) 1898 Rat 905 (905, 966), *Queen v Mahadu Nagu*

2. (12) 13 Cr L Jour 54 (55) 13 Ind Cas 390 (Upp Bur), *Nga Po Chien v Emperor*.

3. (82) 1882 All W N 164 (164), *Emress v Aman*

(73) 20 Suth W R Cr Cr No. 9, p 6

4. (97-01) 1 Upp Bur Rel 69 (89, 90), *King-Emperor v. Ngwe Gany.* (Offence under S. 417, Penal Code)

397.* When a person already undergoing a sentence of imprisonment, penal servitude or transportation, is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence.

Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced

Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

Synopsis

- | | |
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| <ul style="list-style-type: none"> 1 Legislative changes 2 Several sentences — Execution of 3 'Unless the Court directs concurrently with such previous sentence' 3a Whipping—Concurrent sentences of See Note 12 on S 35 3b Imprisonment in default of payment of fine if can be made concurrent 4 "Already undergoing a sentence of imprisonment" etc 5 Order for imprisonment under S 123 — Subsequent sentence for offence—Second proviso | <ul style="list-style-type: none"> 6 Detention in civil prison if "sentence of imprisonment" 6a Detention under Madras Borstal Schools Act, if can be made consecutive 7 Effect of reversal of one of two sentences in appeal 8 Transportation — First proviso 9 Sentence cannot be ante dated 10 Order as to commencement of sentence is not a judgment 11 Power of High Court to pass concurrent sentences 12 Appeal |
|--|--|

NOTE to the Synopsis See the Notes indicated for the following topics.

Compared with S 35 See Note 2

Ignorance of imprisonment and subsequent discovery See Note 8

Imprisonment in foreign territories See Note 4

No order as to transportation during imprisonment —Effect See Note 8

No transportation in default of fine See Note 8

Order as to commencement of sentences — Subsequent to delivery of judgment — Legal See Note 10

Order under S 123 subsequent to sentence for another offence See Note 5

Section 64 Penal Code See Note 4

Security given under S 108 — Withdrawn after conviction for another offence—Effect See Note 4

Sentence of transportation for a second time See Note 8

Sentences to be executed immediately See Note 2

Several sentences same day See Note 4

Subsequent sentence for offence committed after order under S 123 See Note 5

1 Legislative changes.

Changes introduced in 1872 —

There was no provision in the Code of 1861 as to how a sentence of transportation on an offender already undergoing a sentence of *transportation*, was to take effect. This was provided for in the Code of 1872 but in other respects there was no difference between the two Codes.

Changes introduced in 1882 —

- (1) The Code of 1872 referred only to sentences of *imprisonment* and *transportation*. The sentence of *penal servitude* was also added in 1882

- (2) The proviso to S 31^a of the Code of 18 2 was enacted as a separate section in 1882 namely S 393

Changes introduced in 1898 —

There were no changes introduced in 1898

Changes introduced by Act 18 [XVIII] of 1923 —

- (1) The words unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence were newly added See Note 3
(2) The second proviso was newly added See Note 5

2 Several sentences—Execution of —The general principle is that sentences should take effect immediately on conviction and cannot be postponed¹ In cases however where *several sentences* are passed against the same person the Code has enacted a different rule namely that such sentences should run consecutively the one *after the expiration* of the other unless the Court *directs* that they should run concurrently² Section 35 enacts this rule where a person is convicted at *one trial* of several offences and several sentences are given This section enacts the rule where a person *already undergoing a sentence* is sentenced to imprisonment etc³

3 "Unless the Court directs concurrently with such previous sentence" — Before the amendment of the Code in 1923 S 35 enabled a Magistrate in a case where several sentences were passed at *one trial* to order that the punishments shall run concurrently¹ But there was no such provision (except in one particular specified) in *this section* and it was consequently held in cases not falling within S 35 that the Court had no power to order that the sentences should run concurrently² The addition of the

Section 397 — Note 2

1 (69) 12 Suth W R Cr 47 (48) 3 Beng L R App Cr 50 *In the matter of Kishen Soonder Dutt a chargee* (Deputy Magistrate postponing execution of sentence pending appeal on request of accused illegal)

2 (1864) 1 Suth W R Cr 2 (2)

(78) 1878 Rat 132 (132)

(20) 7 AIR 1920 All 211 (211) 21 Cri L Jour 398 *Emperor v Bhulki*

(28) 15 AIR 1928 Oudh 607 (608) 30 Cri L Jour 473 *Hasari Persa v Emperor*

[See also (25) 12 AIR 1925 Oudh 374 (376) 27 Oudh Cas 385 26 Cri L Jour 141^a *Murla Brahman v King-Emperor*]

begin to run from the moment they are passed))

Note 3

1 See (69) 1869 Rat 18 (19 20) *Reg v Ramchandra* (Court may direct that they should run concurrently)

[See also (21) 8 AIR 1921 All 126 (127) 2^a Cri L Jour 529 *Harakh Narain v Emperor*]

2 (69) 1869 Rat 18 (18) (Case under S 48 of the Code of 1861)

(21) 8 AIR 1921 All 126 (127) 2^a Cri L Jour 529 *Harakh Narain v Emperor*

(88) 1888 Rat 391 (391) *Queen Empress v Hars* (Case under first proviso which was already there in the Code of 1882)

(73) 20 Suth W R Cr 70 (70) *Queen v Sobras Gouallal*

(02) 4 Bom L R 8 6 (877) *Emperor v Tularam Hars*

(20) 7 AIR 1920 All 211 (211) 21 Cri L Jour 398 *Emperor v Bhulki*

(1900) 2 Bom L R 111 (112) *Queen Empress v Bhangandas Baldas*

(0) 15 C P L R Cr 57 (57) *Emperor v Buddhu*

(12) 13 Cri L Jour 3 (3) 13 Ind Cas 109 (Lab) *Emperor v Ganda Singh*

(08) 7 Cri L Jour 445 (445) 4 Low Bur Rul 147 *Emperor v San E*

(03) 1903 Upp Bur Rul Cr P C 19 *Aga Tol Gya v Emperor*

(09) 10 Cri L Jour 236 (37) 2 Snd L R 23 *Imperator v Khuda Duz*

(01) 1891 Rat 552 (553) *Queen Empress v Mahomed*

(12) 13 Cri L Jour 466 (467) 15 Ind Cas 306 (Mad) *Advocate-General v Govindanaray*

(17) 4 AIR 1917 Cal 416 (417) 18 Cri L Jo 410 *Kamal Mandal v King Emperor*

words "unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence" by the amendment of 1923, now makes it clear that such orders are competent³ See also S 35, Note 10

3a Whipping—Concurrent sentences of. — See Note 12 on Section 35

3b. Imprisonment in default of payment of fine if can be made concurrent. — Section 64 of the Penal Code lays down that a sentence of imprisonment in default of payment of fine should be *in excess of any other imprisonment to which the accused may have been sentenced*. This implies that a sentence of imprisonment in default is not a sentence of imprisonment within the meaning of S 35 of the Code¹ or of this section² It has, therefore, been held in the undermentioned cases,³ decided under S 35 that sentences of imprisonment in default cannot be ordered to run concurrently. Following this view, the High Court of Lahore⁴ has held in a case coming under this section that it is illegal to make various sentences of imprisonment in default of payment of fine awarded in *separate trials* concurrent with each other Similarly, it has been held that a Court has no power to direct a sentence of imprisonment in default of payment of fine to run concurrently with a substantive sentence of imprisonment passed for a different offence either at the same trial or at different trials⁵ In *Emperor v Punjab Lalaji*,⁶ the High Court of Bombay has, however, held that the word 'imprisonment' in this section includes imprisonment in default of payment of fine and that, therefore, where a person undergoing a sentence of imprisonment in default of payment of fine is sentenced to a substantive term of imprisonment, the latter sentence will begin to run only on the expiry of the imprisonment for default

4. "Already undergoing a sentence of imprisonment," etc. — A is sentenced on the same day to two separate terms of imprisonment on two separate convictions Can A be said, at the moment the second sentence is passed, to be *undergoing a sentence of imprisonment* in respect of the first sentence? It was held by the High Court of Allahabad, in a case arising before the amendment of 1923, that he cannot, the reason being that a person cannot be said to undergo a sentence of imprisonment

(' ') S 397 N 3

Also see S 35, Note 10 and S 240, Note 3

Court]]

Note 3b

- 1 (26) 13 AIR 1926 Bom 62 (62) - 27 Cri L Jour 111, *Emperor v Subrao Sesharao*.
- 2 ('40) 27 AIR 1940 Lah 388 (388) : 1 L R (1940) Lah 143 42 Cri L Jour 33 : 190 Ind Cas 765, *Emperor v Chanan Singh*
- 3 ('12) 13 Cri L Jour 536 (536) . 5 Sind L R 263 15 Ind Cas 808, *Imperator v. Ahidullah*
(29) 16 AIR 1929 Sind 179 (179) - 30 Cri L Jour 907, *Emperor v. Ghulam Ahmed*
(26) 13 AIR 1926 Bom 62 (62) : 27 Cri L Jour 111, *Emperor v. Subrao Sesharao*
- Also see S 35, Note 13
- 4 ('40) 27 AIR 1940 Lah 388 (388) . 1 L R (1940) Lah 143 : 42 Cri L Jour 33 - 190 Ind Cas 765, *Emperor v. Chanan Singh*
- 5 ('41) 28 AIR 1941 Lah 209 (210). 42 Cri L Jour 642 : 195 Ind Cas 3, *Emperor v. Haji*. (Section 397 contemplates substantive sentences of imprisonment)
6. ('39) 26 AIR 1939 Bom 174 (176, 177) - 40 Cri L Jour 602 : 1 L R (1939) Bom 160 (Broomfield J., however, observed that it was doubtful if an order to make the subsequent substantive sentence run concurrently with the previous term of imprisonment in default was legal.—It is difficult to understand this, in view of his Lordship's view clearly expressed, that the term imprisonment in this section includes imprisonment in default of payment of fine)

until he is actually put in jail¹ It was however, held in the same case following the undermentioned case² of the Bombay High Court that where several sentences were passed on the same day, they might be considered to have been passed at *one trial* within the meaning of S 33 and that therefore, the Court could order the sentences to run concurrently The High Courts of Madras and Rangoon and the Judicial Commissioner's Court of Nagpur have on the other hand, held that a person sentenced to imprisonment must be deemed to be undergoing that imprisonment within the meaning of this section *from the moment the sentence is passed* and that, therefore, this section will apply³

A person who has furnished security under s 109 of the Code and is subsequently convicted under s 500 of the Penal Code cannot be said to be undergoing any sentence of imprisonment at the time the sentence under s 500 is passed, though after such conviction the accused withdraws his security and is consequently committed to prison⁴

A person undergoing a sentence of imprisonment in a *foreign territory* will, for the purposes of this section be considered to be "undergoing the sentence" and consequently a Magistrate is competent to direct that a sentence passed by him should commence after the expiration of the sentence which the accused is undergoing in the foreign territory.⁶

5 Order for imprisonment under section 123 — Subsequent sentence for offence — Second proviso. — Before the addition of the second proviso to this section in 1929, there was a difference of opinion as to whether an order for commitment to prison under s 123 in default of furnishing security was a sentence of imprisonment within the meaning of this section. On the one hand it was held that it was not and that the subsequent sentence could not therefore, under this section, be postponed till after the expiry of the imprisonment ordered under s 123.² The High Court of Allahabad held, on

Note 4

- 1 (18) 5 AIR 1918 All 303 (303) 19 Cri L Jour 207, *Makhan v Emperor*
2 (11) 12 Cri L Jour 241 (241) 10 Ind Cas 769 (769) (Bom) *Emperor v Mahomed Isaf Habib* (In
this case the offences could have been joined together under S 234 of this Code)
3 (81) 2 Weir 451 (451, 452) *In re Muthusami Goundan* (Case before 1923.—Sentences held only to
run consecutively)
4 (24) 11 AIR 1924 Rang 307 (308) 25 Cri L Jour 1310, *Emperor v Nga Po Thauang* (Case under the
amended section.—Sentences could be directed to run concurrently)
5 (26) 13 AIR 1926 Nag 426 (429) 27 Cri L Jour 607, *Mahadeo v Emperor* (Do)
[See (35) 22 AIR 1935 Rang 456 (459) 37 Cri L Jour 217, *N N Durgarjee v Emperor* (But
sentences should not be ordered to run concurrently, where the offences are totally unconnected
each other)]
6 (23) 10 AIR 1923 Oudh 56 (57) 25 Oudh Cas 249 24 Cri L Jour 577, *Ganesh Shankar Vidyarthi*
v King Emperor
7 (97) 20 Mad 444 (444) 2 Weir 452, *Queen Empress v Venkatarama Jetti* (Prisoner undergoing
sentence of imprisonment in Mysore)
8 [See (88) 1898 Rat 391 (391), *Queen Empress v Bhika* (Case under first proviso)]

Note 5

- [illegible]

words 'unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence' by the amendment of 1923, now makes it clear that such orders are competent.³ See also S. 35, Note 10.

3a Whipping—Concurrent sentences of — See Note 12 on Sect on 35

3b Imprisonment in default of payment of fine if can be made concurrent — Section 41 of the Penal Code lays down that a sentence of imprisonment in default of payment of fine should be in excess of any other imprisonment to which the accused may have been sentenced. This implies that a sentence of imprisonment in default is not a sentence of imprisonment within the meaning of S 35 of the Code¹ or of this section.² It has therefore been held in the unmentioned cases³ decided under S 35 that sentences of imprisonment in default cannot be ordered to run concurrently. Following this view, the High Court of Lahore⁴ has held in a case coming under this section that it is illegal to make various sentences of imprisonment in default of payment of fine awarded in separate trials concurrent with each other. Similarly, it has been held that a Court has no power to direct a sentence of imprisonment in default of payment of fine to run concurrently with a substantive sentence of imprisonment passed for a different offence either at the same trial or at different trials.⁵ In *Emperor v. Punjaji Lalaji*,⁶ the High Court of Bombay has however, held that the word imprisonment in this section includes imprisonment in default of payment of fine and that therefore, where a person undergoes a sentence of imprisonment in default of payment of fine is sentenced to a substantive term of imprisonment the latter sentence will begin to run only on the expiry of the imprisonment for default.

4 "Already undergoing a sentence of imprisonment," etc — A is sentenced on the same day to two separate terms of imprisonment on two separate convictions. Can A be said, at the moment the second sentence is passed, to be undergoing a sentence of imprisonment in respect of the first sentence? It was held by the High Court of Allahabad, in a case arising before the amendment of 1923 that he cannot, the reason being that a person cannot be said to undergo a sentence of imprisonment

12 11 10 9 8 7 6 5 4 3 2 1

Also see S 35 Note 10 and S 210 Note 3

3 (24) 11 AIR 1924 Rang 307 (30-9) 23 Cal L Jour 1310 Emperor v Ngai Po Thauan)

(26) 13 AIR 1976 Nag 426 (429) 27 Cn L Joat 807, Mahadeo v King-Emperor

[But see (25) 12 AIR 1905 Lab 534 (335) 26 Cr LJ 731 *Batin Singh v Emperor* (The decision is submitted is not correct—The amendment of 1923 was apparently not brought to the notice of the Court.)]

Note 3b

1 (26) 13 AIR 1956 Bom 62 (6) 27 Cri L Jour 111, *Fisaperer v Subrao Sesharao*.

2 (40) 27 All. 1940 Lah 3-5 (3-5) I L R (1940) Lah 143 42 Cri L Jour 53 190 Ind Cas 765
Emperor v Chanan Singh

3 (12) 13 Cri L Jour 536 (536) 3 Sind L R 263 15 Ind Cas 808 *Imperator v Abdulah.*

(29) 16 AIR 1922 S. 117 (179) 30 CrL J. 907, *Emperor v. Ghulam Ahmed*

(22) 13 A1R 19^o Dom 62 (6^a) 27 Cri L Jour III Emperor v Subrao Sesharao.

Also see S 35 Note 13

4 [40] 27 AIR 1910 Lah 343 (349) I L R (1940) Lah 143 42 Cri L Jour 33 100 Ind Cas 765
Emperor v Chanan Singh

5 (41) 29 AIR 1941 Lah 209 (210) 42 Cr L Jour 642 193 Ind Cas 3, *Emperor v Haji* (Sent on 30th Nov 1930) (does not elaborate substantive sentences of imprisonment.)

6 (1939) 26 All ER 174 (176-177). 40 Cr L Jour 602. 1 L R (1939) Dom 160 (Broomfield J. however observed that it was doubtful if an order to make the subsequent substantive sentence run concurrently with the previous term of imprisonment in default was legal—it is difficult to understand this, in view of his Lordship's view clearly expressed, that the term imprisonment in this section in effect imprisonment in default of payment of fine.)

until he is *actually put in jail*¹ It was however, held in the same case following the undermentioned case² of the Bombay High Court that where several sentences were passed on the same day they might be considered to have been passed at *one trial* within the meaning of s 35 and that therefore, the Court could order the sentences to run concurrently. The High Courts of Madras and Rangoon and the Judicial Commissioner's Court of Nagpur have on the other hand, held that a person sentenced to imprisonment must be deemed to be undergoing that imprisonment within the meaning of this section *from the moment the sentence is passed* and that, therefore, this section will apply.³

A person who has *furnished security* under s 108 of the Code and is subsequently convicted under s 500 of the Penal Code, cannot be said to be undergoing any sentence of imprisonment at the time the sentence under s 500 is passed, though after such conviction the accused withdraws his security and is consequently committed to prison.⁴

A person undergoing a sentence of imprisonment in a *foreign territory* will, for the purposes of this section be considered to be "undergoing the sentence" and consequently, a Magistrate is competent to direct that a sentence passed by him should commence after the expiration of the sentence which the accused is undergoing in the foreign territory.⁵

5 Order for imprisonment under section 123 — Subsequent sentence for offence — Second proviso. — Before the addition of the second proviso to this section in 1923, there was a difference of opinion as to whether an order for commitment to prison under s 123 in default of furnishing security was a *sentence of imprisonment* within the meaning of this section. On the one hand, it was held that it was not¹ and that the subsequent sentence could not therefore, under this section, be postponed till after the expiry of the imprisonment ordered under s 123.² The High Court of Allahabad held on

Note 4

- 1 (18) 5 AIR 1918 All 303 (303) 19 Cr L Jour 207, *Makhan v Emperor*
 2 (11) 12 Cr L Jour 241 (241) 10 Ind Cas 769 (769) (Bom) *Emperor v Mahomed Isaf Habib* (In this case the offences could have been joined together under s 234 of the Code)
 3 (91) 2 Weir 451 (451, 452) *In re Muthusami Goundan* (Case before 1923—Sentences held only to run consecutively)

each other]]

- 4 (23) 10 AIR 1923 Oudh 56 (57) 25 Oudh Cas 249 24 Cr L Jour 577, *Ganesh Shankar Yadyarath v King Emperor*
 5 (97) 20 Mad 444 (444) 2 Weir 452, *Queen Empress v Venkatarama Jella* (Prisoner undergoing sentence of imprisonment in Mysore)
 [See (84) 1889 Rat 391 (391), *Queen Empress v Bhika* (Case under first proviso)]

Note 5

- 1 *Emperor*
 2 *Em*
 3 *Ind*
 (03) 2 Weir 452 (452) *In re Venkatasaidu*
 (1900 02) 1 Low Bur Rul 14 (15) *Queen Empress v Nga Kyon*
 (12) 17 Ind Cas 785 (785) 13 Cr L Jour 849 (Bom) *Emperor v Vishnu Balakrishna*
 (03 04) 2 Low Bur Rul 72 (75 76) (FB), *King Emperor v Nga Po Thin* (Thirkell White C. J., dissenting)
 (12) 13 Cr L Jour 849 (849) 37 Bom 178 17 Ind Cas 785, *Emperor v Vishnu Balakrishna*
 (10) 11 Cr L Jour 15 (15) 3 Sind L R 114 4 Ind Cas 623, *Emperor v Pandhi*

words "unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence" by the amendment of 1923, now makes it clear that such orders are competent³ See also S 35, Note 10

3a Whipping—Concurrent sentences of — See Note 12 on Section 35

3b Imprisonment in default of payment of fine if can be made concurrent — Section 64 of the Penal Code lays down that a sentence of imprisonment in default of payment of fine should be *in excess* of any other imprisonment to which the accused may have been sentenced. This implies that a sentence of imprisonment in default is not a sentence of imprisonment within the meaning of S 35 of the Code¹ or of this section² It has therefore, been held in the undermentioned cases,³ decided under S 35 that sentences of imprisonment in default cannot be ordered to run concurrently. Following this view, the High Court of Lahore⁴ has held in a case coming under this section that it is illegal to make various sentences of imprisonment in default of payment of fine awarded in *separate trials* concurrent with each other. Similarly, it has been held that a Court has no power to direct a sentence of imprisonment in default of payment of fine to run concurrently with a substantive sentence of imprisonment passed for a different offence either at the same trial or at different trials⁵ In *Emperor v Punjabi Lalaji*,⁶ the High Court of Bombay has however, held that the word 'imprisonment' in this section includes imprisonment in default of payment of fine and that therefore, where a person undergoing a sentence of imprisonment in default of payment of fine is sentenced to a substantive term of imprisonment the latter sentence will begin to run only on the expiry of the imprisonment for default.

4 "Already undergoing a sentence of imprisonment," etc — A is sentenced on the same day to two separate terms of imprisonment on two separate convictions. Can A be said, at the moment the second sentence is passed, to be *undergoing a sentence of imprisonment* in respect of the first sentence? It was held by the High Court of Allahabad, in a case arising before the amendment of 1923, that he cannot, the reason being that a person cannot be said to undergo a sentence of imprisonment

1923 10 I L R 1000 N 1007 " : Sein Fo

(13) 14 Cri L Jour 388 (388) 20 Ind Cas 212 (Low Bar) *Nga Pya v Emperor*]

Also see S 35 Note 10 and S 240 Note 3

3 (24) 11 AIR 1924 Rang 307 (308) 25 Cri L Jour 1310 *Emperor v Nga Po Thauang*

(26) 13 AIR 1926 Nag 428 (429) 27 Cri L Jour 807, *Mahadeo v King Emperor*

[But see (25) 12 AIR 1925 Lah 334 (335) 26 Cri L Jour 731 *Batan Singh v Emperor* (The decision it is submitted, is not correct—The amendment of 1923 was apparently not brought to the notice of the Court)]

Note 3b

1 (26) 13 AIR 1926 Bom 62 (62) 27 Cri L Jour 111, *Emperor v Subrao Sesharao*

2 (340) 27 AIR 1940 Lah 388 (388) I L R (1940) Lah 143 42 Cri L Jour 33 190 Ind Cas 765 *Emperor v Chanan Singh*

3 (19) 190 I L R 1000 N 1007 " : Sein Fo
ned
ao

4 (40) 27 AIR 1940 Lah 388 (389) I L R (1940) Lah 143 42 Cri L Jour 33 190 Ind Cas 765 *Emperor v Chanan Singh*

5 (41) 28 AIR 1941 Lah 209 (210) 42 Cri L Jour 642 195 Ind Cas 3, *Emperor v Hays* (Section 397 contemplates substantive sentences of imprisonment)

6 (39) 26 AIR 1939 Bom 174 (176, 177) 40 Cri L Jour 602 I L R (1939) Bom 160 (Broomfield J., however, observed that it was doubtful if an order to make the subsequent substantive sentence run concurrently with the previous term of imprisonment in default was legal.—It is difficult to understand this in view of his Lordship's view clearly expressed, that the term imprisonment in this section includes imprisonment in default of payment of fine.)

months in respect of another offence it was held that this proviso did not apply as the latter sentence was not passed while the sentence of imprisonment under s 123 was being undergone, because the accused could not be called upon to give security until the expiry of the substantive sentence for theft and that the sentence of six months would commence after the expiry of the sentence for theft and should run concurrently with the sentence passed in default of giving security⁹

When the sentence for the offence is *fine*, s 64 of the Penal Code requires that any imprisonment in default of the payment of fine should be *in excess of any other imprisonment to which the accused may be sentenced*. Hence, in such cases, even though the offence in question may have been committed prior to the passing of the order under s 123, the effect of s 64 of the Penal Code would be to postpone the imprisonment in default of fine till the expiration of the imprisonment in default of security.¹⁰ (See also Note 2b)

It has been held that ss 20 to 26 of the Sind Frontier Regulations should be read with this section and that, therefore, this proviso applies to cases where imprisonment has been imposed under ss 21 and 24 of the Regulations.¹¹

6. Detention in civil prison, if "sentence of imprisonment." — The detention in civil prison is not a sentence of imprisonment within the meaning of this section. Where therefore a person undergoing detention in a civil jail is convicted of an offence and sentenced to a term of imprisonment, this section has no application and the sentence will commence, under the general principle of law, from the date of the order.¹

6a. Detention under Madras Borstal Schools Act, if can be made consecutive. — This section does not apply to sentences of detention under s 8 of the Madras Borstal Schools Act. Consequently, a direction in a case that the sentence of detention should commence after the expiration of the previous sentence of detention is illegal.¹

7. Effect of reversal of one of two sentences in appeal. — Where x is convicted and sentenced to imprisonment first in one case and subsequently in another, and the former conviction is reversed in appeal, it has been held by the High Court of Bombay that the second sentence will commence from the date of such reversal.¹ But this was not followed by the same High Court in the undermentioned case² in which it was held that such sentence will commence from the date of conviction. According to the High Court of Madras, the sentence already undergone in respect of the conviction which was set aside should be reckoned as imprisonment in the second conviction.³ The Judicial Commissioner's Court of Sind has held that the second sentence will commence only on the date of the acquittal in appeal in respect of the first conviction, but that the High Court has power under s 432 of the Code to reduce, on equitable considerations, the

9. (41) 28 AIR 1941 Sind 190 (190, 191) : 1 L R (1941) Kar 63 : 43 Cr L Jour 105 : 196 Ind Cas 891, *Emperor v. Fazul Khush Muhammad*

10. (32) 19 AIR 1932 Rang 50 (51) : 9 Rang 612 : 33 Cr L Jour 174, *Emperor v. Nan E.*

11. (41) 28 AIR 1941 Sind 29 (29, 30) : 1 L R (1941) Kar 161 : 42 Cr L Jour 342 : 192 Ind Cas 865, *Emperor v. Mahomed Hassan Allahdad*

Note 6

1. (17) 4 AIR 1917 Low Bur 159 (159) : 17 Cr L Jour 480, *Shin Taung v. Emperor* (Subsequent imprisonment under the Prisons Act)

(25) 12 AIR 1917 Rang 202 (203) : 3 Rang 93 : 26 Cr L Jour 821, *Emperor v. Ma Kha Gyi.*

Note 6a

1. (38) 25 AIR 1938 Mad 613 (614) : 39 Cr L Jour 795, *In re Public Prosecutor.*

Note 7

1. (79) 1879 Rat 133 (139)

second sentence by the period of imprisonment already undergone by the accused⁴

8 Transportation — First proviso. — Where an accused who is already undergoing a sentence of imprisonment is sentenced to transportation, the Court has got a discretion under the first proviso to direct the sentence of transportation to commence immediately or after the expiration of the sentence of imprisonment¹ If no order is made directing it to commence immediately, the sentence of transportation will commence only after the expiry of the sentence of imprisonment² Where, however, at the time the sentence of transportation is passed, the Magistrate is ignorant of the previous sentence of imprisonment, an order directing the sentence of transportation to commence immediately can be made later on³ By the amendment of sub s (1) this discretion has been given even in the case of a subsequent sentence of imprisonment or penal servitude The first proviso, therefore, appears to be redundant and unnecessary Where a person already sentenced to transportation for life is for the second time sentenced to transportation, this section has been held not to apply though, for purposes of calculation, a sentence of transportation for life is reckoned as 20 years⁴ It may be noted, in passing, that transportation cannot be ordered in default of payment of fine⁵

9 Sentence cannot be ante-dated — A sentence cannot be made to operate from a date prior to the date on which the sentence was passed Thus, where a prisoner was arrested on 27.1.1931 and was convicted and sentenced on 8.4.1931, it was held that the sentence could not be made to run from 27.1.1931.¹

10 Order as to commencement of sentence is not a judgment — An order made by a Court under this section as to the commencement of sentences is not a part of its judgment and may, therefore, be made after the judgment is signed¹

11 Power of High Court to pass concurrent sentences — The High Court has power, under this section, to pass concurrent sentences in the same manner as the Court which originally passes the sentences¹

12 Appeal. — Where an accused is sentenced to concurrent terms of imprisonment, no one of which alone is appealable, he is not entitled to appeal against them collectively¹ Likewise when an Assistant Sessions Judge sentences an accused to imprisonment for a period not exceeding four years, under each of two sections of the Penal Code, directing the sentences to run concurrently, an appeal lies to the Sessions Court and not to the High Court²

4 (32) 19 AIR 1932 Sind 159 (160) 31 Cri L Jour 24 *Emperor v Koural Shah*
Note 8

1 (02) 2 Weir 453 (453), *In re Pattayal Koorn*
(09) 10 Cri L Jour 236 (237) 2 Sind L R 23, *Imperator v Khuda Buz*.

ALLOES 21, 1001 1001 1001 1001

Note 9
1 (33) 20 AIR 1933 Rang 28 (28) 34 Cri L Jour 447, *Emperor v Nga Po Min*

Note 10
1. (85) 1888 Rat 391 (391), *Queen Empress v Dhika*
Note 11

Note 12

398.* (1) Nothing in section 396 or section 397 shall be held to

excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine until the person has undergone the further sentence or sentences

1 Scope of the section — This section provides that no person will be excused from undergoing any part of the punishment to which he is liable under former or subsequent convictions.¹

Where an accused was convicted under s 447, Penal Code and sentenced to undergo rigorous imprisonment for three months and a fine in default of payment of which he was sentenced to imprisonment for twenty days and the substantive sentence was by some mistake overlooked with the result that the accused served only the sentence of imprisonment in default of payment of fine and was released, it was held that the accused could be re-arrested and sent to jail to serve the substantive sentence and the substantive sentence could be directed to begin from the date of his re-arrest.²

2 Sub section (2) — This sub section was first introduced in the Code of 1893. It supersedes the view held in the undermentioned case¹ that where a convict is imprisoned under two warrants which order consecutive punishments the first warrant should be completely executed both in respect of the substantive sentence of imprisonment and the imprisonment in default of fine before any effect is given to the second warrant. Where a person is already undergoing a sentence of imprisonment in default of payment of fine when a substantive sentence of imprisonment is passed against him an order directing that the subsequent sentence should take effect immediately and that the unexpired portion of the prior sentence should begin to run on the expiry of the subsequent sentence is not justified under this sub section. The reason is that this sub section only provides for the postponement of the imprisonment in default and not for its interruption.²

399.† (1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail, shall be confined in any reformatory established by the "[Provincial Government] as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person

* 1898 S 398 sub section (1) 1882 S 398, 1872 S 317 proviso 1861 S 48 proviso
† 1882 S 399 1872 S 318 1861 S 433

Section 398 — Note 1

1 (1903) 2 Weir 453 (453) *In re Pallayil Kooru*

(1911) 1894 Pun Re No 12 Cr p 58 (39) *Musaffar v Emprass*

2 (197-01) 1 Upp Bur Rcl 89 (89-90) *King Emperor v Agre Gasing*

Note 2

1 (178) 1878 Rat 132 (132)

2 (1939) 26 AIR 1939 Bom 174 (176-177) 40 Cri L Jour 602 ILR (1939) Bom 160, *Emperor v Punjaji Lalaji*

suspension of the sentence by the Sessions Judge will not prevent the carrying out of the detention² As to power to act under s 31 of the Reformatory Schools Act, 1897, see the undermentioned decisions³

5. "Instead of being imprisoned" — Since the detention is only *instead of* imprisonment in jail, the Court which sentences an accused person for any particular period of imprisonment cannot direct detention in a reformatory for a longer period¹ Thus, where a confinement in a reformatory for one year was ordered on a sentence of imprisonment for one day the sentence was held illegal² The period of detention should be defined and words like "or until he attains majority" should not be used³ See also s 8 of the Reformatory Schools Act, 1897, and the undermentioned cases⁴

6 Sub-section (3) — This section does not apply where the Reformatory Schools Act, 1897, is in force¹ In such cases the authority to send a youthful offender to a reformatory school must be found in that Act Section 8 of that Act provides that only the Magistrates specified therein can make an order under this section² A second class Magistrate who is not so specified cannot order a youthful offender to be sent to a

(31) 18 AIR 1931 Mad 771 (771) 54 Mad 764 32 Cri L Jour 1044, *Sellappa Goundan v Emperor*. (Detention in Borstal School held improper)

(34) 21 AIR 1934 Rang 125 (127) 12 Rang 344 35 Cri L Jour 959, *Emperor v Nga Ohn Shwe*. (Detention in Borstal School is not proper where accused merely fails to keep under control his passion or gives way to violence)

903, *Emperor v. Shue Bein*. (Deten-

- v *Krishna Pandaram* (Section 426

. v *Emperor*
31, Reformatory

eror
r. (United Pro-

vinces Rules require minimum sentence of four years for detention in reformatory)

Note 5

1. (76) 1876 Rat 109 (109) *Reg v Ganpaya*

2 (89) 1899 All W N 131 (131), *Queen-Empress v. Hira* (Also there were other irregularities in this case)

3 (13) 14 Cri L Jour 256 (256) 19 Ind Cas 512 (Bom) *Emperor v. Rama Sudama*

Lower Burma
fender should

be detained till majority)

(93) 21 Mad 430 (432) 1 Weir 880, *Queen Empress v. Ramalingam* (Rules passed by Government require detention until the age of eighteen — Per Shephard, Offg C J and Moore, J — Davies J, dissenting)

(1900) 1 Weir 884 (884), *Public Prosecutor v. Bantoo* (Government of India Notification dated 30th June 1887, does not require detention till eighteen years in every case)

(91) 1891 Rat 564 (572), *Queen Empress v. Bala*

Note 6

Muhammad

11 917, *Emperor v. Nur*

reformatory school where the Reformatory Schools Act, 1897, is in force.³ See also the undermentioned cases⁴

7 "Imprisonment." — Transportation is only a particular form of imprisonment and consequently, this section will apply also to cases when an offender under the age of 15 years is sentenced to transportation.¹

8. Revision. — As to the power of the High Court in revision in cases arising under the Reformatory Schools Act (8 [VIII] of 1897), see section 435, Note 15, and the undermentioned cases.¹

400. When a sentence has been fully executed, the officer execut-

Return of warrant on ing it shall return the warrant to the Court from which
execution of sentence it issued, with an endorsement under his hand certifying
the manner in which the sentence has been executed.

1. "Has been fully executed." — Where a person has been convicted under an Ordinance issued by the Governor-General, his sentence does not become fully executed

* 1832 S 400; 1872: S. 305, 1861: S. 385

- 3 (89) 12 Mad 94 (93, 97) • 1 Weir 875 (FB), *Queen-Empress v Madasami*
4 (16) 2 AIR 1915 Mad 841 (841) 16 Cri L Jour 32, *Kanukayya v Emperor*. (A second class Magistrate not empowered to act under S 8 of the Act must refer the case to the District Magistrate under S 9)
(28) 15 AIR 1928 Bom 348 (348, 349) • 29 Cri L Jour 1018, *Emperor v. Lakshman* (High Court can order deletion of a boy to reformatory school not only on appeal but in revision also)
(91) 1891 Rat 636 (536), *Queen Empress v Lallubhas* (Case under S 7, Act 5 [V] of 1878)

Note 7

1. (08) 9 Cri L Jour 99 (102) • 4 Nag L R 180, *Rama v. Emperor*. (Ordinarily, however, youthful offender convicted of murder should not be sent to a reformatory school)

Note 8

1. The order of a Magistrate under S 8 of the Reformatory Schools Act, 1876, is not an executive but a judicial proceeding and the High Court has power to revise
(89) 14 Bom 381 (383) 1899 Rat 494 (495), *Queen-Empress v Manaji*

High Court has no power to interfere with the order of detention under S 7 of Act 5 [V] of 1876

- (96) 1896 All W N 43 (45), *Queen-Empress v Anrudh Singh*

Where the order is not made in substitution of an order for transportation or imprisonment or where it is made without jurisdiction High Court can interfere :

- (97) 20 All 160 (161) 1897 All W N 231, *Queen-Empress v Billar*.
(99) 21 All 391 (395) : 1899 All W N 138 (FB), *Queen-Empress v Hari*.
(93 1900) 1893 1900 Low Bur Rul 493 (493), *Putlu v Queen-Empress*

Revisional jurisdiction excluded only as to the age of offender and order for detention in reformatory for transportation or imprisonment

- (04) 1 Cri L Jour 609 (610) : 6 Bom L R 550, *Emperor v Amar Bhikan*. (21 All 391 (FB) referred to)

in L Jour 11, *Issa Angario v. Emperor*.

High Court can alter the sentence passed :

- (01) 28 Cal 423 (424) • 5 Cal W N 211, *Reasut v Courtney*
(1900) 5 Cal W N 210 (211), *Radha Kruta v Gokula Nat*.
(07) 6 Cri L Jour 129 (130) • 1907 Pun He No 18 Cr, p. 59 : 1908 Pun L R No 55, *Ram Singh v. King-Emperor*.
(31) 18 AIR 1931 Nag 179 (179) : 27 Nag L R 242 : 32 Cri L Jour 1263, *Md Arimuddin v. Emperor*.
(29 Cal 423 followed)
(11) 13 Cri L Jour 44 (44) • 13 Ind Cas 284 : 5 Sind L R 173, *Imperator v. Rajabali*.
[See also (02) 15 C P L R Cr 151 (152), *Emperor v. Jagan*. (Observation.)]

till the expiry of the period of the sentence, though the term of the Ordinance has expired, the detention after the period of Ordinance is not illegal.¹

CHAPTER XXIX

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES

401. (1) When any person has been sentenced to punishment for an offence, ^a[* * *] the ^b[Provincial Government] may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced

(2) Whenever an application is made to ^a[* * *] the ^b[Provincial Government] for the suspension or remission of a sentence, ^a[* * *] the ^b[Provincial Government] ^c[* * *] may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion ^d[and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists]

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of ^a[* * *] the ^b[Provincial Government], ^c[* * *] not fulfilled, ^a[* * *] the ^b[Provincial Government] may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will

^e[(4A) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property]

(5) Nothing herein contained shall be deemed to interfere with the right of ^f[His Majesty or of the ^g(Central Government)] when such right is delegated to ^h(it) to grant pardons, reprieves, respites or remissions of punishment

ⁱ[(5A) Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to ^h(it) by the ^g(Central Government), any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly]

* 1882 S 401, 1872 S 322, 1861 S 54

Section 400 — Note 1

1 (33) 20 AIR 1933 Cal 280 (282) 50 Cal 742 34 Cal L Jour 291, *Jagendra Chandra v Superintendent of the Dum Dum Special Jail* (Ordinance 2 [II] of 1932)
 (33) 20 AIR 1933 Cal 516 (519) 60 Cal 545 34 Cal L Jour 279, *Joyendra Mohan v Emperor* (Bengal Emergency Powers Ordinance 11 [XI] of 1931)

(6) The { * * * } [Provincial Government] may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with

- a The words the Governor-General in Council or were repealed by A O
- b Substituted by A O for Local Government
- c The words as the case may be were repealed by A O
- d These words were inserted by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 193
- e Sub-sections (4A) and (5A) were inserted by Act 18 [XVIII] of 1933
- f Substituted by Act 18 [XVIII] of 1933 for Her Majesty
- g Substituted by A O for Governor-General
- h Substituted by A O for him
- i The words Governor-General in Council and the were repealed by A O

Synopsis

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|--|---|
| <ul style="list-style-type: none"> 1 Scope and applicability of the section 1a Powers of Provincial Government—Sub section (1) 2 Statement of opinion of the presiding Judge—Sub section (2) 3 Procedure to be followed by the Court | <ul style="list-style-type: none"> 4 Violation of condition of remission of punishment—Sub section (3) 5 It at large 6 His Majesty's prerogative of pardon — Sub section (5) 7 Release on medical grounds See Madras Police Manual Vol I pp 319 320 |
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NOTE to the Synopsis See the Notes indicated for the following topics

- | | |
|---|--|
| <ul style="list-style-type: none"> Advice for King's pardon See Note 6 Circumstances for mercy See Note 2 Court's reference for Government mercy See Note 2 Madras Police Manual See Note 7 | <ul style="list-style-type: none"> Non applicability to approvers under S 337 See Note 1 Opinion pending petition to Privy Council See Note 2 Suspension of death sentence for appeal to Privy Council See Note 1 |
|---|--|

1 Scope and applicability of the section — This section does not disturb the *constitution* of an accused. It deals only with the power to suspend the execution of a *sentence* or remit the whole or any part of the *punishment*. The Provincial Government may act of its *own accord* (sub section (1))¹ or may be moved by an application (sub section (2)). The Provincial Government has power under this section to *suspend* the execution of a death sentence to enable the accused to appeal to the Privy Council.² Though an order passed under this section by the Provincial Government is in the name of the Governor because that is the constitutional form it has to take it is in reality an order of the Provincial Government.³

The special authority conferred by this section relates to persons *sentenced to punishment* and does not touch cases under S 337 in which a person charged along with others with a crime has under a conditionally tendered pardon given evidence against such persons.⁴ The effect of an order of remission is to wipe out the remitted portion of the sentence altogether and not merely to suspend its operation.⁵

1a Powers of Provincial Government—Sub section (1) — Sub section (1) of this section confers on the Provincial Government the power to suspend the execution

Section 401 — Note 1

- 1 See (30) 19 AIR 1932 All 230 (232) 33 Cr L Jour 830 *In re Ram Dewan Singh*
- 2 (31) 18 AIR 1931 Lah 359 (360) 33 Cr L Jour 126 *Chint Pam v Emperor*
[See also (15) 2 AIR 1915 P C 29 (30) 43 Cal 739 40 Ind App 133 16 Cr L Jour 494 (PC) *Balmukund v Emperor* (Privy Council is unable to interfere with regard to staying of execution of death sentence)]
- 3 (38) 25 AIR 1938 Nag 513 (516) 40 Cr L Jour 397 1 L R (1940) Nag 1 (FB) *Venkatesh Yeshwant v Emperor*
- 4 (88) 11 All 79 (89) 1889 All W N 293 *Queen-Empress v Ganga Charan*
- 5 (38) 25 AIR 1938 Nag 513 (520) 40 Cr L Jour 397 1 L R (1940) Nag 1 (FB) *Venkatesh v Emperor*

of sentence or remit the whole or any part of the sentence with or without conditions. But where the Provincial Government has remitted a sentence unconditionally, it is not open to it to cancel the order and restore the sentence subsequently, except in cases of fraud or mistake. The general power of cancellation of orders under S 21 of the General Clauses Act, 1897, cannot be invoked in such a case.¹

2. Statement of opinion of the presiding Judge — Sub-section (2) — On the receipt of an *application* the Provincial Government may require, from the presiding Judge of the Court before or by which the conviction was had or confirmed, a statement of his opinion with reasons and a certified copy of the available record. The object of calling for such a statement is to avoid a possible misapprehension about the legality of the sentence passed or a mistake as to the propriety of a particular punishment inflicted.¹ The Judge may also *suo motu* send his opinion whenever he considers that the prerogative of mercy should be exercised in favour of an accused. The following are instances where the Courts have thus recommended the accused to the mercy of the Government —

- (1) discovery of facts *after* the final judgment is pronounced and signed, showing that the accused has committed no offence,^{1a}
- (2) an oversight on the part of a counsel or omission on the part of the Court to notice a *relevant* fact in the proceedings resulting in an error of fact or law,²
- (3) unsoundness of mind not *strictly* covered by S 84 of the Penal Code,³ see also Note 3 on S 376.
- (4) the punishment prescribed by the law being more rigorous than the circumstances of the case deserve.⁴

Note 1a

1. ('88) 25 AIR 1938 Nag 513 (518,520) 40 Cri L Jour 397 1 LR (1940) Nag 1 (FB), *Vekatesh Yeshwant v Emperor*. (Sub-s (8) of this section indicates that except where there is a breach of the conditions on which a sentence has been remitted, the Provincial Government cannot cancel the order of remission — Held further that in the circumstances of this case, the Provincial Government had lost its *locus penitentie* in the matter)

Note 2

1. See ('34) 21 AIR 1934 Rang 125 (126, 127) : 12 Rang 344 : 35 Cri L Jour 959, *Emperor v Ngs Ohn Shue*

1a ('23) 10 AIR 1923 All 473 (474) : 45 All 143 : 24 Cri L Jour 766, *Kale v. King-Emperor*.

('66) 8 Soth W R Cr 42 (42), *Nussur Ali v. G Hart*.

('26) 27 Cri L Jour 1254 (1256) : 98 Ind Cas 102 (104) (Cal), *Araja v Emperor*.

('19) 6 AIR 1919 Cal 409 (410) : 48 Cal 60 20 Cri L Jour 265, *Rajah Ali v Emperor*.

[See ('85) 7 All 672 (673) : 1885 All W N 177, *Empress v. Durga Charan*]

2. ('85) 10 Bom 176 (180, 181) (FB), *Queen-Empress v C P Fox*

('95) 1895 Rat 791 (791), *Queen Empress v Mohun Abhesing*

Talah.

v Emperor.

('23) 10 AIR 1923 Cal 460 (463), *Emperor v Tincouri Dhopi*

('31) 18 AIR 1931 Lah 276 (278) : 32 Cri L Jour 1230, *Dagga v Emperor*

('27) 14 AIR 1927 Lah 674 (677) : 8 Lah 684. 28 Cri L Jour 538, *Tola Ram v. Emperor*

('19) 6 AIR 1910 Lah 470 (470) - 1918 Pun Re No 30 Cr 20 Cri L Jour 1, *Ramsan v. Emperor*.

('31) 1031 Mad W N 719 (723), *Narayanasaamy Goundan v Emperor*.

('19) 6 AIR 1919 Mad 129 (129) : 20 Cri L Jour 828, *In re Muthusami Asari*

('89) 12 Mad 459 (461, 462) : 1 Weir 42, *Queen Empress v Venkatasami*

('10) 11 Cri L Jour 105 (110) : 4 Ind Cas 985 (Lah), *Chafju Mal v Emperor*.

('13) 14 Cri L Jour 81 (91) : 15 Oudh Cas 321 : 18 Ind Cas 641, *Md Husain v. Emperor*.

('20) 7 AIR 1920 Cal 39 (40) : 21 Cri L Jour 517, *Mantajali v. Emperor*

4 ('37) 24 AIR 1937 Lah 689 (691) : 39 Cri L Jour 16, *Asis Begum v Emperor*. (Girl less than seventeen years of age convicted of being accessory to murder on forfeiture of pardon tendered to her — Her statement as approver leading to successful investigation and conviction of principal offender — Con-

(5) other mitigating circumstances⁶

It has been held that the Court ought not to express an opinion in a case where stay of execution of sentence is prayed for until a petition to His Majesty in Council is disposed of and that it is a matter which lies entirely with the Government⁶ In the undermentioned case⁷ where the accused were proved to be guilty of the grievous offence of waging war against the King, the Rangoon High Court refused to recommend the accused to mercy on the ground that the matter was entirely in the hands of Government.⁷

considerable portion of sentence already served—Sentence of transportation though could not be reduced by Court case held strong for exercise of prerogative of mercy)

(23) 10 AIR 1913 All 355 (356) 24 Cri L Jour 753, *Emperor v Umrao* (Absence of intention to kill — Accused striking only one blow with a lath.)

(20) 7 AIR 1910 All 199 (200) 21 Cri L Jour 607 *Goshain v Emperor* (Grave but not sudden provocation due to infidelity of wife which all the world over results in death)

(95) 1893 Rat 792 (792), *Empress v Salu* (A young woman deserted by her husband and left to maintain child murdering it due to want and misery)

(64) 1864 3uth W R Cr 27 (27) *Queen v Dabee*

(64) 1 3uth W R Cr L 9 (9) (Judge considering accused innocent contrary to verdict of jury)

(65) 3 3uth W R Cr L 16 (16)

(66) 5 3uth W R Cr 73 (73) *Queen v Durwan Gueer* (Murder committed by accused while acting against a burglar and killing him though exceeding right of private defence of person or property)

(67) 7 3uth W R Cr 6 (7) *Queen v Chand Bagdee* (Want of positive evidence though the jury passed

age of accused — Anxiety of concealing shame — Mitigating circumstances)

(29) 16 AIR 1929 Lah 601 (603) *Joga Singh v Emperor* (Young age — Minor part played—Influence of bad company)

(32) 19 AIR 1932 Lah 259 (260) 33 Cri L Jour 484, *Kartar Singh v Emperor* (Youth of accused — Participation in crime under influence of his father and brother)

(32) 19 AIR 1932 Lah 297 (297) 33 Cri L Jour 448 *Mt Alam Bibi v Emperor* (Causing death of child — Reduction of sentence — Mitigating circumstances)

(32) 19 AIR 1932 Lah 308 (310) 33 Cri L Jour 580, *Nawab v Emperor* (Deceased found in adultery with female relative of accused — Tender age of the accused)

(33) 20 AIR 1933 Lah 718 (720) 34 Cri L Jour 1251 *Mt Sardaran v Emperor* (Illiterate and superstitious young woman causing the death of a child of her sister in law, believing her to be the cause of death of her own issues)

(33) 20 AIR 1933 Lah 1021 (1022) 35 Cri L Jour 430 *Ghulam Mohamad v Emperor* (Young age — Influence of relations)

(34) 21 AIR 1934 Lah 31 (32) 35 Cri L Jour 652, *Mt Dhaulan v Emperor* (Woman committing murder of her child on account of weak intellect, ill treatment of relation and extreme poverty)

(68) 4 Mad H C R App xix (xix) (Circumstance that the Sessions Court thinks that he ought not to have believed the evidence)

(26) 13 AIR 1926 Mad 1165 (1166) 50 Mad 474 27 Cri L Jour 1357, *Mayandi Thevan v Emperor*, (Sentence for third conviction under Criminal Tribes Act being transportation for life being harsh.)

(31) 18 AIR 1931 Rang 235 (244) 9 Rang 404 33 Cri L Jour 205 (SB) *Aunij Hla v Emperor* (Political offence)

(16) 3 AIR 1916 Sind 65 (66) 9 Sind L R 205 17 Cri L Jour 231 *Jiwany & Co v Emperor* (Right of appeal and revision barred — Erroneous conviction — Recommendation to Government)

(90) 14 Mad 36 (37, 38) 2 Weir 390, *Empress v Chinana Thevan* (The circumstances that Judge disagrees with the verdict.)

[See (1865) 3 3uth W R Cr 1 (2) *Queen v Gobando Bagdee* (There are remarks in this decision suggesting that where the evidence in support of conviction is manifestly weak and insufficient, the prisoner can be recommended for mercy — It is submitted this view is not correct — Such a case is one for acquittal)]

3 Procedure to be followed by the Court — A Sessions Judge required to state his opinion under this section must forward his reply through the High Court whether the requisition for the opinion has been received through the High Court or not—*Madras H C Cir dated 15th November 1895*

When any Court shall be of opinion that there are grounds for recommending to the Provincial Government to exercise the powers vested in it by S 401 and S 40² of suspending remitting or commuting the punishment to which any accused person has been sentenced the recommendation shall be submitted with the proceedings in the case through the Court of the Judicial Commissioner — *C P Criminal Circulars Part II No 40*

All recommendations for remission or suspension of a sentence made under section 401 by an officer of any subordinate Court to the Provincial Government in regard to a convict whose case has been before the High Court on appeal shall be made through the High Court — *Calcutta G R and C O P 40*

4 Violation of condition of remission of punishment — Sub section (3) — Section 227 of the Penal Code runs thus: Whoever having accepted any conditional remission of punishment knowingly violates any condition on which such remission was granted shall be punished with the punishment to which he was originally sentenced if he has already suffered no part of that punishment and if he has suffered any part of that punishment then with so much of that punishment as he has not already suffered. Under this section it is for the Court to decide whether a conditionally released prisoner has violated the conditions on which the remission was granted¹

5 "If at large" — Under s 21 of the Prisoners Act of 1900 the Provincial Government may grant to any person under sentence of penal servitude a license to be at large within such part of the province and during such portion of his term of penal servitude as may be specified in the licence and upon such conditions as the Provincial Government may by general or special order prescribe

6 His Majesty's prerogative of pardon — Sub section (5) — Primarily the power of pardon rests in the Sovereign and the provisions contained in this section in no way interfere with the prerogative of the Crown in that respect¹ The tendering of advice to His Majesty as to exercise of his prerogative of pardon is a matter for the Executive Government and is outside the province of the Judicial Committee of the Privy Council²

7 Release on medical grounds — See *Madras Police Manual Vol. I pages 319 320*

402.* (1) The ^a[* * *]^b **[Provincial Government]** may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it —

death, transportation, penal servitude rigorous imprisonment for a term not exceeding that to which he might have been sentenced simple imprisonment for a like term, fine

*[(2) Nothing in this section shall affect the provisions of section 54 or section 55 of the Indian Penal Code]

a The words G O in Council or the were repealed by A O

b Substituted by A O for Local Government

c Section 402 was renumbered as S 402 sub-s (1) and sub-s. (2) was inserted by the Code of Criminal Procedure (Amendment) Act 16 [XVIII] of 1973

* 1882 S 402 1872 S 322 1861 — N1

Note 4

1 (33) 20 AIR 1933 Bang 28 (29) 34 Cri L Jour 417 *Emperor v Nga Po Min.*

Note 5

1 (88) 11 All 79 (89) 1888 All W N 262 *Queen Empress v Ganga Charan.*

2 (15) 2 AIR 1915 F C 29 (30) 12 Cal 739 42 I A 133 16 Cr L J 404 (PC) *Bal nulund v Emperor*

1 Scope of the section — Certain accused persons were sentenced to death by a special Tribunal under Ordinance 8 (III) of 1930. The execution of the sentence was stayed by the Provincial Government pending the decision of the Privy Council in the appeal against the sentence. Before the appeal was disposed of, the special Tribunal ceased to exist and on the dismissal of the appeal it was contended that as the Tribunal ceased to exist and the time for execution had expired the custody of the prisoners was illegal. It was held that even if there was difficulty in carrying out the death sentence, still the Provincial Government could commute the sentence under this section¹. See also the undermentioned cases.²

^a 402A. The powers conferred by sections 401 and 402 upon the Provincial Government may, in the case of sentences of death, also be exercised by the Governor General in his discretion

a This section was newly inserted by A. O. compare Government of India Act 1935 Sect on 29.

CHAPTER XXX

OF PREVIOUS ACQUITTALS OR CONVICTIONS

403.* (1) A person who has once been tried by a Court of competent

Person once convicted or acquitted not to be tried for same offence jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force not be liable to be tried again for the

* Code of 1882 S 403

Sub-section (5) was added in 1898 otherwise the section was the same

Code of 1872 Ss 460 147 para 2 195 Explan 2 and 215 Explan 2

460 A person who has once been tried for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be liable to be tried again on the same facts for the same offence nor for any other offence for which a different charge from the one made against him might have been made under S 45 or for which he might have been convicted under section 456

A person convicted or acquitted of any offence may be afterwards tried for any offence for which a separate charge might have been made against him in the former trial under S 454 para 1

A person acquitted or convicted of any offence in respect of any act causing consequences which together with such act constituted a different offence from that for which such person was acquitted or convicted, may be afterwards tried for such last mentioned offence if the consequences had not happened or were not known to the Court to have happened at the time when he was acquitted or convicted

A person acquitted or convicted of any offence in respect of any facts may notwithstanding such acquittal or conviction be subsequently charged with and tried for any other offence which he may have committed in respect of the same facts if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged

Illustrations

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards be charged upon the same facts either with theft as a servant with theft simply or with criminal breach of trust

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery but it appears from the facts that A committed robbery at the time when the murder was committed. He may afterwards be charged with and tried for robbery

(c) A is tried for an assault and convicted. The person afterwards dies. A may be tried again for culpable homicide.

Section 402 — Note 1

1 (31) 18 AIR 1931 Lah 359 (360) 33 Cr L Jour 126 *Chini Ram v Emperor*

2 (19) 6 AIR 1919 All 445 (447) 20 Cr L Jour 767, *Garib v Emperor* (Co-offenders tried separately received a lesser sentence on the same facts—Held that case might be brought to notice of Government so that the inequalities in sentences might be removed)

(68) 1868 Rat 10 (11) *Reg v Jerva Amtha* (In view of the long delay in execution of the sentence death, High Court recommended to Government that sentence should be commuted to life.)

same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (i)

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code

(d) A is tried under S 270 I P C, for maliciously doing an act likely to spread the infection of a disease dangerous to life and is acquitted. The act so done afterwards causes a person permanently to lose his eyesight. A may be charged, under S 305 with voluntarily causing grievous hurt to that person

(e) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried for the murder of B on the same facts

(f) A is charged by a Magistrate of the first class with, and convicted by him of voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts unless the case comes within paragraph 3

(g) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with, and tried for robbery on the same facts

(h) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts

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The dismissal of a complaint shall not prevent subsequent proceedings

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Explanation II — A discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution for the same offence

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Explanation II — A discharge is not equivalent to an acquittal and does not bar the revival of a prosecution for the same offence,

Code of 1861 Ss 55 and 60

55 A person who has once been tried for an offence and convicted or acquitted of such offence shall not be liable to be tried again for the same offence. Provided that any person may be tried for the offence of culpable homicide and punished for that offence, notwithstanding he may have been tried and punished for the act which caused the death if at the time of his conviction

Proviso

for the said act death shall not have resulted, or shall not have been known by the Court which passed sentence to have resulted

60 No person charged and tried for an offence under any section of the Penal Code in the last four sections of this Act mentioned and found guilty of another offence under the provisions of any other of the said sections of the Penal Code shall be liable to be afterwards prosecuted upon the same facts under the section under which he was charged, or under the section under which he was found guilty

Explanation — The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section.

Illustrations

(a) *A* is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same facts, with theft simply, or with criminal breach of trust.

(b) *A* is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that *A* committed robbery at the time when the murder was committed, he may afterwards be charged with, and tried for, robbery.

(c) *A* is tried for causing grievous hurt and convicted. The person injured afterwards dies. *A* may be tried again for culpable homicide.

(d) *A* is charged before the Court of Session and convicted of the culpable homicide of *B*. *A* may not afterwards be tried on the same facts for the murder of *B*.

(e) *A* is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to *B*. *A* may not afterwards be tried for voluntarily causing grievous hurt to *B* on the same facts, unless the case comes within paragraph 3 of the section.

(f) *A* is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of *B*. *A* may be subsequently charged with, and tried for, robbery on the same facts.

(g) *A*, *B* and *C* are charged by a Magistrate of the first class with, and convicted by him of, robbing *D*. *A*, *B* and *C* may afterwards be charged with, and tried for, dacoity on the same facts.

Synopsis

- 1 Scope of the section
- 2 In what cases fresh trial is barred
- 3 'Same offence'
- 4 Any other offence for which a different charge might have been made under Section 236
- 5 "Any distinct offence"
- 6 Consequences of act happening after previous conviction—Sub-section (3)
- 7 "Tried"
- 8 "Acquittal" — Meaning of
- 9 "Conviction" — Meaning of

- 10 "While such conviction or acquittal remains in force"
- 11 Court of competent jurisdiction
- 12 Identity of accused necessary for application of section
- 13 Dismissal of complaint or discharge of accused
- 14 "Discharge"—Meaning of
- 15 General Clauses Act, Section 26
- 15a Section 188 of the Code
- 16 Practice

NOTE to the Synopsis See the Notes and cited for the following topics

Absence of sanction or complaint for trial—Court trying — Whether one of competent jurisdiction. See Note 11

Acquittal — Implies trial. See Note 7

Acquittal — Establishes innocence of accused — Such innocence cannot be disputed in subsequent proceedings. See Note 1

Acquittal or discharge. See Note 8

Appeal—Not fresh trial. See Note 7

Bar of extradition on proceedings — Not affected. See Note 15a

Complaint dismissed by one Magistrate — Another Magistrate — Whether can start fresh prosecution. See Note 13

Conviction in Native State — Whether can be pleaded as bar. See Note 11

Conviction or acquittal by Court established under local or special law is by competent Court. See Note 11

Departmental punishment — Not conviction. See Note 9

Dismissal of complaint or discharge — Fresh prosecution not barred. See Note 13

Distinct offences — Test. See Note 5

Fresh trial—Not barred under this section—Court may refuse re-trial on other grounds. See Note 2

Fresh trial—When barred and when not—Illustrations. See Note 2

Legal Practitioners Act — Disciplinary proceedings — Not trial. See Note 7

Magistrate's successor — Whether can start fresh proceedings. See Note 13

Offence consisting of parts — One of parts itself offence — Not distinct. See Note 5

Offence triable as warrant-case—Tried as summons case — Acquittal order is only discharge. See Note 14

Offences by same acts or omissions — Not distinct. See Note 5

Practice

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1. Scope of the section. — This section embodies the ancient maxim *nemo debet bis vexari pro eadem causa* (no person should be twice disturbed for the same cause),¹ and provides that where a person has once been tried and convicted or acquitted of an offence he cannot again be tried for the same offence or for any other offence which is not distinct from the one previously tried (See Note 2) It incorporates the common law principle of the well known pleas of *autrefois acquit* (formerly acquitted) and *autrefois convict* (formerly convicted),² namely, that no one shall be punished or put in peril twice for the same matter.³ The principle does not rest on any doctrine of estoppel, but on grounds of public policy.⁴ There is nothing like *res judicata* in a criminal trial so long as it does not terminate in either acquittal or conviction so as to attract the provisions of this section. Hence the mere fact that a question was determined in a particular way in a prior proceeding against the accused will not preclude its being raised again.⁵

The provisions contained in this section are complete by themselves on the subject of the effect of previous acquittals or convictions.⁶

Even in cases in which a trial is not barred under this section, it has been held in a series of decisions,⁷ following *Rex v Plummer*,⁸ that a judgment of acquittal fully

Section 403 — Note 1

1. (35) 22 AIR 1935 Mad 56 (57) 58 Mad 513 36 Cri L Jour 311, *A M Rangachariar v Venkata swami Chetty* (Overruled on another point by AIR 1938 Mad 847. I L R (1938) Mad 903 39 Cri L Jour 712)

s v Emperor.

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proceedings

against conviction — Certain defence raised by accused rejected by High Court in such proceedings

but retrial ordered on other grounds — Accused not precluded from raising same defence at the retrial)

6 (39) 26 AIR 1939 Cal 65 (71) 40 Cri L Jour 199 I L R (1939) 1 Cal 1 (FB), *Purnananda Das v.*

Emperor (The language of the section cannot be stretched nor the principles extended so as to give

of particular

used in subsequent trial for conspiracy)

(13) 14 Cri L Jour 5 (18, 26) 18 Ind Cas 149 (Cal), *Rajendra Narayan v Emperor*

(11) 12 Cri L Jour 94 (96) 9 Ind Cas 511 (Lab), *Ganesh Das v Emperor* (Acquittal on charge of

enticing away married woman — Magistrate holding that accused was not present when the woman

ran away with her children — Fresh trial for kidnapping children — Finding of fact in previous trial

cannot be ignored)

(33) 20 AIR 1933 Oudh 470 (472) 35 Cri L Jour 36, *Emperor v Munnoo* (Charge of burglary —

Evidence of possession of certain rifle cartridges sought to be let in as proof of complicity of accused —

Prior acquittal under Arms Act, S 19 (f), of offence of possession of same cartridges — Question can-

not be reopened)

(12) 15 Cal L Jour 517 (536) 18 Cri L Jour 609 16 Ind Cas 257, *Pulvin Behari Das v Emperor*

(35) 1935 Mad W N 1342 (1343), *Veerayya Vandayar v Emperor* (Acquittal of murder on ground

that accused acted in private defence — Finding that he did so is binding in subsequent prosecution

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establishes the innocence of the accused and that the fact of such innocence cannot be disputed in any subsequent proceedings. Thus, where A was acquitted of an offence and later on B was prosecuted under ss 213 and 214, Penal Code, (concealing offence and screening offender) with reference to the same offence, it was held that the fact, established by the acquittal of A, viz., that no offence was committed by him, could not be disputed in the prosecution of B.⁹ But in *Malak Khan v Emperor*,¹⁰ the Privy Council has held that where in a trial for murder and robbery, the accused is convicted of murder but acquitted of robbery and an appeal is preferred from the conviction for murder, the High Court is entitled to accept the evidence which has been disbelieved by the trial Court on the charge of robbery as corroborative evidence of murder.

2 In what cases fresh trial is barred — The question in what cases a fresh trial is barred under this section and in what cases it is not, can best be discussed by reference to the following illustrative cases —

- (1) A is tried for offence X and is convicted or acquitted. He is again sought to be tried on the same facts, for same offence X.
- (2) A is tried for offence X and is convicted or acquitted. He is again sought to be tried for offence Y, for which a charge might have been framed against him in the former trial, under s 236 of the Code or of which he might have been convicted under s 237 of the Code.
- (3) A is tried for offence X and is convicted or acquitted. He is again sought to be tried for offence Y. X and Y are *distinct* offences forming parts of the same transaction but not falling within s 236 or s 237 of the Code.
- (4) A is tried for offence X and is convicted or acquitted. He is again sought to be tried for offence Y. X and Y are 'distinct' offences forming *separate* transactions.
- (5) A is tried for offence X. He is again sought to be tried for offence Y. X and Y are *not* distinct offences and do not fall within ss 236 and 237 of the Code, but *form part of the same transaction*.

In cases 1 and 2 the subsequent trial is barred under sub s (1) of the section.¹ Sub section (2) provides that in case 3 the subsequent trial is not barred. Case 4 does not

⁹ (13) 14 Cr L Jour 453 (455) 20 Ind Cas 613 37 Bom 659 *Emperor v Sanatal Lahu Bhai*

diminished)

Note 2

1 Same offence

- (46) 33 AIR 1946 P C 16 (19) 72 Ind App 305 222 Ind Cas 273 (PC), *Malak Khan v Emperor*
 (09) 3 Cr L Jour 115 (116) 2 Cr L Jour 622 *Suresh Chandra v Banju Sadhu*
 (07) 5 Cr L Jour 412 (412) 3 Low Bur Bul 253 *San Mya v Emperor*,
 (34) 21 AIR 1934 Oudh 259 (259) 35 Cr L Jour 570 *Gaya Din Lal v Emperor*
 (17) 4 AIR 1917 Lah 143 (143) 18 Cr L Jour 324 *Saifuddin v Emperor*

Swami Pillai v Rajaratna Mudaliar

65 *Fakir Mahomed v Emperor* (Do)
 v *Emperor* (Do)

Case 5 is not within sub s (1) of the section. Sub section (2) also does not in terms apply to it, but it *implies* that a subsequent trial is barred, and decisions which have held that a subsequent trial in such cases is barred can only be supported in this view². Thus, where A gives Z fifty strokes with a stick, each stroke is a different offence, but all the strokes form part of the same transaction. The offences are, however, not *distinct* and a conviction or acquittal in respect of one such stroke would operate as a bar to a subsequent trial for other strokes. For further illustrations see the cases noted below³.

- (1) Where the offence subsequently charged is the same as the one previously tried
- (2) Where the offence subsequently charged is one for which a charge might have been framed under S 236 or of which the accused might have been convicted under S 237 at the previous trial
- (3) Where the offence subsequently charged is one of which the accused might have been convicted under S 238 at the previous trial⁴. But the High Court of Madras appears to have taken a contrary view⁶
- (4) Where the offence subsequently charged is not distinct from the one previously tried (except in cases coming under sub ss (3) and (4))

Further, even with regard to offences which are not distinct, a second trial will not be barred in cases coming under sub ss (3) and (4) of this section.

As to the meaning of the words "same offence" and "distinct offences," see Notes 3 and 5 respectively.

(28) 15 AIR 1928 Bom 177 (178) 29 Cr L Jour 522, *Dagdā Dagdya v Emperor* (Do)
Sok Suk v Emperor

3 (46) 33 AIR 1946 Bom 38 (44) (FB), *Government of Bombay v Abdul Wahab* (Accused acquitted of major offence — New trial on minor offence included in major offence is barred)

(145) 32 AIR 1945 Mad 472 (472), *In re Sinna Ranga Boyan* (Accused convicted under Ss 147 and 148 of the Penal Code for the same facts as in (144) but charged with a different offence.)

6 ('44) 31 AIR 1944 Pat 247 (250) 23 Pat 95 45 Cr L Jour 809 216 Ind Cas 112 (DB) *Ala Raso*
not barred —
he res gesta at

(The true test is conviction from

sanando Das v.

(36) 23 AIR 1936 Rang 174 (175) - 14 Rang 24 37 Cri L Jour 493, Abdul Hamid v. Emperor, (Do)

Even in cases in which a fresh trial may not be barred under this section, the Court may refuse to proceed against a person on the ground that it is not desirable or proper in the circumstances of a particular case to prosecute a person for a second time on the same facts.⁷

3 "Same offence"—The word "offence" has been defined in S 4 (1) clause (a) as any act or omission made punishable by any law for the time being in force. That definition applies however, only where a different intention does not appear from the subject or context. Sub-section (4) of this section shows that the *same act* may constitute different offences. The words "same offence" in this section, therefore, must be taken to mean the *same act or omission* made punishable under the *same provision of law*. Where an act or omission is punishable under different provisions of law, the person committing it cannot be said to "commit the same offence" within the meaning of this sub-section.¹ Hence, the expressions "same offence" and "same act or omission" cannot be treated as interchangeable. The judgment in the undermentioned case² is, it is submitted, not correct in this respect.

The view has sometimes been expressed³ that the words "same offence" in sub s (1) refer to the same *transaction*. It is submitted that such an interpretation is too broad. Subsections (2) to (4) show that though the transaction may be the same the offences involved may be different.

7 (45) 32 AIR 1945 Bom 413 (416, 417) 47 Cri L Jour 138 221 Ind Cas 266 (DB) *Emperor v*

(42) 29 AIR 1942 Lah 122 (123) 43 Cri L Jour 632 200 Ind Cas 446, *Faqir Chand v Karam Chand* (The fact that the petitioner has been harassed already by two similar complaints both of which have been dismissed or have ended in the accused being discharged, is ample ground for quashing a third complaint made on the same facts)

(1900) 2 Weir 549 (550) (DB) *In re Sundram Aiyar* (Accused discharged for offence under S 193 Penal Code — Second trial for offence under S 193, Penal Code, on same facts is not proper, unless on exceptional grounds)

(36) 25 AIR 1938 Lah 625 (627) 39 Cri L Jour 900 I L R (1939) Lah 373, *Emperor v Ram Rajha* (Accused acquitted on charge under S 211, Penal Code — Subsequent trial under S 162 after obtaining

[See also (36) 23 AIR 1936 Lah 47 (48) 37 Cri L Jour 427, *Chaman Lal v Emperor* (Though a previous order dismissing a complaint under S 203 is not a bar to the institution of a fresh complaint, it is only in exceptional circumstances that the second complaint should be entertained on the same facts)]

Note 3

under S 397 includes one under S 307)

3 (103) 6 Oudh Cas 153 (154) *Raghubar v King-Emperor*.

[See also (13) 14 Cri L Jour 135 (136) 18 Ind Cas (When person is tried and convicted or acquitted for an offence, while acquittal or conviction remains in force, the same facts.)]

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4 Any other offence for which a different charge might have been made under section 236 — The expression 'might have been made' means 'might have been lawfully made' ¹ As to when a charge may be framed under S 236, see Notes on S 236 See also the cases cited below ²

5 "Any distinct offence." — Before the amendment of 1923, S 35 of the Code provided that where at one trial, a person was convicted of two or more *distinct* offences the Court may sentence him to the several punishments prescribed therefor. An explanation to the section provided that separable offences within the meaning of S 71 of the Penal Code were not *distinct* offences within the meaning of that section. Separate offences not falling within S 71 of the Penal Code were, therefore, distinct offences. The word "distinct" which had been used in this section also even before 1923 continues to exist even now in this section, though by the amendment of 1923, it has been deleted in S 35. But the test to determine whether the offences charged at two trials are distinct for purposes of this section would be the same, namely, whether, if the offences were charged at the same trial separate sentences could be passed in respect thereof under S 71 of the Penal Code ¹ Hence, the following considerations based on S 71 of the Penal Code may be applied in determining whether two offences are distinct

- (1) Where the offences are constituted by the same acts or omissions they are not distinct ² See also Note 6

Illustrations

- (a) A person who has been tried for an offence under S 203 of the Penal Code cannot be tried again on the same facts for an offence under S 176 of the Penal Code because the offences under the two sections would be constituted by the same acts ³
- (b) A person who is acquitted of the offence of disorderly behaviour on a public thoroughfare under a Police Act [for example, the Rangoon Police Act, s 41 sub s. (16)] cannot again be tried under the Penal Code for rioting where the same acts constitute both the offences ⁴
- (c) An acquittal of a person under S 211 of the Penal Code would bar his trial again on the same facts for an offence under S 182 of the Penal Code ⁵

Note 4

expressly reserved — Charges cannot have been framed for such offences)

— al and acquittal for alternate charges

- (15) 2 AIR 1915 Low Bur 60 (61) 16 Cri L Jour 267 *Nga Shawa F v Emperor* (Conviction for lesser offence — Discovery of fresh evidence showing that graver offence was committed — Fresh trial for graver offence barred)

Note 5

- 1 (34) 21 AIR 1934 Mad 311 (313) 57 Mad 554 35 Cri L Jour 783 *Janakirammaraju v Emperor*
- 2 (89) 2 C P L R Cr 66 (68 69) *Empress v Ganesh Prasad* (Trial and acquittal of accused on charge of murder — Second trial on same facts and for same criminal act but for offence of culpable homicide not amounting to murder held barred)
- (34) 21 AIR 1934 Mad 311 (313) 57 Mad 554 35 Cri L Jour 783, *Janakirammaraju v Emperor* (*Autrefois convict* forbids a man to be punished twice for the same offence, i e, the same acts and omissions)
- Also see cases in foot notes 3 to 7
- 3 (06) 3 Cri L Jour 398 (389 390) 10 Cal W N 518, *Sharbelhan v Emperor*
- [See also (13) 14 Cri L Jour 135 (138) 9 Nag L R 25 *Mahadeogir v Emperor* (Acquittal under S 203 precludes trial under S 177 Penal Code)]
- 4 (35) 22 AIR 1935 Rang 436 (438) 37 Cri L Jour 189 *Nga Myai Thaung v Emperor*
- 5 (13) 14 Cri L Jour 214 (216) 19 Ind Cas 310 36 Mad 308, *Ganapathi Bhatta v Emperor*

(d) A person tried under s 353 of the Penal Code cannot again be tried in respect of the same Act under s 196 of the Penal Code⁶

See also the undermentioned cases.⁷

- 6 (29) 16 AIR 1929 All 910 (940) 30 Cr L Jour 1153, *Abdul Rashid v Harish Chandra*
- 7 (44) 31 AIR 1944 Pat 328 (330) *Satrughana Bheera v Emperor* (Bihar and Orissa Municipal Act — Bye laws Nos 59 and 2 — Obstruction to latrine passage — Accused convicted under S 341 Penal Code, and fined — Accused again convicted on same facts under bye law No 59 — S 403 (2), Cr P C, held applicable — Second conviction held legal — S 341, Penal Code, contemplated purely a personal wrong to a particular person while the offence under bye-law 59 was an offence against the public health and convenience)
- (41) 28 AIR 1941 Pat 442 (444) 42 Cr L Jour 774 195 Ind Cas 608 *Halkhari Ram v Emperor* (Acquittal of offence under S 465, Penal Code, and under S 52, Income Tax Act, bars trial for offence under S 196, Penal Code in respect of same facts)
- (38) 25 AIR 1938 Lah 614 (614 615) 39 Cr L Jour 870 1 L R. (1938) Lah 127, *Bhag Singh v Emperor* (Acquittal of charge under S 323, Penal Code — Subsequent re trial for charge under S 324 barred)
- (17) 17 AIR 1927 Cal 117 (117 118) 28 Cr L Jour 535 9 Pat 535, *Dabu Lal Mahlon v Ram Saran Singh* (S 253 Penal Code, for obstructing river by extending tank banks acquitted on appeal — Subsequent prosecution under Embankment Act for meddling with embankment — Subsequent offence held not distinct offence and principle of *autrefois acquit* applied)
- (30) 17 AIR 1930 Pat 26 (27) 30 Cr L Jour 806 9 Pat 535, *Dabu Lal Mahlon v Ram Saran Singh* (Accused suddenly rising in Court and shouting out, assaulting another with shoes — He commits offences under Ss 228 and 355, Penal Code, but subs (2) of S 403 does not apply because the entire series of acts constitute both the acts)
- (23) 10 AIR 1923 Cal 407 (408) 25 Cr L Jour 140, *Fassar Pramanio v Emperor* (First trial under S 426 (Mischief) Penal Code—Second trial under S 379, Penal Code, for same act and on same facts barred)
- (27) 14 AIR 1927 Cal 221 (225) 23 Cr L Jour 233, *Alfred v Emperor* (Conviction of officer of ship under S 68 of Calcutta Police Act for drunken and disorderly behaviour by assaulting captain of ship bars trial on same facts for assault under S 103 (4) of the Merchants Shipping Act)
- (26) 13 AIR 1926 Lah 633 (639) 8 Lah 52 27 Cr L Jour 1019, *Fatleh Muhammad v. Emperor* (Cutting tree in Mahomedan graveyard — First trial under S 297, Penal Code, and acquittal — Second trial under S 379 barred, the reason being that the act is the same though it may have two distinct results)

But conviction for rash driving does not protect accused from prosecution for consequences of such driving — S 338, Penal Code, for rash and negligent driving motor car bars fresh trial under Motor Vehicles Act, S 16, for driving without licence — Applicability of S 403 does not depend upon additional evidence being available or not — The observation of the Judge that the accused cannot be tried a

the goods which formed the
S 54 A, Calcutta Police Act,

- (25) 12 AIR 1925 Lah 157 (153) 25 Cr L Jour 1241, *Hussain v Emperor* (Trial under S 121 A (conspiracy to wage war against the king) precludes trial on same facts for offence under S 120B, criminal conspiracy)
- (28) 15 AIR 1928 Rang 252 (251) 6 Rang 386 29 Cr L Jour 930 *Froel Kuh v Emperor* (Trial under Burma Forest Act for extracting teak timber without licence and for counterfeiting akani mark on teak timber stolen by him — Fresh trial on same facts under Ss 379 and 411, Penal Code, is barred.)
- (23) 10 AIR 1923 Cal 179 (179) - 24 Cr L Jour 509 - 49 Cal 921 *Emperor v Jhabbar Mull* (Trial for offence under S 403, (criminal breach of trust) in respect of certain sums — Misappropriation alleged by prosecution to have been carried out by means of certain false entries in accounts — Fresh trial under S 477 A is barred)
- (21) 8 AIR 1921 Pat 22 (22, 23) 22 Cr L Jour 63, *Malsuddan Mistry v Emperor* (Acquittal under s 338, Penal Code, for rash and negligent driving motor car bars fresh trial under Motor Vehicles Act, S 16, for driving without licence — Applicability of S 403 does not depend upon additional evidence being available or not — The observation of the Judge that the accused cannot be tried a

The undermentioned decisions⁸ in so far as they are inconsistent with the above view are it is submitted, not correct

- (2) Where anything which is an offence consists of parts any of which parts is itself an offence, the offences are not distinct. Thus where a person receives or retains different items of stolen property at the same time, he does not commit so many distinct offences⁹. See also the case cited below¹⁰. In this view the undermentioned decision¹¹ must be deemed incorrect.
- (3) Where several acts, of which one or more than one would, by itself, or by themselves, constitute an offence, constitute, when combined, a different offence the offences are not distinct¹². Thus A is a member of an unlawful assembly, the

- time on the same facts cognate to or involved in the offence with which he was previously charged held to be of a somewhat general character in AIR 1936 Pat 503 37 Cri L Jour 785)
- (18) 5 AIR 1918 Lah 49 (50) 1918 Pan Re No 23 Cr 19 Cri L Jour 931 *Raj Bahadur v Emperor* (Selling married girl by misrepresenting that she is virgin — Conviction under S 372 Penal Code precludes trial for cheating)
- (19) 6 AIR 1919 Pat 70 (71) 20 Cri L Jour 526 *Muhammad Saleh v Emperor* (Acquittal under S 363, Penal Code (kidnapping) bars trial under Ss 365 366 and 368 Penal Code)
- (21) 24 Mad 284 (292) 10 Mad L Jour 405 *Jagannadha Rao v Kamaraju*. (A charge of kidnapping from lawful guardianship under S 366 Penal Code in general terms and not stating from whose guardianship kidnapping took place — Acquittal on such a charge may be pleaded in bar of a trial of a charge of kidnapping from the guardianship of particular person)
- S (32) 19 AIR 1932 Mad 362 (363) 55 Mad 788 33 Cri L Jour 522 *Subbiah Kone v Kandaswami Kone* (Offences under S 323, Penal Code and S 3 (12), Madras Towns Nuisances Act — Though same act may constitute both offences separate trials not barred)
- (10) 11 Cri L Jour 325 (325 326) 6 Ind Cas 352 37 Cal 604 *Ram Sewak Lal v Manwar Singh* (False informat on to public servant — Ss 182 and 500 Penal Code — Acquittal on charge under S 182 Penal Code — No bar to trial under Section 500)
- (10) 11 Cri L Jour 420 (421) 6 Ind Cas 944 1910 Pan Re No 20 Cr, *Thakar Singh v Chatter Pal* (Acquittal under S 182 no bar to trial under S 211 Penal Code)
- (28) 16 AIR 1928 Bom 231 (232) 29 Cri L Jour 931, *Emperor v Ram Deoji* (Convicted on for driving car while drunk no bar to trial for rash and negligent driving)
- (26) 13 AIR 1926 All 405 (408) 48 All 496 27 Cri L Jour 767 *Deoki Koters v Emperor* (Where the accused was convicted for theft as he was found removing gunny bags with opium inside — Held his conviction for theft does not bar the trial for being in possession of opium under S 9 Opium Act)
- (25) 12 AIR 1925 All 299 (300) 47 All 234 28 Cri L Jour 688, *Ram Sukh v Emperor* (Conviction for effray does not bar trial for hurt caused in course of affray)
- (20) 7 AIR 1920 Pat 449 (450) 22 Cri L Jour 222 *Tanuk Lal v Emperor* (Conviction for rioting — Common object of unlawful assembly to obstruct public servant in discharge of duty — Subsequent trial under S 186 Penal Code for causing obstruction to public servant in discharge of duty not barred)
- (33) 20 AIR 1933 Oudh 470 (472) 35 Cri L Jour 36, *Emperor v Munno* (Conviction in respect of possession of stolen revolver under Ss 411 and 414 Penal Code, is no bar to conviction under S 19 (f), Arms Act in respect of such possession)
- (See also (39) 19 AIR 1932 Cal 723 (725) 60 Cal 179 31 Cri L Jour 177 *Hanuman v Emperor* (Accused not found guilty under S 376 (Rape) 1 P C does not amount to acquittal under Ss 376 and 511))
- 9 (25) 12 AIR 1925 Pat 20 (24 25) 3 Pat 503 25 Cri L Jour 738 *Emperor v Bishun Singh*
- (25) 12 AIR 1925 Oudh 298 (299) 26 Cri L Jour 1 *Munwa v Emperor*
- (93) 15 All 317 (318) 1893 All W N 101 *Queen Empress v Makhan*
- (88) 15 Cal 511 (513 514) *Ishan Much v Queen Empress*
- (23) 10 AIR 1923 Cal 557 (558) 50 Cal 594 24 Cri L Jour 707 *Ganesh Sahu v Emperor*
- (06) 1906 All W N 22 (22 23) 28 All 313 3 Cri L Jour 207 *Emperor v Manjan*
- [See (27) 14 AIR 1927 Sind 53 (54) 27 Cr LJ 1256 21 S and LR 154 *Dadla Mal v Emperor* (Properties received on different dates — Separate trials not barred — Where it is proved that the properties were stolen on different occasions it may be presumed that they were received also at different times)]
- Also see S 233 Note 3
- 10 (27) 14 AIR 1927 Mad 444 (445) 28 Cri L Jour 235 *In re Mool a Pillai* (Accused inducing complainant to buy certain property by misrepresenting that it was unencumbered and that he would make a deposit—Two separate trials for cheating in respect of the two facts misrepresented not maintainable.)
- 11 (29) 16 AIR 1929 Pat 710 (711) 31 Cri L Jour 472 *Ghana Mahapatra v Emperor* (Unlawful

common object of which is to cause hurt to B. In pursuance of the common object, A causes hurt to B. In such a case the act of being a member of an unlawful assembly and that of causing hurt constitute offences in themselves under Ss 143 and 323 of the Penal Code respectively and constitute when combined a different offence, viz rioting under S 147 of the Penal Code. But the offences under Ss 143, 323 and 147 are not *distinct* and cannot be made the subject of separate trials.¹³

Where the offences in question do not fall within any of the above categories they are distinct.¹⁴

- (29) 16 AIR 1929 All 893 (900) 51 All 977 30 Cri L Jour 1089 *Ghamand Nath v Babu Lal*
 13 (1900) 5 Cal W N 72 (73) *Jaliram v Rajkumar* (Unlawful assembly with common object of assaulting complainant — Complainant assaulted by accused in prosecution of common object—Accused tried and acquitted under S 147, Penal Code (rioting) — He cannot be tried again on same facts for causing hurt to complainant)
 14 (45) 32 AIR 1945 Bom 65 (66) 46 Cri L Jour 258 217 Ind Cas 235 (DB) *Ibrahim Iboov v Emperor* (Previous acquittal for offence of being in possession of illicit liquor—Accused can be charged on same facts for loitering on road under Bombay City Police Act S 112 (d))
 (42) 29 AIR 1942 Bom 326 (328) 44 Cri L Jour 120 203 Ind Cas 592 (DB) *Emperor v Karsandas Govindji Veda* (Offence of working factory under S 390 Bombay City Municipal Act without permission—Previous acquittal cannot under S 403, Cr P C, bar subsequent charge of working factory without permission at later date)
 (42) 29 A I R 1942 Oudh 473 (477) 18 Luck 408 43 Cri L Jour 830 202 Ind Cas 382 *Ram Nath Date v King Emperor* (Conviction for offence under S 420 Penal Code, for cheating certain person and obtaining from him Government Promissory Notes on false representation — Subsequent trial for offence under S 409 Penal Code for embezzlement of amount is not barred as offences are distinct)
 (38) 42 Cal W N 1232 (1934) *Roh Charan v S K Brahmachari* (Trial and conviction of an accused person along with certain others under S 45 of the Calcutta Police Act does not bar his subsequent trial on the same facts under S 44 of that Act)
 (40) 27 A I R 1940 Mad 224 (224) 41 Cri L Jour 401 187 Ind Cas 87 *Thanammal v Alamelu Ammal* (Conviction of a person under S 75 of the Madras City Police Act is no bar to his trial for an offence under Ss 323 and 302 Penal Code)
 (39) 26 A I R 1939 Cal 65 (69 70) 40 Cri L Jour 199 1 L R (1939) 1 Cal 1 (FB) *Purnananda Das v Emperor* (Conspiracy—Person once tried on charge of conspiracy — Section 403 is no bar to trial of entry into fresh conspiracy)
 (36) 23 A I R 1936 Pat 503 (504) 37 Cri L Jour 785 *Sankatha Rai v Kaderan Mian* (Accused acquitted on a charge of affray — Subsequent trial and conviction for causing hurt during the affray is not barred—A I R 1930 Pat 26 9 Pat 585 30 Cri L Jour 606 and A I R 1921 Pat 22 22 Cri L Jour 63, explained)
 (29) 16 AIR 1929 Bom 451 (452) 30 Cri L Jour 965 *In re Dodds Kalu* (Conviction for affray does not bar trial for hurt caused in course of affray)
 (33) 1938 Ind W N 186 (187), *Dewan Sahab v Emperor* (Acquittal on charge under S. 323, Penal Code does not bar trial for offence under Madras Towns Nuisances Act)

not barred)

- (29) 16 A I R 1929 All 940 (940) 30 Cri L Jour 1153 *Abdul Fasih v Haris chandra* (Prosecution under S 155 of U P Municipalities Act for evasion of octroi duty does not bar trial for the offence of obstructing the municipal peons)

Vehicles Act is no bar to trial for causing hurt.)

- (26) 15 A I R 1928 Bom 177 (178) 29 Cri L Jour 522, *Dagda Dagda v Emperor* (Two contradictory statements — Accused charged under S 193 Penal Code, but acquitted — Subsequent charge under S 182, Penal Code, in respect of earlier statement is not barred.)

- (34) 21 AIR 1934 Mad 673 (674) : 58 Mad 178 : 35 Cri L Jour 1503, *Srirangachariar v Emperor* (Person prosecuted and acquitted for theft of blank railway ticket—Subsequent trial for forgery thereon is not barred)
- (15) 2 AIR 1915 Bom 203 (204, 205) : 40 Bom 97 : 16 Cri L Jour 761, *Jatram Dankarji v Emperor* (Abetment of forgery of a document and using such document as genuine are distinct offences and separate trials are legal — But see (1865) 3 Sath W R Cri Letters No 519 at p 9 (9) — Acquittal for theft bars fresh trial for abetment of theft on same facts—Submitted decision is not correct)
- (30) 17 AIR 1930 Lah 57 (59) : 30 Cri L Jour 954, *Mangalsen v Emperor* (Conviction of director of company under S 91-B, Companies Act (for voting on contract in which he was personally interested) is no bar to his trial for criminal breach of trust)
- (35) 22 AIR 1935 Cal 571 (572) : 36 Cri L Jour 1364, *Saroda Datta v Satyeeswar Santra* (Complaint disclosing several offences — Accused summoned for one offence and acquitted — Fresh complaint in respect of other offences is not barred)
- (02) 4 Bom L R 575 (577), *Municipality of Bombay v Jater Jagjivan* (Trial for building without licence from Municipality is no bar to trial for failure to comply with notice for removal of building)
- (15) 2 AIR 1915 Lah 147 (147) : 16 Cri L Jour 605, *Emperor v Mohan Lal* (Do)
- (09) 9 Cri L Jour 578 (580 581) : 2 Ind Cas 357 : 5 Low Bur Rul 12, *Oborna Charan v Emperor* (Disobedience of notice under Municipal Act to leave passage while building under construction — Acquittal for such disobedience does not bar trial for disobedience of notice to alter building after construction)
- (35) 1935 Mad W N 1342 (1343), *Veerayya v Emperor* (Acquittal of murder by firing gun is no bar to trial for same offence — *See also (1865) 3 Sath W R Cri Letters No 519 at p 9 (9) — Acquittal for theft bars fresh trial for abetment of theft on same facts—Submitted decision is not correct*)
- complaint
in trial

- (25) 12 AIR 1923 Lah 537 (538) : 26 Cri L Jour 1097 *Chhagya v Emperor* (Being member of gang for the purpose of habitually committing theft, trial for — Acquittal — Receiving stolen property, trial for, not barred)
- (30) 17 AIR 1930 Oudh 455 (459) : 128 Ind Cas 739 *Daechhu v Emperor* (Acquittal of offence for receiving property stolen in dacoity no bar to trial for taking part in dacoity)

Criminal breach of trust or criminal misappropriation committed of different items at various times between certain dates—Charge under S 222 for an aggregate sum omitting some of the items—Trial on such charge no bar to trial in respect of an omitted item

- (41) 28 AIR 1941 Pat 606 (607) : 43 Cri L Jour 286 : 197 Ind Cas 632, *Mayadhar Suam v Netranada Mahant*
v Emperor
v Hannath Bagaji
 '47, *Sidh Nath v Emperor* (Though

S 403 may not strictly apply, a second trial in such circumstances ought not to be allowed in the ends of justice)

- (23) 10 AIR 1923 Cal 654 (656) : 50 Cal 632 : 25 Cri L Jour 156 *Nagendra Nath v Emperor* (Suhrawardy J, dissenting)
- (31) 18 AIR 1931 All 209 (209) : 32 Cri L Jour 376 : 53 All 411, *Brijwan Das v Emperor*
 Also see S 222 Note 8

[But see (17) 4 AIR 1917 Mad 524 (525) : 17 Cri L Jour 30 *In re Appadurai Ayyar* (Submitted not correct)]

Conspiracy to commit an offence is distinct from the offence the commission of which is the object of the conspiracy

- (42) 29 AIR 1942 Pat 58 (59, 60) : 43 Cri L Jour 41 : 196 Ind Cas 604 (DB), *Emperor v Gourishankar Dohidar* (An acquittal of an offence under S 420, Penal Code, for a particular overt act of cheating; A, cannot be a bar to the prosecution of the acquitted person on a charge of conspiracy under S 120B Penal Code, to commit a series of acts of cheating)

- (34) 21 AIR 1934 All 61 (65) : 35 Cri L Jour 1349 *Ram Das v Emperor*

- (33) 20 AIR 1933 Bom 447 (448, 449) : 59 Bom 23 : 35 Cri L Jour 117, *In re Chhavlal Bhikabhai* (Conviction for criminal conspiracy — Acts of cheating committed in pursuance of the conspiracy — Section 403 is no bar to subsequent trial for cheating)

- (24) 11 AIR 1924 Cal 603 (611) : 25 Cri L Jour 1049, *Emperor v Osman Sardar* (Conspiracy to murder is not same as murder and conviction for conspiracy is no bar to trial for murder)

[But see (26) 13 AIR 1926 Cal 450 (450) : 26 Cri L Jour 1023, *Cheragala Bepari v Salish Chandra* (After person is acquitted of offence under S. 193, Penal Code he cannot be proceeded against on facts wholly inseparable from the facts of the prior prosecution case for an offence under Ss 467 and 471 read with S 120B Penal Code)]

It has sometimes been said¹⁵ that the test for determining whether an offence is distinct from one previously tried is to see whether the evidence necessary to prove the two offences is the same or different. It is submitted that such a test is not conclusive¹⁶ as it is possible that though the evidence necessary to prove two offences is different the offences may not be distinct.

Further the observation in the undermentioned case¹⁷ that in order to constitute distinct offences the offences must be *totally* unconnected, is not correct as the same transaction may involve distinct offences in which case they cannot be said to be totally unconnected.

6 Consequences of act happening after previous conviction — Sub section (3) — A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide (Illustration c)¹

In such a case a fresh trial will be competent even while the accused is undergoing the previous sentence².

But a fresh trial will not be competent if the death had occurred, and was known to the Court to have occurred at the time of the previous conviction³. The reason is that sub s (3) will not apply to such a case while at the same time the offences charged at the two trials would be constituted by the same acts and as such would not be *distinct* offences. See Notes 2 and 5.

Previous trial for abetment of forgery is no bar to trial for offence under Section 82 Registration Act

(15) 2 AIR 1915 All 114 (115) 37 All 107 16 Cr L Jour 144 *Emperor v Jivan*
[But see (24) 11 AIR 1924 Rang 213 (213) 1 Rang 299 20 Cr L Jour 191, *Maung Saing v Emperor*]

Non compliance with notice under S 159 (1) Madras Local Boards Act for removal of encroachment — Prosecution for — Fresh prosecution for disobedience of fresh notice regarding same encroachment is not barred.

(39) 25 AIR 1939 Mad 947 (849 849) 39 Cr L Jour 712 I L R (1939) Mad 907 *Public Prosecutor v Sabapathy Chetty* (Prosecution for failure to obey notice to remove encroachment — Acquittal does not bar prosecution for failure to obey fresh notice—AIR 1935 Mad 56 59 Mad 513 36 Cr L Jour 311 overruled, AIR 1932 Mad 635 33 Cr L Jour 626 AIR 1932 Mad 537 33 Cr L Jour 69 approved AIR 1926 Mad 1067 48 Mad 870 26 Cr L Jour 1049 dissented from)
(32) 19 AIR 1932 Mad 535 (536) 33 Cr L Jour 626 *Mond Beary v President Taluk Board Mangalore*
(32) 19 AIR 1932 Mad 537 (537) 33 Cr L Jour 699 *President Panchayat Board Velgoda v Venkata Reddy*
(27) 1927 Mad W N 645 (646) *Narayan Aiyar v Rakkupayal*

Section 35, Madras Planters Labour Act (1903) did not limit the number of directions to fulfil the contract that could be made or to the number of prosecutions following on default.
(16) 3 AIR 1916 Mad 527 (529 530) 16 Cr L Jour 777 39 Mad 889 *N O Whittom v Mammad*
[But see (13) 14 Cr L Jour 79 (79 80) 36 Mad 427 18 Ind Cas 415 *Ponga Maistry v Emperor*]
15 (28) 15 AIR 1928 Pat 577 (578) 29 Cr L Jour 760 *Chhannu Prasad v Emperor*
(27) 14 AIR 1927 Bom 699 (630) 28 Cr L Jour 1032 *Emperor v Kallasan*
(30) 17 AIR 1930 All 92 (95) 30 Cr L Jour 1149 *Hukum Singh v Emperor*

n Singh

(Second
th trial

Kanda

swami Kone

17 (28) 15 AIR 1928 Rang 252 (253) 6 Rang 386 29 Cr L Jour 930 *Yeok Kul v Emperor*

Note 6

1 (14) 1 AIR 1914 All 191 (192) 15 Cr L Jour 64 36 All 4 *Sailani v King Emperor* (A and B tried for grievous hurt to C — Case compounded and A and B acquitted—C subsequently died—Second trial of A and B for culpable homicide not barred)

(01) 1901 Pun Re No 3 Cr p 6 (8) *Crown v Sarbuland*

2 (35) 2 AIR 1935 Pesh 18 (19) 36 Cr L Jour 813 *Arsala Khan v Emperor*

3 (70) 2 All 349 (350) *Empress of India v Danni*

(10) 14 Cr L Jour 135 (137 138) 18 Ind Cas 687 9 Nag L R 26 *Mahadeogir v Emperor*

7. "Tried" — This section does not apply unless the accused has been *tried*¹ and convicted or acquitted. But the previous trial need not be one on the merits² so that an acquittal under s 247, in a summons case on the ground of the complainant's absence will be a valid bar under this section,³ although the summons had not been served on the accused⁴. The same principle applies in case of a withdrawal under s 494 of the Code⁵.

Security proceedings⁶ or proceedings under s 145⁷ do not constitute a *trial* within the meaning of this section. Similarly a proceeding for maintenance under s 488 of the Code is not a trial and a prior application for maintenance does not bar a fresh application. But where a Magistrate knows or has reason to believe that a prior application has been made and disposed of, he ought not to act on a later application without taking into consideration the adjudication on the prior application. See s 488 Note 28a.

Disciplinary proceedings under the Legal Practitioners Act are not trials⁸. But the

Note 7

1 (43) 30 AIR 1943 Mad 6 (7) 44 Cri L Jour 176 204 Ind Cas 273 *Bobba Kutumbayya v Ketavarapu Lakshminarasimha Rao*

(34) 21 AIR 1934 Mad 716 (717) 36 Cri L Jour 550 58 Mad 256 *Narayanaswamy v Karum bayaram Periyar* (Conviction set aside on ground that trial Bench had no jurisdiction and therefore there was no trial — Another complaint on same facts before same Court — Section 403 was no bar)

(18) 5 AIR 1918 Mad 212 (213) 40 Mad 977 19 Cri L Jour 497, *Kottayya v Venkayya*

2. (11) 12 Cri L Jour 41 (42) 34 Mad 253 9 Ind Cas 253 *In re Guggilappu Peddaya*

(29) 16 AIR 1929 Cal 189 (189 190) 30 Cri L Jour 585 *Sulu Pam Koch v Krishna Deb Sarma*

(97) 14 AIR 1927 Nag 388 (388) 28 Cri L Jour 183 *Mt Yeshoda v Mt Bannu Bai*

(18) 5 AIR 1918 Mad 231 (233) 40 Mad 976 19 Cri L Jour 501 *In re Dube Kula Lal*

(35) 22 AIR 1935 Cal 491 (493) 36 Cri L Jour 1238 62 Cal 1119 *Bhupati Bhushan v Amio Bhushan*

(29) 16 AIR 1929 Bom 408 (409 410) 53 Bom 693 31 Cri L Jour 1000 *Shankar Dattatraya v Dattatraya Sadasiva*

3 (43) 30 AIR 1943 Mad 6 (7) 44 Cri L Jour 176 204 Ind Cas 273 *Bobba Kutumbayya v Ketavarapu Lakshminarasimha Rao*

(11) 12 Cri L Jour 41 (41 42) 34 Mad 253 9 Ind Cas 253 *In re Guggilappu Peddaya*

(24) 11 AIR 1924 Pat 140 (141) 24 Cri L Jour 815 *Kiran Sarkar v Emperor*

(35) 22 AIR 1935 Cal 491 (493) 62 Cal 1119 36 Cri L Jour 1238 *Bhupati Bhushan v Amio Bhushan*

(29) 16 AIR 1929 Cal 189 (190) 30 Cri L Jour 585 *Sukuram Koch v Krishna Deb Sarma*

(21) 8 AIR 1921 Pat 311 (312) 22 Cri L Jour 331 *Ram Mahto v Emperor* (Although it cannot be said that the accused person was tried)

(97) 14 AIR 1927 Nag 388 (388) 28 Cri L Jour 183 *Mt Yeshoda v Mt Bannu Bai*

(23) 10 AIR 1923 All 360 (360) 45 All 58 24 Cri L Jour 862 *Dulla v Emperor*

(86) 2 Weir 457 (457) *Suraya Sastri v Venkata Rao*

(18) 5 AIR 1918 Mad 628 (630) *Krishnamachari v Gavenda Ramanuja*

(29) 16 AIR 1929 Bom 408 (409) 53 Bom 693 31 Cri L Jour 1000 *Shankar Dattatraya v Dattatraya Sadasiva*

Also see Note 8

[But see (18) 5 AIR 1918 Mad 212 (212 213) 40 Mad 977 19 Cri L Jour 497 *Kottayya v Venkayya* (Acquittal under s 247 does not entitle acquitted person to plead bar under s 403 to fresh prosecution on same facts — Term tried in s 403 is not surplusage.)]

4 (35) 22 AIR 1935 Cal 491 (493) 62 Cal 1119 36 Cri L Jour 1238 *Bhupati Bhushan v Amio Bhushan*

(24) 11 AIR 1924 Pat 140 (140 141) 24 Cri L Jour 815 *Kiran Sarkar v Emperor*

[But see (18) 5 AIR 1918 Mad 212 (212, 213) 40 Mad 977 19 Cri L Jour 497 *Kottayya v Venkayya* (Trial of summons case does not begin until particulars of offence are stated to accused under s 242 of this Code)]

5 (18) 5 AIR 1918 Mad 231 (232 234 236) 40 Mad 976 19 Cri L Jour 501, *In re Dudikula Lalsahib*

6 (42) 29 AIR 1942 Lah 84 (84) 11 R (1943) Lah 365 43 Cri L Jour 564 199 Ind Cas 632 (DB) *Subey Singh v Emperor*

(42) 29 AIR 1942 Oadh 416 (416) 43 Cri L Jour 729 201 Ind Cas 60 *Sheikh Abdulah v Emperor*

(13) 14 Cri L Jour 559 (561) 36 Mad 315 21 Ind Cas 159 *In re Muthia Moopan*.

[See however (24) 15 AIR 1924 Rang 135 (136) 30 Cri L Jour 630 *Nga Mya Gui v Emperor* for section in

Rangoon High Court has held that such proceedings are quasi criminal and that the principle of this section will apply to them.⁹

Where in a sessions trial in a High Court the jury is discharged on a difference of opinion between the Judge and the jury and the case is re tried with a new jury, there is no fresh trial, for the purpose of this section.¹⁰ The High Court of Madras has, however, taken a contrary view in the undermentioned case.¹¹ It has been held by the High Court of Calcutta that the re trial of an accused on remand owing to misdirection to the jury is part of the same trial which is not concluded till the appeal is heard and determined.¹² Similarly, an appeal is not a fresh trial but only a continuation of the trial in the lower Court.¹³

This section does not say that a person who has been tried and convicted or acquitted shall be *acquitted* if an attempt is made to prosecute him again for the same offence. It says that he shall not be *tried* at all.¹⁴ Therefore the *acquittal* of a person on the ground of his trial being barred under this section is illegal, the reason being that an acquittal implies a trial.¹⁵

8 "Acquittal"—Meaning of. — The acquittal of an accused under S 247 of the Code on the ground of the complainant's absence¹ or under S 494 on withdrawal of a

9 (25) 12 AIR 1925 Rang 110 (110) 2 Rang 491 25 Cri L Jour 1111, *In the matter of Maung Po Tok*

10 (46) 83 AIR 1946 Bom 88 (42, 44) (FB), *Govt of Bombay v Abdul Wahab* (Accused charged in High Court with murder only — Judge directing jury to return verdict on lesser offence — Jury holding accused not guilty of murder unanimously and not guilty of grievous hurt by divided verdict — Judge disagreeing with latter verdict — Re trial by fresh jury under S 308 on charge of grievous hurt not barred by acquittal on charge of murder — AIR 1931 Bom 309 83 Cri L Jour 62 55 Bom 520 overruled, AIR 1945 Bom 110, reversed)

(14) 1 AIR 1914 Cal 901 (904) 41 Cal 1072 15 Cri L Jour 460, *Emperor v Nirmal Kanta Ray*
11 (43) 80 AIR 1943 Mad 737 (738, 739) 45 Cri L Jour 516 212 Ind Cas 97, *In re Aruningham* (Accused tried for stabbing deceased in abdomen — Wound resulting in death — Judge while charging jury suggesting alternative verdicts of murder or grievous hurt — Jury giving verdict of grievous hurt by 5 to 4 — Judge ordering re trial for grievous hurt — Acquittal on charge of murder was held to be bar to re trial for grievous hurt)

12 (36) 87 Cri L Jour 707 (707) 52 Cal 928, *Abdul Khan v Emperor*

13 (14) 1 AIR 1914 Mad 258 (259) 37 Mad 119 15 Cri L Jour 180, *Bala Reddi v Emperor*

(98) 23 Cal 975 (977), *Queen Empress v Jabanulla*

(32) 19 AIR 1932 Nag 121 (123) 28 Nag L R 233 33 Cri L Jour 849 (FB), *Mad Gul Rohilla v Emperor*

[See (95) 22 Cal 377 (381 382, 383), *Krishna Dhan Mandal v Queen Empress* (Accused acquitted by jury of some offences and convicted of others — Appeal from conviction — High Court ordering re trial without express limitation as to charges — Re trial to be on all original charges — Previous acquittal is no bar to those charges being re-tried — S 403 does not apply to such cases.)]

Also see Note 1

14 (38) 25 AIR 1928 Mad 847 (848) 39 Cri L Jour 712 11LR (1936) Mad 902, *Public Prosecutor v Sabhapathy Chetty*.

15 (08) 8 Cri L Jour 139 (140) 10 Bom L R 628, *In re S E Dubash*

(09) 9 Cri L Jour 578 (580, 581) 5 Low Bur Rul 12 2 Ind Cas 357 *Oborno Charan Chowdhury v Emperor*

Note 8

1 (43) 80 AIR 1943 Mad 6 (7) 44 Cri L Jour 178 201 Ind Cas 273, *Kutumbayya v Lalshmi narasimha Rao*

(40) 27 AIR 1910 Nag 357 (359, 360) 41 Cri L Jour 913, *Emperor v Lazma Prasad*

(29) 16 AIR 1929 Bom 408 (409, 410) 53 Bom 693 31 Cri L Jour 1000, *Shankar Dattatraya v Dattatraya Sadasna* (Even though summons had not been served on the accused)

(35) 22 AIR 1935 Cal 491 (493) 62 Cal 1119 36 Cri L Jour 1239, *Bhupati Bhushan v Amio Bhushan*

(24) 11 AIR 1924 Cal 96 (96) 24 Cri L Jour 716, *Nityananda Koer v Rakhahari Misra*

(11) 12 Cri L Jour 41 (41, 42) 34 Mad 253 9 Ind Cas 253, *In re Guggilapu Peddaya*

(29) 16 AIR 1929 Cal 189 (189, 190) 30 Cri L Jour 585, *Suku Ram v Krishna Deb*

prosecution by the Public Prosecutor² is an acquittal within the meaning of this section. Similarly, the acquittal of an accused on the case being lawfully compounded is an acquittal for the purposes of this section³.

The dismissal of a complaint⁴, the discharge of an accused⁵ or an order stopping proceedings under S. 213⁶ of the Code is not an acquittal for the purposes of this section. See Note 13. Similarly, an order refusing to take cognizance of an offence does not amount to an acquittal⁷.

See also S. 240 Note 5.

- (23) 10 AIR 1923 Cal 407 (408) 20 Cr L Jour 149 *Kassab Pramanick v Emperor*
 (23) 10 AIR 1923 All 360 (360) 45 All 58 24 Cr L Jour 862 *Dulla v Emperor*
 (15) 2 AIR 1915 Cal 119 (120) 42 Cal 363 16 Cr L Jour 145 *Achambit Mondal v Mahatab Singh* (Void order under S. 217 does not amount to acquittal)
 (15) 2 AIR 1915 Cal 263 (263) 15 Cr L Jour 796 *Madho Choudhury v Turab Musan* (Do)
 (29) 16 AIR 1929 Cal 657 (659) *Musa Singh v Gostho Behari* (Do)
 [See (08) 8 Cr L Jour 139 (140) 10 Bom L R 628 *In re S E Dubash* (Order striking off case not proper—Proper order would be acquittal)]

ALN see Note 7

[But see (18) 5 AIR 1918 Mad 212 (212 213) 49 Mad 977 19 Cr L Jour 497 *Kotayya v Venkayya* (The word tried in the early part of S. 403 (1) should not be treated as surplusage and the section does not apply to a case where even the particulars of the offence were not stated to the accused)]

- 2 (43) 9 Cal L T 85 (97) *Narsingh Mahapatra v Emperor*
 (41) 28 AIR 1941 Pat 442 (444) 42 Cr L Jour 774 195 Ind Cas 698 *Halkhor Ram v Emperor* (Charge under S. 465 Penal Code, withdrawn—Complaint under S. 196 Penal Code founded upon facts constituting charge under S. 465—Proceedings under S. 196 held should be quashed)
 (13) 14 Cr L Jour 135 (138) 9 Nag L R 26 18 Ind Cas 897 *Mahadeogir v Emperor*
 (18) 5 AIR 1918 Mad 231 (233 235) 40 Mad 976 19 Cr L Jour 501 *In re Duda Kula Lal*
 (89) 12 Mad 30 (36) 2 Weir 457 *Queen Empress v Sivarama* (Prosecution withdrawn under S. 494—Sessions Judge discharging accused—Second trial for same offence but on fresh sanction—First order held should have been one of acquittal—Second trial held barred)
 3 (36) 23 AIR 1936 Mad 353 (360 372) 37 Cr L Jour 637 (FB) *Emperor v John McEter* (Charge of criminal breach of trust and cheating based on same facts—Charge of cheating compounded with permission of Court and accused acquitted of cheating—It operates as a bar to trial of charge of criminal breach of trust)

- (13) 14 Cr L Jour 498 (459) 20 Ind Cas 618 (Cal) *Danreddi v Khairat Ali*
 [See (38) 25 AIR 1938 Lah 739 (740 741) 40 Cr L Jour 131 *Mi Harbans Kaur v Lahari Ram* (Complaint on behalf of minor daughter filed and compounded by father without Court's permission—Consequent acquittal does not bar complaint by daughter)
 (93 1900) 1893 1900 Low Bur Rul 240 (241) *Queen Empress v Po Ba* (No lawful compromise—No bar to fresh trial)]

Also see S. 345 Note 18

- 4 (44) 31 AIR 1944 Nag 318 (319) 11 LR (1945) Nag 486 46 Cr L Jour 195 217 Ind Cas 147 *Narayan Punjaram v Shankar Singh* (Dismissal of a complaint interlarded with false allegations of a very serious crime is no bar in law to the subsequent institution of a more reasonable complaint)
 (37) 24 AIR 1937 Rang 35 (37) *Chin Hone O v C Ah Foo*
 (34) 21 AIR 1934 All 877 (879) 33 Cr L Jour 1177 *Ah Bux v Emperor* (Dismissal of the complaint after recording of the prosecution evidence and framing of a charge on discovery that the complainant had not been examined under S. 200 Cr P C does not amount to an acquittal)
 5 (23) 16 AIR 1919 Mad 260 (261) 30 Cr L Jour 403 *Venkatasubba Ayyar v Soundraraja Ayyangar* (Assumed)
 (66) 5 South W R Cr 59 (59) *In re Shoodun Mundle* (Discharge by Magistrate in warrant-case is not final like an acquittal and Sessions Judge can order accused to be put upon his trial again)
 (07) 5 Cr L Jour 309 (318) 31 Bom 335 9 Bom L R 331 *Emperor v Bhagwan Das*
 (32) 19 AIR 1932 Mad 503 (505 507) 53 Mad 793 33 Cr L Jour 633 *Vannier v Draxler* (Discharge under S. 259)
 (34) 21 AIR 1934 All 340 (341) 55 All 750 36 Cr L Jour 63 *Suraj Bali v Emperor* (Dismissal of complaint for default in warrant-case operates as discharge under S. 259 and not acquittal)
 6 (12) 13 Cr L Jour 809 (861) 1913 Inn Re No 9 Cr 17 Ind Cas 793 *Achirru v Emperor*
 7 (32) 19 AIR 1932 Cal 871 (874 875) 60 Cal 149 34 Cr L Jour 181 *Nafar Sardar v Emperor* (1900) 21 Mad 337 (339) 2 Weir 251 *Queen Empress v Kanayil Laru*
 (33) 20 AIR 1933 Pat 242 (243) 12 Pat 234 34 Cr L Jour 1193 *Lma Singh v Emperor* (Magistrate's order directing case reported to him by police to be struck off is purely administrative or ministerial order and not judicial one—Rule of *ex rebus acquit* does not apply to it)

Where an appellate Court sets aside a conviction without doing anything further, the order amounts to an acquittal⁸. But where the appellate Court sets aside a conviction and orders a re-trial its order does not amount to an acquittal⁹. In some decisions¹⁰ it has

[But see (703) 7 Cal W N 711 (713) *Kedar Nath Biswas v Adhin Manji* (Police sending charge to Magistrate in respect of four persons—Only some tried and acquitted—Magistrate holding case against others to be false—Until this order is set aside each other persons cannot be proceeded against)]

(03) 7 Cal W N 493 (494) *Bishun Singh Ghose v Emperor* (Do)

(1900) 4 Cal W N 346 (347) *Panchsingh v Umor Mohamad Sheikh* (Case against two accused—Attendance of one not procurable—Complainant absent—Present accused acquitted under S 247 and case dismissed—Unless order of dismissal is set aside, case could not be proceeded with as regards absent accused)]

As regards revival of proceedings see the following cases

(07) 6 Cr L Jour 34 (36) 11 Cal W N 832, *Mokamayi Das v Emperor* (Information of cognizable and non-cognizable offence—Police reporting cognizable case to be false and charge only of non-cognizable case—Magistrate accepting report—Magistrate's subsequent order calling for charge-sheet of cognizable offence held not legal.)

(81) 5 Bom 405 (407) *Gott v Bombay v Shidapa* (Information as to cognizable and non-cognizable offence—Police enquiring only into latter and reporting that no prima facie case made out—Magistrate directing that offence to be expunged from charge-sheet—Held that revival of complaint as regards former offence not barred.)

(26) 13 A I R 1878 Sind 198 (199) 22 Sind L R 427 27 Cr L Jour 302, *Morrison v Crowder* (One Magistrate refusing to issue process—Another Magistrate may issue process without necessity of upsetting order of first Magistrate—Such refusal does not give criminal immunity from all processes for ever.)

(14) 1 AIR 1914 Oudh 406 (406) 17 Oudh Cas 273 15 Cr L Jour 638 *Allaudin Khan v Emperor* (Refusal of Magistrate to take cognizance on complaint does not bar subsequent revival of the proceedings.)

Also see S 190, Note 17

[But see (89) 1889 All W N 8 (9), *Empress v Raghunandan Lal* (Magistrate expressly refraining from dealing with and disposing of the charge under S 204 Penal Code and not acquitting in terms the accused upon such charge—Held the action of the Magistrate might be taken as a stay of the trial of such charge under S 240 of the Code and the subsequent trial was not barred)]

8 (33) 1933 Mad W N 224 (224) *Similan v Similan*

(18) 5 AIR 1918 Nag 126 (127) 19 Cr L Jour 796 *Nanakram v Emperor*

[But see (06) 8 Cr L Jour 15 (17) 3 Low Bur Rul 87 (FB) *Hla Gyi v Emperor* (Accused convicted at criminal sessions in Chief Court and sentenced to death—Conviction and sentence set aside by Bench but accused not acquitted—District Magistrate's action in taking cognizance of the case with a view to re-commitment held legal in view of S 403 read with Ss 273 and 333)]

9 (35) 36 Cr L Jour 1333 (1334) 158 Ind Cas 200 (All) *Emperor v Bahrahi Chis*

(30) 19 A I R 1932 All 409 (411) 54 All 756 33 Cr L Jour 669 *Basynath v Emperor* (Convicted under one section set aside and commitment for offence under another section ordered—Held that there was no acquittal.)

[See (26) 13 A I R 1976 Cal 585 (586) 53 Cal 192 27 Cr L Jour 733 *Emperor v Majan* (Conviction set aside—Question of re-trial left to District Magistrate—Order setting aside conviction is not acquittal.)

(19) 6 A I R 1919 Cal 115 (116) 20 Cr L Jour 225 40 Cal 212n (914n) *Benimadha Kundu v Emperor* (Do)]

Also see S 493 Note 21

10 (02) 29 Cal 412 (414) *Abdul Ghans v Emperor*

(81) 3 Mad 48 (50 51) 2 Weir 756 *In re Rams Redd and Seshu Redd*

(26) 13 AIR 1926 Pat 307 (304) 5 Pat 452 27 Cr L Jour 849 *Mohammad Yasin v Emperor*

(34) 21 AIR 1934 Mad 716 (717 718) 58 Mad 256 36 Cr L Jour 550 *Narayanadaswami Vannier v Karumbayram Parayars*

Emperor (Such order

Khan v Emperor

(18) 5 A I R 1918 Nag 126 (123) 19 Cr L Jour 796 40 Ind Cas 716 (719) *Nanakram v Emperor* (Do)

(1865) 2 Suth W R Cr 9 (10) *Queen v Muthoorapershad* (Do)

been held that an order setting aside a conviction on the ground of the lower Court having had no jurisdiction, does not amount to an acquittal but only to a discharge. See also the cases cited below.¹¹ See also Note 11.

9. "Conviction"—Meaning of.—A finding of guilty by a Magistrate, proceeding under S 349, is not a conviction.¹ But it has been held that the finding of guilty by a Magistrate who commits a case under S 318 would bar the trial of the accused for the offence to which the finding relates.² Departmental punishment is not a conviction for the purposes of this section.³ See also the undermentioned cases.⁴

10. "While such conviction or acquittal remains in force"—The bar of a fresh trial under this section applies only where the previous conviction or acquittal is in force.¹

11. (40) 1940 Mad W N 962 (963), *Abdul Hameed Rowther v Mahomed Sali Rowther* (De novo trial under S 350—Charge already framed—Discharge in de novo trial amounts to acquittal—When that order is in force, accused cannot be tried again.)
 (37) 24 AIR 1937 Bom 152 (152) 38 Cri L Jour 571, *Emperor v Yemanya Kallappa* (Appeal from acquittal—High Court setting aside order of acquittal on ground of trial having been illegal but not ordering re trial—Fresh trial not barred.)
 (72) 18 Suth W R Cr 10 (10), *Ramjoy Surma v Mirza Ali* (Order for the release of the accused, as being not guilty amounts to an acquittal.)
 (24) 11 AIR 1924 All 778 (779) 26 Cri L Jour 98, *Harbans v Emperor*. (Acquittal of accused brought about by fraud established against third person in proceedings to which the accused were not parties is valid unless set aside by independent proceedings.)
 (13) 14 Cri L Jour 404 (404) 9 Low Bur Bul 35 20 Ind Cas 228, *Krishna Perdan v Pasand* (Dismissal for default of application under S 1 of Workman's Breach of Contract Act—No acquittal.)
 (21) 8 A 1 R 1921 Cal 1 (15) 48 Cal 388 22 Cri L Jour 31 (S B), *Satish Chandra v Ram Dayal De* (Dismissal of application for sanction to prosecute does not attract the operation of S 403.)
 (30) 17 A 1 R 1930 Sind 315 (315) 24 Sind L R 416 32 Cri L Jour 521 *Rajabali Hassanali v Emperor* (Doctrine of *autrefois acquit* does not apply to a refusal by a Magistrate under S. 476 to file complaint against the accused.)

Note 9

- 1 (28) 15 AIR 1928 Bom 240 (240) 52 Bom 456 29 Cri L Jour 901, *Emperor v Narayan Dhalu Bhal*
 2. (14) 1 AIR 1914 Mad 149 (149) 38 Mad 552 15 Cri L Jour 188 *In re Kora Sellandi*
 Also see S 347, Note 3
 3. (87) 1887 Rat 318 (319), *Queen Empress v Ramnash*
 (18) 2 A 1 R 1915 Lah 350 (351) 1915 Pun Re No 26 Cr 16 Cri L Jour 788 *Emperor v Gul Muhammad*
 (94) 17 Mad 278 (279, 280) 1 Weir 839, *Queen Empress v Fakruddeen*
 (10) 12 Cri L Jour 143 (144) 9 Ind Cas 831 (Lah), *Sohan Singh v Emperor*
 Also see S 190, Note 17
 4 (42) 29 AIR 1912 Lah 84 (84) 1 L R (1943) Lah 363 43 Cri L Jour 564 199 Ind Cas 532 (D B) *Subeg Singh v Emperor* (Section does not apply to proceedings for taking security either under S 107 or S 110 as there is no conviction of any offence.)
 (70) 7 Bom 11 C R Cr 55 (56), *Reg v Durgaram* (Fine levied by pound keeper is no punishment imposed on conviction for offence and is no bar to trial for offence.)
 (72) 17 Suth W R Cr 15 (18 19) 9 Beng L R 36 *Queen v Amir Khan* (Issuing a warrant of commitment and placing a person under restraint under Regulation 3 [III] of 1818 is not in the nature of a conviction.)

Note 10

- 1 (40) 1940 Mad W N 962 (963) *Abdul Hamid v Md Sali Rowther*
 (19) 6 AIR 1919 Pat 344 (385) 20 Cri L Jour 667, *Emperor v Nand Kishore* (Two accused convicted under S 420, Penal Code—On appeal conviction against one set aside—Revision petition by the other—Conviction under S 420, set aside and committal to sessions for trial under S 477A ordered—Former accused also cannot be tried again upon the same record.)
 (29) 16 AIR 1929 All 710 (719) 31 Cri L Jour 230, *Asam Ali v Emperor*
 (17) 4 AIR 1917 All 410 (412) 39 All 293 18 Cri L Jour 546, *Hussain Khan v Emperor* (Previous conviction when set aside for want of jurisdiction does not bar second trial on same facts.)
 (75) 7 N W P H C R 371 (373), *Queen v Panna*
 (84) 1 Weir 759 (759, 760), *In re Kunniya Gounden* (Person improperly convicted under Forest Act—Conviction has no legal effect—Prosecution under Penal Code not barred.)

Where an appellate Court sets aside a conviction without doing anything further, the order amounts to an acquittal⁸. But where the appellate Court sets aside a conviction and orders a re trial, its order does not amount to an acquittal⁹. In some decisions¹⁰ it has

[But see (03) 7 Cal W N 711 (713) *Kedar Nath Biswas v Adhin Manj*: (Police sending charge to Magistrate in respect of four persons — Only some tried and acquitted — Magistrate holding case against others to be false—Until this order is set aside such other persons cannot be proceeded against)]

(03) 7 Cal W N 493 (491), *Bishun Singh Ghose v Emperor* (Do)

(1900) 4 Cal W N 346 (347), *Panchsinging v Umor Mohamad Sheikh* (Case against two accused — Attendance of one not procurable—Complainant absent—Present accused acquitted under S 247 and case dismissed — Unless order of dismissal is set aside, case could not be proceeded with as regards absent accused)]

As regards revival of proceedings see the following cases

(07) 6 Cr L Jour 34 (36) 11 Cal W N 832, *Mokamsi, Das v Emperor* (Information of cognizable and non cognizable offence—Police reporting cognizable case to be false and charge only of non-cognizable case — Magistrate accepting report — Magistrate's subsequent order calling for charge-sheet of cognizable offence held not legal)

(61) 5 Bom 405 (407), *Gout of Bombay v Shidapa* (Information as to cognizable and non-cognizable offence—Police enquiring only into latter and reporting that no prima facie case made out—Magistrate directing that offence to be expunged from charge sheet — Held that revival of complaint as regards former offence not barred)

(26) 13 A I R 1926 Sind 198 (199) 22 Sind L R 427 27 Cr L Jour 302, *Morrison v Crowder* (One Magistrate refusing to issue process — Another Magistrate may issue process without necessity of upsetting order of first Magistrate — Such refusal does not give criminal immunity from all processes for ever)

(14) 1 AIR 1914 Oudh 406 (406) 17 Oudh Cas 273 15 Cr L Jour 636 *Allaudin Khan v Emperor* (Refusal of Magistrate to take cognizance on complaint does not bar subsequent revival of the proceedings)

Also see S 190, Note 17

[But see (89) 1669 All W N 8 (9), *Empress v Raghunandan Lal* (Magistrate expressly refusing from dealing with and disposing of the charge under S 204 Penal Code and not acquitting in terms the accused upon such charge — Held the action of the Magistrate might be taken as a stay of the trial of such charge under S 240 of the Code and the subsequent trial was not barred)]

8 (33) 1933 Mad W N 224 (224) *Simulan v Simulan*

(16) 5 AIR 1916 Nag 126 (127) 19 Cr L Jour 796, *Nanakram v Emperor*

[But see (06) 3 Cr L Jour 15 (17) 3 Low Bar Rul 67 (FB) *Hla Gya v Emperor* (Accused convicted at criminal sessions in Chief Court and sentenced to death — Conviction and sentence set aside by Bench but accused not acquitted—District Magistrate's action in taking cognizance of the case with a view to re-commitment held legal in view of S 403 read with Ss 273 and 333)]

9 (35) 36 Cr L Jour 1333 (1334) 158 Ind Cas 200 (AU), *Emperor v Bakras Ch*

(32) 19 A I R 1932 All 409 (411) 54 All 756 33 Cr L Jour 669 *Baynath v Emperor* (Convict on under one section set aside and commitment for offence under another section ordered — Held that there was no acquittal)

[See (26) 13 A I R 1926 Cal 585 (586) 53 Cal 192 27 Cr L Jour 733, *Emperor v Mijyan* (Conviction set aside—Question of re-trial left to District Magistrate—Order setting aside conviction is not acquittal)

(19) 6 A I R 1919 Cal 115 (116) 20 Cr L Jour 225 46 Cal 212n (314n) *Benimadha Kundu v Emperor* (Do)]

Also see S 423, Note 21

(34) 21 AIR 1934 Mad 716 (717, 718) 58 Mad 256 36 Cr L Jour 650, *Narayanaswami Vannier v Karumbayram Pariyari*

(32) 19 AIR 1932 Cal 683 (684) 33 Cr L Jour 770, *Nagendra Nath Sirkar v Emperor* (Such order of the appellate Court amounts to discharge)

(17) 4 AIR 1917 All 410 (412) 18 Cr L Jour 546 39 All 293 (296 297), *Hussain Khan v Emperor* (Second trial held not barred)

(19) 5 A I R 1918 Nag 126 (128) 19 Cr L Jour 796 46 Ind Cas 716 (718) *Nanakram v Emperor* (Do)

(1865) 2 Suth W R Cr 0 (10) *Queen v Muthoorapershad* (Do)

been held that an order setting aside a conviction on the ground of the lower Court having had no jurisdiction, does not amount to an acquittal but only to a discharge. See also the cases cited below.¹¹ See also Note 11

9. "Conviction"—Meaning of —A finding of guilty by a Magistrate proceeding under S 349 is not a conviction¹ But it has been held that the finding of guilty by a Magistrate who commits a case under S 348 would bar the trial of the accused for the offence to which the finding relates.² Departmental punishment is not a conviction for the purposes of this section.³ See also the undermentioned cases.⁴

10 "While such conviction or acquittal remains in force" — The bar of a fresh trial under this section applies only where the previous conviction or acquittal is in force.¹

11 (40) 1940 Mad W N 962 (963) *Abdul Hameed Bowther v Mahomed Salih Bowther* (De novo trial under S 350—Charge already framed—Discharge in de novo trial amounts to acquittal — When that order is in force, accused cannot be tried again)
(27) 24 AIR 1927 B 182 (150) 22 C L J 571 *Emperor v Venu* (1) 1

valid unless set aside by independent proceedings)

(13) 14 Cri L Jour 404 (404) 9 Low Bur Rul 35 20 Ind Cas 298 *Krishna Perdan v Pasand* (Dismissal for default of application on under S 1 of Workman a Breach of Contract Act—No acquittal)
(21) 8 A I R 1921 Cal 1 (15) 48 Cal 388 22 Cri L Jour 31 (S B) *Satish Chandra v Ram Dayal De* (Dismissal of application for sanction to prosecute does not attract the operation of S 403)
(30) 17 A I R 1930 Sind 315 (315) 24 Sind L R 446 32 Cri L Jour 521 *Itayabali Hassanali v Emperor* (Doctrine of *autrefois acquit* does not apply to a refusal by a Magistrate under S 476 to file a complaint against the accused)

Note 9

1 (28) 15 AIR 1923 Bom 240 (240) 52 Bom 456 29 Cri L Jour 904 *Emperor v Narayan Dhaku Bhal*
2 (14) 1 AIR 1914 Mad 149 (149) 33 Mad 552 15 Cri L Jour 188 *In re Kora Sellandi*
Also see S 347 Note 3
3 (87) 1887 Rat 318 (319) *Queen Empress v Ramnath*
(15) 2 A I R 1915 Lah 350 (351) 1915 Pan Re No 26 Cr 16 Cri L Jour 788 *Emperor v Gul Muhammad*
(94) 17 Mad 278 (279 280) 1 Weir 839 *Queen Empress v Fakruddeen*
(10) 12 Cri L Jour 143 (144) 9 Ind Cas 831 (Lah) *Sohan Singh v Emperor*
Also see S 190 Note 17
4 (42) 29 AIR 1912 Lah 84 (84) 1 L R (1913) Lah 365 43 Cri L Jour 564 199 Ind Cas 532 (D B) *Subeg Singh v Emperor* (Section does not apply to proceedings for taking security either under S 107 or S 110 as there is no conviction of any offence)
(70) 7 Bom H C R Cr 55 (56) *Reg v Durgaram* (Fine levied by pound keeper is no punishment imposed on convict on for offence and is no bar to trial for offence.)
(72) 17 Soth W R Cr 15 (18 19) 9 Beng L R 36 *Queen v Amir Khan* (Issuing a warrant of commitment and placing a person under restraint under Regulation 3 [III] of 1818 is not in the nature of a conviction)

Note 10

1 (40) 1940 Mad W N 962 (963) *Abdul Hamid v Md Salih Bowther*
(19) 6 AIR 1919 Pat 384 (385) 20 Cri L Jour 667 *Emperor v Nand Kishore* (Two accused convicted under S 470 Penal Code — On appeal conviction against one set aside—Revision petition by the other — Conviction under S 420 set aside and committal to sessions for trial under S 477A ordered — Former accused also cannot be tried again upon the same record.)
(29) 16 AIR 1929 All 710 (719) 31 Cri L Jour 230 *Arum Ali v Emperor*
(17) 4 AIR 1917 All 410 (412) 39 All 293 16 Cri L Jour 546 *Husain Khan v Emperor* (Previous conviction when set aside for want of jurisdiction does not bar second trial on same facts.)
(75) 7 N W P H C R 371 (373) *Queen v Panna*
(84) 1 Weir 759 (759 760) *In re Kunnya Gounden* (Person improperly convicted under Forest Act — Conviction has no legal effect — Prosecution under Penal Code not barred)

11 Court of competent jurisdiction — The bar of a fresh trial under this section will apply only where the previous conviction or acquittal has been by a Court of competent jurisdiction¹ It is also necessary for the application of this section that the Court by which the accused was first tried should have been competent to try the offence subsequently charged² See sub section (4)

(29) 16 AIR 1929 Nag 161 (162) 30 Cr L Jour 763 *Manjy Jairam v Kalekhan* (Conviction of some accused and acquittal of others — Appeal by former — Appellate Court holding whole trial void as without jurisdiction — Acquittal also void and does not operate as a bar to fresh trial of persons acquitted)

[See (67) 7 Suth W R Cr 2 (2) *Queen v Kali Charan* (Verdict of jury reversed proceedings of first trial annulled and fresh trial ordered to take place immediately)]

(68) 9 Suth W R Cr 15 (16) *Goonath Mundle v Troylocka Chuckerbutty* (Magistrate in warrant-case acquitting accused without framing charge or putting him upon trial — Acquittal set aside — Fresh trial ordered to be proceeded with)

(70) 13 Suth W R Cr 42 (42) *Queen v Wahed Ali* (Prisoner released by Court of Session on the ground of the proceedings being illegal and irregular — Subsequent trial and conviction for same offence not barred)

Note 11

1 (17) 4 AIR 1917 All 410 (412) 39 All 293 18 Cr L Jour 546 *Hussain Khan v Emperor*

(84) 8 Bom 307 (308) *Queen Empress v Hussein Garibu*

(81) 3 Mad 48 (51) 2 Weir 756 *In re Ram Reddi*

(84) 1884 Pan Ho do 38 Cr p 73 (75) *Gulzar v Empress* (Accused convicted by gurga in foreign territory under Frontier Regulation — Deputy Commissioner having no authority under the Regulation to convene gurga — Conviction cannot be pleaded in bar of jurisdiction of criminal Courts over same offence in British territory)

(1865) 2 Suth W R Cr 9 (10) *Queen v Muthoorapershad Pandey*

(1865) 4 Suth W R Cr L 2 (9) (Dismissal of charge by Magistrate in respect of offence over which he has no jurisdiction does not bar further proceedings.)

2 (43) 30 AIR 1943 Pesh 89 (90) 45 Cr L Jour 167 210 Ind Cas 10 *Khurshid v Emperor* (Conviction under S 823 Penal Code does not bar trial for offence under S 309 Penal Code an offence which is exclusively triable by a Court of Session)

(39) 26 AIR 1939 Cal 85 (70) ILR (1939) 1 Cal 1 40 Cr L Jour 199 (FB) *Purnananda Das Gupta v Emperor*

(38) 25 AIR 1938 Lah 614 (615) 39 Cr L Jour 870 1 L R (1938) Lah 127, *Bhag Singh v Emperor* (Accused tried by second class Magistrate under S 323 Penal Code and acquitted by him — Trial for offence under S 324 Penal Code is barred as the second class Magistrate was competent to try such offence)

(37) 24 AIR 1937 All 117 (118 119) 38 Cr L Jour 368 *Mahadeo Prasad v Emperor* (Where the Court could have tried the offence subsequently charged fresh trial is barred)

(37) 24 AIR 1937 Cal 99 (113) 38 Cr L Jour 818 (SB) *Jitendra Nath v Emperor* (Court not competent to try subsequent offence — Section 493 held no bar)

(84) 7 Mad 557 (560) 2 Weir 456 *Viran Kutli v Chigamu*

(19) 6 AIR 1919 Cal 464 (464 465) 19 Cr L Jour 388 *Abdul Hakim v Emperor* (Acquittal by Magistrate on charge under S 465 Penal Code — Subsequent commitment to and trial by Court of Session for offence under S 467 on same facts not barred)

v Tulshiram

(28) 15 AIR 1928 Pat 577 (579) 29 Cr L Jour 760 *Chhanu Prasad Singh v Emperor*

(25) 12 AIR 1925 Mad 711 (711) 26 Cr L Jour 1087 *Palani Goundan v Emperor*

v Nyun

h v Emperor

(18) 5 AIR 1918 Mad 461 (462) 18 Cr L Jour 643 *In re Venkataranga Josier*

(29) 16 AIR 1929 Nag 161 (162) 30 Cr L Jour 763 *Manjy Jairam v Kalekhan*

(19) 6 AIR 1919 Cal 511 (511) 20 Cr L Jour 112 *Krishnadhan Giose v Mahendra Nath Dutt*

(28) 15 AIR 1928 Lah 844 (844) 29 Cr L Jour 701 *Mt Allah Di v Emperor*

(34) 21 AIR 1934 All 141 (142) 56 All 529 35 Cr L Jour 885 *Sukhala v Emperor*

Where the sanction or complaint of a particular person or authority is necessary under the law for the trial of a person, the question arises whether in the absence of such sanction or complaint a Court which tries him is a Court of competent jurisdiction. On this question there is a conflict of decisions. The majority of the High Courts have held that the Court cannot be deemed to be a Court of competent jurisdiction in such cases.³ The Madras High Court in *Ganapathy Bhatta v. Emperor*⁴ had taken a contrary view, holding that the words 'competent jurisdiction' refer only to the character and status of a Court and not to conditions precedent for the prosecution or trial of a person. The question again arose for consideration before a Full Bench of the same High Court. After referring to the conflict of decisions on the point King J., with whom the other Judges agreed thought it unnecessary to come to any final conclusion on the meaning of the word 'competent' and held that the trial without a proper complaint was void under S 50 and therefore the judgment of acquittal was also void and so there was nothing which the accused could compel the Court to recognize in support of a plea of *autrefois acquit*.⁵ The Calcutta

- (23) 10 AIR 1923 Pat 228 (229). 2 Pat 333. 25 Cr L Jour 1385 *Gobind Swain v. Emperor*
 (21) 8 AIR 1921 All 205 (205). 22 Cr L Jour 750 *Mohan Lal v. Emperor*
 (15) 2 AIR 1915 Bom 203 (204). 40 Bom 97. 16 Cr L Jour 761 *Jitram Dankarji v. Emperor*
 3 (44) 31 AIR 1944 Pat 328 (330) *Satrughana Behera v. Emperor* (Consent of Municipal Commissioner to prosecute not obtained under S 875, Bihar and Orissa Municipal Act — Criminal Court cannot be said to have been competent to try offence under S 403 (4))
 (38) 25 AIR 1938 Lah 625 (626). 39 Cr L Jour 960. 1 L R (1939) Lah 373 *Emperor v. Ram Rakhia*
 (29) 16 AIR 1922 All 940 (940). 30 Cr L Jour 1153, *Abdul Rashid v. Harish Chandra*
 (26) 13 AIR 1926 All 231 (232). 27 Cr L Jour 703 *Ram Nath v. Emperor*
 (21) 8 AIR 1921 All 205 (205). 22 Cr L Jour 750 *Mohan Lal v. Emperor*
 (17) 4 AIR 1917 All 410 (412). 33 All 293. 18 Cr L Jour 546 *Musain Khan v. Emperor*
 (15) 2 AIR 1915 All 114 (116). 37 All 107. 16 Cr L Jour 144 *Emperor v. Jivan*
 (15) 2 AIR 1915 Bom 203 (204). 40 Bom 97. 16 Cr L Jour 761 *Jitram Dankarji v. Emperor*
 (15) 2 AIR 1915 Bom 194 (195). 16 Cr L Jour 662 *Tikaram v. Emperor*
 (28) 15 AIR 1928 Bom 143 (144). 57 Bom 257. 29 Cr L Jour 545 *Emperor v. Ambaji*
 (98) 22 Bom 711 (713). *In re Samsudin*
 (28) 15 AIR 1928 Bom 530 (531, 532). 30 Cr L Jour 54. 53 Bom 69 *In re Shanker Tulshiram*
 (18) 5 AIR 1918 Nag 126 (127, 128). 19 Cr L Jour 796 *Nanakram v. Emperor*
 (34) 21 AIR 1931 Pat 411 (411). 35 Cr L Jour 636 *Mohendra Nath v. Emperor*
 (26) 13 AIR 1926 Pat 302 (304). 5 Pat 452. 27 Cr L Jour 649 *Mohammad Yasin v. Emperor*
 (1900 92) 1 Low Bur Rul 340 (343) (FB) *San Baso v. Croix* (Want of sanction in cases where it is requisite goes to the root of the jurisdiction of the Court and affects its competency)
 (27) 14 AIR 1927 Sind 10 (12, 16). 21 Sind L R 1. 27 Cr L Jour 110; *Fakir Mohammad v. Emperor*
 (30) 17 AIR 1930 Pat 26 (29). 9 Pat 585. 30 Cr L Jour 806 *Babul Mohit v. Ram Saran Singh* (Want of complaint or other material on which to take cognizance—No jurisdiction to try)
 (05) 4 Cr L Jour 422 (423). 2 Nag L R 149 *Emperor v. Mahabirpuri* (Do)
 [See (09) 9 Cr L Jour 526 (596). 31 All 317. 2 Ind Cas 219 *Umer-ud-din v. Emperor* (Complaint for enticement away brother's wife — Magistrate finding that complainant had no authority from his brother to file complaint — Accused acquitted — Second complaint by husband himself not barred)
 (30) 17 AIR 1930 Lah 1055 (1055). 32 Cr L Jour 253 *Chukar v. Emperor* (First trial under S 291 Penal Code — Subsequent proceedings under S 188 Penal Code not barred as they cannot be taken without a complaint under S 195 Cr I C)]

Also see S 195 Note 29

- [But see (22) 9 AIR 1922 All 502 (509). 45 All 11. 23 Cr L Jour 495 *Kolna Ram v. Emperor* (Offence committed under two sections — Sanction to prosecute under one refused — Prosecution under the other barred)
 (21) 8 AIR 1921 Sind 137 (139, 140, 149). 16 Sind L R 1. 23 Cr L Jour 305 *Emperor v. Mergharaj Decidas*]
 4 (13) 14 Cr L Jour 214 (217, 218). 36 Mad 309. 19 Ind Cas 310
 [See also (30) 17 AIR 1930 Mad 783 (785). 32 Cr L Jour 27, *Kolanda Ram Prasad v. Jayaram Mudaliar* (Though there was no question of sanction in this case 36 Mad 309 was approved in obiter remark)]
 [But see (02) 27 Mad 61 (62). 2 Weir 236 *Rangaraj Isari v. Emperor* (Where a conviction was set aside on the ground that there being no complaint by the husband of an offence under S 493 Penal Code the Court had no jurisdiction to convict)]
 5 (37) 24 AIR 1937 Mad 301 (302, 293) - 38 Cr L Jour 457. 1 L R (1937) Mad 664 (FB) v. *Muthu Moogan*

High Court has held that a trial held in the absence of the necessary sanction or complaint is not a *trial* at all within the meaning of this section.⁶

It has been held by the High Court of Bombay that a Court having no local jurisdiction to try a case is not a Court of competent jurisdiction and a conviction or acquittal by such Court will be no bar to a fresh trial of the accused on the same facts.⁷ But a Full Bench of the Madras High Court has dissented from the Bombay High Court and held that an accused person can plead *autrefois acquit* if the only defect in the jurisdiction of the Court which passed the order is want of territorial jurisdiction and that s. 531 applies to such cases.⁸ The Judicial Commissioner's Court of Sind⁹ has followed the Madras view in preference to that of the Bombay High Court. It is submitted that the Madras view is correct. See s. 531, Note 4.

Where the previous trial was by a Court of Session with the aid of assessors and the offence subsequently charged was triable by jury, it was held that it could not be said that the Court by which the accused was first tried was not competent to try the offence subsequently charged.¹⁰

The High Court of Bombay has held that the word "Court" in this section does not include the jury and that, therefore, where a trial takes place before a jury in excess of the legal number, the Court does not cease to be a Court of competent jurisdiction¹¹

A conviction or acquittal by a Court established under a local or special law is a conviction or acquittal by a Court of competent jurisdiction within the meaning of this section.¹²

It has been held that a conviction by a Court in a Native State can be pleaded as a bar under this section ¹⁵

An illegal conviction is not the same thing as a conviction by a Court having no jurisdiction¹⁴ Similarly, an order of acquittal does not cease to be one by a Court of competent jurisdiction merely because it was passed after an irregular procedure¹⁵

It was held by the Chief Court of Sind that a judgment of acquittal passed by a Special Court constituted under Ordinance 2 [II] of 1942, which was held to be *ultra vires* by the Federal Court¹⁶ so far as the constitution of the Special Courts was concerned must be deemed a judgment passed by a Court of competent jurisdiction in view of s 3 of Ordinance 19 [XIX] of 1943 and the persons so acquitted are entitled to plead s 403 as a bar to their fresh trial¹⁷ In the undermentioned case¹⁸ the accused who were acquitted by the

6 (26) 13 AIR 1926 Cal 691 (692) 27 Cr L Jour 751, P Banerjee v Bepin Behary

7 (28) 15 AIR 1928 Bom 530 (531, 532) 53 Bom 69 30 Cri L Jour 54 *In re Shanker Tulshiram.*

8 (33) 20 AIR 1933 Mad 765 (766) 54 Cr L Jour 1080, 56 Mad 996 (FB) *Nathnavelu v K S Iyer*

9 (37) 24 AIR 1937 Sind 179 (180, 181) 36 Cri L Jour 959, *Dhingano Khoso v Gulsher Kambir*

Khan (AIR 1933 Mad 765 (FB) followed, AIR 1928 Bom 530, dissented from)

10 (01) 24 Mad 641 (644) 2 Weir 458, *King Emperor v Krishna Ayyar*

[illegible]

12 . . . (Conviction

by _____ under S. 234,

Penal Code, and other offences)

(84) 1884 Pun Re No 30 Cr, p 52 (53, 54) *Sarwar v Empress* (Conviction by Council of Elders convened under Frontier Regulation No 4 [IV] of 1873)

13. (24) 11 AIR 1924 Lah 238 (239); 24 Cn L Jour 716, *Teja Singh v Emperor*

Also see S 188, Note 2

14 (31) 18 AIR 1931 Lah 199 (199, 200) 32 Cr L Jour 731, *Mt Ram Piyari v Emperor*

15 (42) 46 Cal W N 1027, *Nauabali Anzi v Khatun Bibi* (Cross-cases — Order of acquittal in one

Special Court were sought to be retried in accordance with the provisions of S 4 of Ordinance 19 (XIX) of 1943. Since their committal the Privy Council reversed the decision of the Federal Court mentioned above, holding that Ordinance 2 (II) of 1912 was *intra vires*¹⁹. It was held that the accused could not be called upon to stand a second trial on the same charges.

12 Identity of accused necessary for application of section — This section will preclude a fresh trial only if the accused in the second case is the same as the accused in the previous case. The conviction or acquittal of an accused person is, therefore, no bar to the trial of *another* person *implicated* in the same offence¹. But in determining the question whether there is sufficient ground for proceeding against a person the fact that another person accused of the same offence and on the same facts has been acquitted may be taken into consideration².

13 Dismissal of complaint or discharge of accused — The explanation to the section expressly provides that the dismissal of a complaint or the discharge of an accused is not an acquittal for the purposes of the section. The question has arisen whether notwithstanding this the provision of a special remedy in such cases under S 436 and S 437 impliedly bars the institution of a fresh prosecution for the same offence where the order dismissing the complaint or discharging the accused has not been set aside by a competent authority. It is well settled now that a fresh prosecution is not barred in such cases¹. The

19 (45) 32 AIR 1945 P C 48 (52) 72 Ind App 57 1 L R (1945) Kar P C 97 1915 F C R 161 46 Cri L Jour 589 219 Ind Cas 263 (PC) *Karunapejjalage Bilindi v Wellawa Attadassi Thero*

Note 12

- 1 (36) 23 AIR 1936 Pesh 152 (153) 37 Cri L Jour 689 *Awal Khan v Emperor*
 (14) 1 AIR 1914 All 85 (86) 36 All 168 15 Cri L Jour 200 *Emperor v Ghure*
 (14) 1 AIR 1914 Cal 886 (887) 41 Cal 754 15 Cri L Jour 402 *Manindra Chandra Ghose v Emperor*
 (10) 11 Cri L Jour 641 (541) 37 Cal 680 7 Ind Cas 939 *Kokas Sardar v Mehar Khan*
 (05) 4 Cri L Jour 173 (174) 10 Cal W N 1031 *Deputy Legal Remembrancer v Hatim Mollah* (Dismissal by a Court of charge of riot against a person does not extend to other persons not then before the Court which ordered dismissal)
 (66) 6 Suth W R Cr 51 (51) *Queen v Morly Sheikh*
 2 (98) 13 AIR 1926 Cal 795 (798) 53 Cal 606 27 Cri L Jour 768 *Sudal Chandra v Ahadullah Sheikh*
 (33) 1933 Mad W N 246 (247 248) *Seshachalam v Dapanayya* (Second complaint against different accused on same facts — Plea of *autrefois acquit* though not available Courts will rightly exercise discretion in not proceeding with the second case where there was complete trial in the first)
 (99) 4 Cal W N 346 (347) *Panchu Singh v Umor Mohamed Sheikh* (Order in previous trial purporting to terminate all proceedings)
 Also see S 204 Note 5

[See however (36) 23 AIR 1936 Pesh 152 (153) 37 Cri L Jour 689 *Awal Khan v Emperor* (It is the duty of a Court to decide a case on the evidence before it without being influenced by the fact that another Court has on the same evidence on a previous occasion come to a certain conclusion)]

Note 13

- 1 Dismissal of complaint — Fresh prosecution not barred
 (42) 29 AIR 1912 Pesh 24 (25) 43 Cri L Jour 611 200 Ind Cas 60 *Abdul Ghani Khan v Rakhan Shah*
 (39) 26 AIR 1939 Sind 193 (193 196) 40 Cri L Jour 745 1 L R (1940) Kar 74 (FB) *Mt Harba v Raja Premji*
 (34) 21 AIR 1934 Lah 435 (436) 36 Cri L Jour 69 *Mahomed Din v Hussain* (Complaint dismissed — Second complaint on same facts by different complainant is competent)

(1900) 28 Cal 211 (215) : 5 Cal W N 169, *Queen-Empress v Deogorind Dass*.

(06) 29 All 7 (9, 10) : 8 All L Jour 562 : 1906 All W N 215 : 4 Cri L Jour 59, *Emperor v Meharban Hussain* (Second complaint by different complainant)

(34) 21 AIR 1934 All 87 (87) : 56 All 425 : 35 Cri L Jour 1062, *Rama Nand v. Shera*.

(14) 1 AIR 1914 Sind 44 (44) : 8 Sind L R 196 : 16 Cri L Jour 174, *Bulchand v. Ghandhoomal*

(08) 8 Cri L Jour 249 (249) (Lab), *Beharilal v. Emperor*.

(04) 1 Cri L Jour 167 (173, 179) : 2 Low Bur Ral 27 : 10 Bur L R 1 (F B), *King-Emperor v Nga Pyn Di*

(34) 21 AIR 1934 All 514 (515, 516) : 35 Cri L Jour 1059, *Lallain v Emperor*.

(32) 19 AIR 1932 Mad 369 (371) : 55 Mad 622 : 33 Cri L Jour 454 (FB), *Ponnuswamy v Emperor*

(92) 16 Bom 414 (427), *Queen Empress v Vajiram* (Court which has jurisdiction to try prisoner for an offence in respect of which complaint against him has been dismissed, can take cognizance of it in a proceeding for a connected offence *non-obstante* the order of dismissal)

[See (27) 14 AIR 1927 Mad 695 (696) : 28 Cri L Jour 507, *Rama Naidu v Venkataswami Naidu*. (Dismissal of complaint by village Magistrate does not bar fresh prosecution)]

[See however (25) 12 AIR 1925 Rang 114 (114, 115) : 26 Cri L Jour 284, *U Shwe Kyaw v. Ma Sein Bwin* (On dismissal of complaint under S 203, fresh complaint cannot be entertained unless new facts not available previously are adduced or manifest error or miscarriage has occurred in the previous proceedings)]

Discharge of accused — Fresh prosecution not barred

(43) 30 AIR 1913 Mad 178 (179) : 44 Cri L Jour 331 : 205 Ind Cas 146, *In re Dala Achanna Kamthi*

(05) 9 Cri L Jour 60 (82) : 31 Mad 543, *Emperor v Maheswara Kondaya*

(14) 1 AIR 1914 Sind 44 (44) : 8 Sind L R 196 : 16 Cri L Jour 174, *Bulchand v Ghandhoomal*

(25) 12 AIR 1925 Nag 432 (432) : 26 Cri L Jour 1040, *Asgar Ali v Akbar Ali*

(34) 21 AIR 1934 Nag 215 (216) : 31 Nag L R 93 : 36 Cri L Jour 57, *Ram Prasad v Ganpatrao*

(Discharge under S 259 — Fresh complaint not barred)

(24) 11 AIR 1924 Pat 797 (798) : 26 Cri L Jour 129, *Ramanand Lall v Ali Hassan* (Discharge under S 494A—Fresh complaint not barred)

Emperor (Third Class Magistrate acting without jurisdiction in discharging accused — Sub divisional Magistrate held, could ignore the discharge order and proceed to try the accused)]

Dismissal of complaint or discharge of accused—Same proceedings can be revived

con Hoy (Magistrate after he has

tion to take up case *de novo*)

(07) 1 Cal W N 49 (51), *Apoorba Kumar Sett v. Prabod Kumari Dass*, (Presidency Magistrate can revive complaint even after discharge order)

(87) 1887 Rat 350 (352), *Queen Empress v. Bapuda*

(92) 1892 Rat 598 (590), *Queen Empress v Govind*

(75) 1 Bom 64 (66), *Reg v. Devama*

(88) 13 Bom 384 (398) : 1888 Rat 422, *Queen Empress v. Shanhar* (Sanction under S 195 given to private person — Complaint by such person dismissed — Proceedings under S 478 not barred.)

contrary view taken in some of the earlier decisions² is, it is submitted, not good law

- (07) 5 Cr L Jour 255 (256) 9 Bom L R 250, *Emperor v Nabs Palara*. (A Magistrate after he has discharged an accused is not prevented from inquiring again into the case against the accused)
- (70) 14 Suth W R Cr 65 (66) 6 Beng L R App 67 *In the matter of the petition of Ramyas Majumdar* (Magistrate of district has power, whether there be a private prosecutor or not, to order arrest of and take up the case against a person who has been tried and discharged by a subordinate Magistrate)
- (73) 20 Suth W R Cr 19 (19), *Queen v Ramsodoy Chuckerbutty* (In case triable by Court of Session, a Magistrate has power to commit the accused to sessions after he has once discharged the accused)
- (73) 20 Suth W R Cr 47 (48) *Kistoram Mohara v Anis* (Accused discharged by joint Magistrate — Magistrate of the district on petition presented to him, remanding case and directing Magistrate to proceed with the case — Order held not illegal — Held, he could have received complaint and made it over to subordinate Magistrate to be heard)
- (01) 23 Cal 211 (216, 217) 5 Cal W N 169, *Queen Empress v Dolegobind Dass* (Discharge of accused — Re arrest and commitment of accused without previous order of discharge being set aside — Commitment held good)
- (01) 28 Cal 652 (659) 5 Cal W N 457 (1E) *Duarka Nath v Beni Madhab* (Presidency Magistrate

the High Court)

- (18) 5 AIR 1918 Cal 485 (486) 18 Cr L Jour 886, *Umesh Chandra v Satish Chandra*

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- (06) 3 Cr L Jour 274 (280) 29 Mad 126 *In re Chinna Kaliappa Goundan* (Magistrate can re hear complaint previously dismissed by him under S 203)

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order of dismissal as having been passed through mistake and proceeding with the case — Held Magistrate acted without authority)

- (98) 4 Cal W N 26 (27) *Ram Kumar v Pamy* (Dismissal of complaint by Presidency Magistrate — Revival by him of the same complaint held barred)
- (99) 4 Cal W N 46 (47) *Damini Dass v Hurry Mohan* (Discharge of accused by Presidency Magistrate — Revival by him of same proceedings barred)

Fresh prosecution not barred though order dismissing complaint or discharging accused has been confirmed by superior Court

- (30) 17 AIR 1936 Lah 879 (880) 12 Lah 9 31 Cr L Jour 1180, *Allah Ditta v Karam Dakh*
- (09) 9 Cr L Jour 563 (564) 36 Cal 415 2 Ind Cas 293 *Jyotindra Nath Daw v Hem Chandra Daw* (Dismissal of complaint — Refusal by District Magistrate to order further inquiry does not prevent the revival of the original complaint by the Magistrate who dismissed it)

But a contrary view was taken in the following cases

- (28) 15 AIR 1928 Sind 49 (50) 21 Sind L R 127 23 Cr L Jour 57, *Shah Mahomed v Emperor* (Discharge or dismissal of complaint confirmed by superior Court — Fresh prosecution barred)
- (10) 11 Cr L Jour 347 (348) 6 Ind Cas 991 (Lah) *Mohammad Fakub v Emperor* (Do)
- (05) 2 Cr L Jour 752 (753) 28 Mad 255 2 Weir 247 *Mohammad Abdul Menron v Panduranga Row* (Complaint dismissed — District Magistrate refusing to interfere — Second complaint cannot be entertained)

Also see S 119, Note 3

- 2 (96) 23 Cal 943 (944, 949) 1 Cal W N 57, *Nirratin Sen v Jogesh Chandra*
- (01) 24 Cal 296 (297) 1 Cal W N 185 *Komal Chandra v Gour Chind*
- (94) 1894 Pon Re No 33 Cr, p 110 (111, 112) *Jowahir Singh v Queen Empress*
- (78) 2 Weir 247 (247) (Dismissal of complaint by one Magistrate — Another Magistrate cannot entertain the same complaint without an order under S 437)
- (82) 6 Mad 25 (26), *Queen v Vengatayangar*, (District Magistrate has no power to revive prosecution in a case in which the accused is improperly discharged by a Court competent to try it.)
- {See (05) 2 Cr L Jour 759 (759) 24 Mad 310 *Kannathar-ba Muthiah v Subapurammay* (Discharge without taking evidence — Fresh prosecution not barred — Discharge after taking — Fresh prosecution barred)}

Where a complaint is dismissed or an accused is discharged by one Magistrate, there is a conflict of decisions as to whether *another* Magistrate of co ordinate or inferior jurisdiction can start a fresh prosecution against the accused for the same offence. It has been held by the High Courts of Bombay,³ Madras⁴ Rangoon⁵ and the Chief Court of the Punjab⁶ that a fresh prosecution can be started by such Magistrate. A contrary view is held by the High Courts of Allahabad⁷ and Calcutta⁸ and by the Judicial Commissioners Court of Sind⁹ on the ground that it would be contrary to sound principle to allow one Magistrate to practically displace the orders of another Magistrate of equal rank and powers. It is submitted that there is no warrant for limiting the effect of the words of the explanation in this way. It has also been held by a Full Bench of the Sind Judicial Commissioners Court that where a complaint has been dismissed for *default* there is no bar to the entertainment of a fresh complaint by the same Magistrate or by his successor in office or by some other Magistrate of co ordinate jurisdiction.¹⁰

It is settled that the *successor* of the Magistrate by whom a complaint was dismissed

3 (25) 12 AIR 1925 Bom 258 (209) 25 Cri L Jour 991 *In re Mahadev Lazman*

(92) 16 Bom 414 (427) *Queen Empress v Vajiram* (Pec Telang J)

(84) 1884 Rat 209 (209) *Queen Empress v Krishna*. (One Magistrate in warrant-case discharging accused — High Court suggesting complainant to file his complaint before another Magistrate)

4 (32) 19 AIR 1932 Mad 369 (371) 55 Mad 622 33 Cri L Jour 454 (FB) *Ponnuswami Goundan v Emperor*

[See (16) 3 AIR 1916 Mad 887 (887) 16 Cri L Jour 814 *Pampalli Subbareddi v Clauduberger Kamal* (Dismissal of complaint by one Magistrate does not bar presenting a second complaint on same facts before different Magistrate.)]

5 See (84) 21 AIR 1934 Rang 40 (41) 35 Cri L Jour 802 *U Stein Ywet v U Maung Gyi* (Dismissal of complaint by one Magistrate does not bar prosecuting a second complaint on same facts before different Magistrate)

6 (11) 12 C 11 22 22

was discharged.]

7 (1900) 22 All 106 (108) 1899 All WN 211 *Queen Empress v Adam Khan*

(81) 21 AIR 1934 All 87 (87 88) 56 All 405 35 Cri L Jour 1062 *Rama Nand v Siers*

(27) 14 AIR 1927 All 815 (816) 28 Cri L Jour 538 *Nanda v Emperor*

[See (15) 2 AIR 1915 All 50 (50) 16 Cri L Jour 73 *Mohammed v Ali Baza* (Magistrate who dismissed complaint had jurisdiction in case merely by reason of transfer of the case to him — Subsequent complaint instituted in the Court which alone could take cognizance of the complaint

(prosecution for the same offence but it can only be revived in the Court in which it could legally be instituted)]

[See however (35) 22 AIR 1935 All 60 (63) 56 All 990 35 Cri L Jour 1485 *Kunj Lal v Emperor* (Same Magistrate entertaining second complaint can transfer it to another Magistrate for disposal)]

[But see (26) 13 AIR 1926 All 298 (298) 27 Cri L Jour 383 *Puran v Emperor* (Complaint dismissed — Order of dismissal not set aside — Second complaint on same facts can be entertained by

Das Agarwallah

Isomai v Kewalmal

Jeramdas

(22) 0 AIR 1922 Sind 23 (24) 15 Sind L R 131 23 Cri L Jour 737 *Ohanda Rani v Emperor*

(29) 16 AIR 1929 Sind 61 (61) 23 Sind L R 43 29 Cri L Jour 1097, *Mt Tirathdas v Mt Sugunda*

) Kar 74 (FB) *Mt Harbat*
overruled so far as cases

or an accused was discharged can start proceedings against the accused afresh¹¹ See also Section 559

Whether it is the same Magistrate or a different Magistrate before whom proceedings against an accused are sought to be re commenced, the Magistrate has a discretion in the matter,¹² he ought not to start a fresh prosecution in the absence of exceptional circumstances¹³

As to whether the same case can be re opened see Notes on S 369

- 11 (25) 12 AIR 1925 Nag 432 (433) 26 Cri L Jour 1040, *Ashgar Ali v Akbar Ali* (First complaint before Magistrate A only because Magistrate D who had jurisdiction was on leave — Complaint dismissed — Second complaint before Magistrate D held maintainable)
- (14) 1 AIR 1914 All 79 (50) 36 All 129 15 Cri L Jour 158 *Rambharos v Baban* (Complaint forwarded to Magistrate dismissed — Another complaint on same facts to same Magistrate — Magistrate succeeded by another — Successor held, not precluded from issuing process and entertaining complaint)
- (20) 7 AIR 1920 Pat 523 (524) 21 Cri L Jour 660 *Sheo Gobind Singh v Emperor*
- (34) 21 AIR 1934 All 514 (515) 35 Cri L Jour 1059 *Lallan v Emperor*
- (34) 21 AIR 1934 All 67 (88) 56 All 425 35 Cri L Jour 1062 *Rama Nand v Shri* (Obiter)
- (20) 7 AIR 1920 All 267 (267, 268) 21 Cri L Jour 815 *Mohan Singh v Emperor*
- 12 See S 190 Note 17
- 13 (36) 23 AIR 1936 Lah 47 (49) 37 Cri L Jour 427 *Chaman Lal v Emperor*
- (30) 17 AIR 1930 Lah 879 (880) 12 Lah 9 31 Cri L Jour 1180, *Alla Ditta v Karam Baksh*
- (18) 3 AIR 1918 Mad 494 (495) 18 Cri L Jour 329 *In re Koyassan Kutty* (Unless strong grounds are made out, person once discharged should not be harrassed again for the same charge)
- (29) 9 AIR 1920 Pat 372 (375) 23 Cri L Jour 238 *Bisoram v Emperor* (Fresh prosecution cannot be started unless there are new materials before the Magistrate which were not before him formerly)
- (25) 12 AIR 1925 Rang 114 (115) 26 Cri L Jour 284 *U Shree Kyaw v Mt Shin Dcin* (Fresh complaint cannot be entertained unless new facts not available previously are adduced or manifest error or miscarriage of justice has occurred in previous proceedings)
- (04) 1 Cri L Jour 867 (869) 1904 Upp Bur Rul Cr Pro Code 19 *Mr The Kyin v Nga E Tha* (Do)
- (03) 2 Cri L Jour 851 (653) 1 Nag L R 18 *Maknatamba v Hasanah* (In entertaining second complaint proper discretion should be exercised so that injustice should not be done to the parties)
- (06) 4 Cri L Jour 59 (60) 3 All L Jour 562 29 All 7 *Emperor v Mehraban Hussain* (Magistrate to whom second complaint is made may take into consideration the fact that a previous complaint was preferred and dismissed)
- (06) 8 Cri L Jour 249 (249) (Lab) *Behari Lal v Emperor* (Magistrate on receiving second complaint should form an independent opinion whether prima facie case is established for investigation by the Court)
- (11) 12 Cri L Jour 364 (369) 11 Ind Cas 132 1911 Pun Re No 10 Cr (PB) *Emperor v Kiru* (Where circumstances make the order of discharge equivalent to one of acquittal no further proceedings should be taken against accused)
- (87) 2 C P L R 82 (85 86) *Empress v Bhawanigan Mahee* (Magistrate taking up case of accused discharged by his predecessor and convicting him on evidence rejected by the predecessor would be acting wrongly)
- (87) 1887 Rat 350 (352) *Queen Empress v Papuda* (Magistrate is bound to exercise due discretion and take the previous discharge into consideration and avoid oppressive proceeding)
- (32) 33 Cri L Jour 493 (495) 137 Ind Cas 590 (Lab) *Mohammad Din v Mehtab Din* (Second complaint can be entertained only where previous order was passed on incomplete record or it was manifestly perverse or foolish)
- (29) 30 Cri L Jour 444 (444) 115 Ind Cas 309 (Snd) *Pararam Bhagwan Das v Emperor* (Fresh complaint based on same facts and involving same evidence available at the previous trial should not be entertained)
- (29) 16 AIR 1929 Snd 242 (243) 31 Cri L Jour 687 *Emperor v Alias* (Do)
- (10) 11 Cri L Jour 522 (529) 4 Sind L R 52 8 Ind Cas 209 *Mohammad Hassan v Emperor* (Sound judicial discretion should be exercised in proceeding with the second complaint)
- (25) 12 AIR 1925 Bom 259 (259) 26 Cri L Jour 991 *In re Mahadev Laxman* (There is a compelling duty on the complainant while making his second complaint to inform the Magistrate that a previous similar complaint was dismissed so that Magistrate may exercise greater care in dealing with the case)
- (14) 1 AIR 1914 Snd 41 (44) 8 Sind L R 196 16 Cri L Jour 174 *Buchand Tahirsam v Ghazn dhoomal* (That previous complaint was dismissed under S 259 is not sufficient ground for refusing to entertain second complaint though it may give an additional ground for refusing to proceed upon the complaint)

14. "Discharge" — Meaning of — It has been seen in Note 13 that a discharge of an accused is not an acquittal for the purposes of this section.

Where on a complaint of a major offence the Magistrate frames a charge only for a minor offence, his action has been held to amount to a discharge of the accused in regard to the major offence¹ Where an offence triable as a warrant case is tried as a summons-case and the accused has been acquitted, it has been held that the order only amounts to a discharge² See also the undermentioned cases³

(25) 12 AIR 1925 Cal 104 (104) 25 Cr L Jour 311, *In re Eastulla* (Person discharged and examined as witness in case against accomplice—Trial again is unfair)

[See (29) 16 AIR 1929 Bom 131 (134) : 30 Cr L Jour 594, *Emperor v Amanat Kader* (Magistrate exercising due discretion in proceeding to inquire into merits of the second complaint)]

(29) 16 AIR 1929 Lah 544 (544), *Budh Singh v Mt Soman* (Complainant failing to prove his alleged marriage with accused—Complaint dismissed—Another complaint cannot be entertained)]

Note 14

1 (43) 30 AIR 1943 Pesh 89 (90) • 45 Cr L Jour 167 210 Ind Cas 10 (DB), *Khurshid v Emperor* (An order of the Magistrate to whom the accused are sent under S 302/34, convicting the accused under S 323 amounts to an order of discharge under S 302/34, Penal Code, and the Sessions Judge can in revision pass an order for committing the accused to the Sessions Court)

(01) 24 Mad 136 (139, 140, 146) • 2 Weir 544, *Krishna Peddy v Subbamma*

(.) *Madra* (Not framing charge under S 355, Penal

(.) *arasa* (Police charge under S 304—under S 304 Penal Code—discharged for

offence under S 304)

(32) 19 AIR 1932 Nag 85 (85) • 33 Cr L Jour 558, *Pamrao v. Emperor* (Charge under S 388 Penal Code—Evidence disclosing offence under S 378 — Application to amend charge rejected—Order amounts to discharge of offence under S 376)

(.) 1938, *Khanu v Emperor* (Prosecution by complainant to frame charge applications—Implied discharge

of offence under S 304)

[See (26) 27 Cr L Jour 615 (615, 616) 94 Ind Cas 359 (All), *Nad Ram v Emperor* (Magistrate refraining from framing charge for offence under a particular section—Subsequent trial for same offence not barred.)]

Also see S 209, Note 6, S 253, Note 4 and S 437, Note 8

[But see (03) 5 Bom L R 125 (126), *Emperor v Zugs Marudibrit* (Where a contrary view was assumed.)]

2. ('88) 1888 All W N 96 (97), *Empress v Lajja Ram*

('86) 1886 All W N 260 ('60) *Empress v Jindu*

Also see S 245, Note 5 and S 251, Note 3

[But see (80) 3 All 129 (131), *Empress of India v Gurdur* (Mere failure to frame charge does not invalidate acquittal and convert it into discharge)]

3 (42) 46 Cal W N 1077, *Nawabali Hasi v Khatun Dibi* (Cross cases — Order of acquittal in one on conviction in the other—Conviction set aside on appeal—Further trial of accused in former case treating the order of acquittal as one of discharge—Held, this was not allowable and that the second trial was barred)

(40) 27 AIR 1940 Bom 413 (413) 42 Cr L Jour 153. 191 Ind Cas 397 (DB), *Kanji Vittal v Pandurang Keskar* (Case under S 102, Presidency towns Insolvency Act (summons-case) and S 420

(.) purposes of discharge before)

(67) 8 Suth W R Cr 41 (41), *Queen v Needie* (Magistrate used the words acquittal and release when he intended only to discharge a person accused of an offence not triable by him—Held, Sessions Court could order commitment of such person)

(75) 1 Bom 64 (65, 66), *Peg v Detama* (Non-compoundable case dismissed on parties coming to amicable settlement—Order of dismissal amounts to discharge)

15. General Clauses Act, section 26.—Sub section (5) of this section provides *inter alia* that nothing in this section shall affect the provisions of S 26 of the General Clauses Act. That section runs as follows

“Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence”

Thus, the section clearly provides that if the same act constitutes an offence under two enactments the accused cannot be awarded two separate punishments for such act¹ But the section only applies where the offences under the two enactments are constituted by the same act or omission² and not where the offences are distinct³

What is the effect of sub s (5)? Suppose, the previous trial has only ended in an acquittal. Can the accused be prosecuted again for the same act under a different enactment? On this question there is a conflict of opinion. The Madras High Court has held that in such a case the second prosecution is clearly authorised by s 26, General Clauses Act—as there is no question of punishing the accused twice for the same offence—and that this provision is expressly saved by sub section (5)⁴ But the Oudh Judicial Commissioner's Court has expressed a contrary view⁵ The Oudh view proceeds on the ground that s 26, General Clauses Act, only concerns the question of trying an accused at the same trial for offences under different enactments but not the question of the competence of a subsequent trial and that such a subsequent trial will be clearly barred under this section whether the previous trial has ended in a conviction or acquittal. It is submitted that the Oudh view unduly restricts the words of s 26 General Clauses Act, and is not correct⁶

According to the Peshawar Judicial Commissioner's Court, even where the previous trial has ended in a conviction and sentence a subsequent conviction and sentence under a different enactment must be deemed as permitted under s 26, General Clauses Act read with sub s (5) and that s 26, General Clauses Act, will only preclude the enforcement of the subsequent sentence after the prior sentence has been carried out⁷

15a. Section 188 of the Code—Sub section (5) of this section provides *inter alia* that nothing in this section shall affect the provisions of S 183 of the Code. The second

(33) 20 AIR 1933 Mad 98 (99) 34 Cri L Jour 12, *Musalayya v Janga Rao* (Accused tried for offence triable as warrant-case on complaint by police—Before charge framed case withdrawn but order of acquittal passed—Order of acquittal was virtually one of discharge and did not bar subsequent trial for same offence)

(18) 5 AIR 1918 Mad 371 (373) 41 Mad 727 19 Cri L Jour 613 *Baghutsain Nasier v Singaram* (Case under S 352 (summons-case) and S 504 (warrant-case)—Complainant absent—Accused discharged—Discharge does not operate as acquittal with reference to offences under S 501)

Note 15

1 (16) 3 AIR 1916 Pat 86 (86) 1 Pat L Jour 373 18 Cri L Jour 321 38 Ind Cas 433 *Pabnatulur v Emperor* (Same act constituting offence both under Penal Code and Railways Act)

2 (33) 20 AIR 1933 All 461 (462) 34 Cri L Jour 1018 145 Ind Cas 609, *Peoli v Emperor* (Possession of stolen revolver without license—Offence under Arms Act and S 411 of Penal Code not constituted by same act.)

3 (32) 19 AIR 1932 Mad 537 (537) 144 Ind Cas 115, *Duraisami Therasan v Lakshmaran Chettiar*

4 (44) 31 AIR 1914 Mad 369 (370) 46 Cri L Jour 194 217 Ind Cas 138, *F B Prabhu v Emperor* (Managing director of company—Prosecution for criminal breach of trust and under Companies Act—Trial on former charge alone—Latter charge reserved for separate trial—Acquittal—Subsequent trial on charge under Companies Act is not barred)

5 (03) 6 Oudh Cas 153 (157) (DB) *Fayhubar v King Emperor*

6 NOTE.—The view expressed in the previous editions of this book has been reconsidered and altered in the light of the Madras decision

7 (35) 22 AIR 1935 Fich 18 (19) 36 Cri L Jour 813 155 Ind Cas 257 (DB) *Araslic Khan v Emperor* (Sentence for attempt to murder—Victim dying subsequently—Trial again of accused and conviction and sentence of death for murder—S. 26 General Clauses Act, is no bar to such sentence being passed)

NOTE.—It may be questioned whether this is a case of offences under “two or more enactments” or as to make S 26, General Clauses Act, applicable at all.)

proviso to that section provides that the trial of a person under the section in British India for an offence committed out of British India will preclude *extradition proceedings* being taken against him for the same offence. This section precludes only a *fresh trial* of a person on the same facts in the circumstances stated in the section. The object of this sub section is to provide that the fact that only a *fresh trial* is barred under this section does not affect the bar of *extradition of proceedings* created by Section 188.

16. Practice.—A plea of bar under this section can be raised at any stage of the case¹ The plea can be raised even in revision,² though the proper time to take it is when the accused is called upon to plead.³ The burden of proving the facts necessary to establish the plea is on the accused.⁴ When a plea of bar is raised under this section, it must be determined after hearing the evidence and ascertaining what the facts are in the two cases.⁵ It cannot be constructively decided.⁶

PART VII.

OF APPEAL, REFERENCE AND REVISION

CHAPTER XXXI.

OF APPEALS.

404.* No appeal shall lie from any judgment or order of a Criminal

Unless otherwise pro- Court except as provided for by this Code or by any
vided, no appeal to lie other law for the time being in force

Synopsis

- 1 Right of appeal
- 1a Forum of appeal.
- 2 Appeal to Privy Council.
- 2a Appeal to Federal Court
3. Limitation. See Note 9 on Section 419
- 4 "By any other law."

- 5 Appeal and revision. See Section 439
- 6 Withdrawal of appeals See Section 423
- 7 Death of appellant—Abatement of appeal See Section 431
- 8 Transfer of territory and appeal, forum See Section 1

NOTE to the Synopsis See the Notes indicated for the following topics.

Appeal—Continuation of trial See Note 1
Appellate Court's powers same as original See Note 1
Interlocutory order non-appealable See Note 1
Judgment, order, conviction and sentence — Meaning See Note 1

Letters Patent—Leave to appeal See Note 2
Power of superior Court to cancel or vary — do right of appeal See Note 1
Procedure for appeals under special or local law See Note 4
Procedure in appeals See Note 1

* 1882 S 404, 1872 S 282, para. 2 and S 286, Illustrations, 1861 S 414

Note 16

- 1 (36) 23 AIR 1936 Mad 353 (357, 363) • 37 Cri L Jour 637 (FB), *Emperor v John McIver*.
(14) 1 AIR 1914 Cal 901 (904) 41 Cal 1072 15 Cri L Jour 460, *Emperor v Nirmal Kanta Roy*
(Before verdict in any form is given)
- (28) 15 AIR 1928 Pat 577 (579) 29 Cri L Jour 760, *Chhanu Prasad Singh v Emperor*
- 2 (34) 21 AIR 1934 All 877 (878) 85 Cri L Jour 1177, *Ali Bux v Emperor*.
- (21) 8 AIR 1921 Sind 137 (138) 16 Sind L R 1, 23 Cri L Jour 305, *Emperor v Menghray Desidas*
(Objection to trial can be taken notice of by High Court in revision of its own motion)
- (35) 22 AIR 1935 Nag 23 (25), *Jagannatha Rao v Emperor* (Do)
3. (36) 23 AIR 1936 Mad 353 (357, 363) 37 Cri L Jour 637 (1B) *Emperor v John McIver*
d Cas 266 (DB), *Emperor v*
the time raising plea of autre-
d v. Emperor.
Emperor
v Matangji Charan
Jeh Chand
John McIver (Per Mocketti, J.)

Right of appeal—Expressly to be given by statute and not by implication See Notes 1 and 4

Right of appeal subject to conditions See Note 1

Right of appeal under rule making power See Note 4

Section 428 not applicable to S 250 See Note 1

Sections 250 486 515 524 and 562 See Note 1

Sections 476 486 195 and procedure See Note 1

Sentences final—No appeal See Note 4

Transfer—Appeal not lost See Note 1

1 Right of appeal — A right of appeal is not a natural or inherent right. It must be expressly given by statute¹. It cannot arise by implication². Thus, the existence of a power in a superior Court to cancel or vary an order of a subordinate Court, as for instance, under S 195,³ or under S 195, sub-section (6), as it stood before

Section 404 — Note 1

- 1 (43) 30 AIR 1943 All 26 (36) ILR (1943) All 238 44 Cr L Jour 216 205 Ind Cas 113 (FB), *Salig Ram v Emperor* (The commission of an offence does not give a right of appeal to the offender. The date of the commission of the offence is therefore, wholly irrelevant to the determination of the question whether an offender has or has not a right of appeal. The right of appeal is the creation of statute and it must therefore be governed by the statute in conformity with which a particular offender is tried.)
- (41) 28 AIR 1941 Lah 414 (115) 43 Cr L Jour 170 197 Ind Cas 446 *Karamdad v Emperor* (Therefore it is inaccurate to say that an accused has been deprived of his right of appeal by a Magistrate by the imposition of a fine below Rs 50)
- (39) 26 AIR 1939 F C 43 (15) 40 Cr L Jour 468 1 LR (1939) Kar (FC) 132 1939 F C R 159 ILR (1910) Lah 400 (FC) *Hori Ram Singh v Emperor*
- (37) 24 AIR 1937 Cal 413 (413) ILR (1937) 1 Cal 123 38 Cr L J 878 *Kali Kumar Miller v Emperor*
- (18) 40 Cal 21 (27) 6 Low Bar Rnl 150 18 Ind Cas 188 39 Ind App 197 (P C) *Rangoon Dotatoung Co, Ltd v Collector of Rangoon*
- (87) 11 Mad 26 (34) 14 Ind App 160 5 Sar 54 (P C), *Manabhai Nasidu v Subramanya Sastri*
- (15) 2 AIR 1915 Mad 831 (932) 39 Mad 539 18 Cr L Jour 303 *Adur v Emperor*
- (25) 12 AIR 1925 All 380 (389) 47 All 513 (FB) *Abdul Rahman v Abdul Rahman*
- (00) 2 Cr L Jour 329 (330 331) 1905 All W N 135 2 All L Jour 716 *In the matter of the petition of Chet Ram* (Before S 406 was amended in 1923 there was no right of appeal from an order under S 118 requiring security to keep the peace)
- (92) 15 All 81 (89) 1892 All W N 242 *Mehdi Hasan v Tola Ram* (The word appeal in Ss 195 and 439, Cr P C, does not grant an appeal — It is only intended to designate the Court in question)
- (73) 19 Suth W R Cr 53 (54) *Delicious v Queen*
- (95) 25 Cal 630 (636) 2 Cal W N 225 *Ram Chandra Mistry v Nobin Mirdha* (No appeal from an order under S 522 Cr P C)
- (91) 1891 All W N 48 (51) 13 All 171 (FB) *Queen Empress v Pohpa*
- (99) 21 All 181 (182) 1899 All W N 15, *In the matter of the petition of Madho Ram* (No appeal from order under S 36 Legal Practitioners Act)
- (86) 10 Bom 258 (263 264) *Queen Empress v Mangal Tekchand* (By the Aden Act 2 II) of 1861

of complaint)

- (00) 2 Cr L Jour 24 (76) 1905 All W N 19 2 All L Jour 64 27 All 415 *Manhi v Bhagwanis* (No appeal from an order under S 522 Cr P C)
- (12) 13 Cr L Jour 782 (782) 17 Ind Cas 414 (All) *Syed Iltaf Husain v Emperor* (Order of transfer

2 A C 211 followed)

Emperor
1st 195 (FB) *Mare Gould v.*

rats' Singh
Emperor

1923,⁴ or under S 123, sub s (2),⁵ cannot be construed as giving a right of appeal in such cases

Where a right of appeal is given by statute subject to certain conditions and limitations, the right cannot be enlarged so as to nullify such conditions or limitations⁶ A right of appeal duly conferred on a person cannot be taken away by transfer⁷

A right of appeal has been given not only by Ss. 405 to 418 of this chapter but also by other sections of the Code See Ss 250, 486, 515 and 524. The procedure to be adopted in all such appeals under the Code is that prescribed by this chapter (Ss 419 to 431)⁸ unless any of the provisions thereof specifically restrict the application of such provisions to appeals under this chapter Thus, S 423 applies only to appeals under this chapter, it consequently does not apply to appeals under Section 476B⁹

The section refers to *criminal Courts* It does not, however, follow from this that the Code deals only with the appeals from criminal Courts Sections 476B and 486 deal with orders passed by any civil or revenue Courts Appeals in respect of orders from such Courts are specially provided for in those sections As to the procedure applicable to such appeals, see Ss 195 and 476 and the undermentioned cases¹⁰

[But see ('76) 3 Cal 379 (381) 1 Cal L Rep 339, *In re Captain Mitchell* (Power to alter or annul under S 520 held to imply right of appeal)]

4 ('12) 13 Cri L Jour 296 (296) 14 Ind Cas 760 40 Cal 37, *Hari Mandal v Keshai Chandra* (Not being an appeal District Judge cannot transfer the proceeding to a Subordinate Judge under the Civil Courts Act)

(12) 13 Cri L Jour 599 (601) 40 Cal 239 16 Ind Cas 167, *Pochay Misay v Emperor*
[But see (04) 1 Cri L Jour 7 (9) 1904 All W N 10 26 All 244, *Hardeo Singh v Hanuman Dasi* 476B

5 being an appeal no re trial can be ordered as if on appeal)

6. ('37) 24 AIR 1937 Bom 336 (336) 38 Cri L Jour 985, *Mota Ram v Emperor* (Sentence of whipping passed by Presidency Magistrate — No appeal lies to High Court)

(37) 24 AIR 1937 Cal 413 (414) 1 L R (1937) 1 Cal 123 . 38 Cri L Jour 676, *Kalkumar Miller v Emperor* (Sentence of six months rigorous imprisonment passed by Presidency Magistrate—Co-accused bound over under S 562 — Appeal does not lie.)

(81) 7 Cal 447 (531) *In re Poona Churn Pal* (Right of appeal under S 417 is not available to a private complainant)

(84) 7 Mad 213 (214) 2 Weir 477, *Rangaswami v Narasimhulu* (No appeal to a District Magistrate from an acquittal by a second class Magistrate — See S 417)

(96) 20 Bom 145 (145), *Queen-Empress v Hari Savba* (Appeal under S 411 lies only in cases of

9 But Ss 407,

ami Naidu

v Emperor

v Venkata

e on appeal

si Kumar

ror (Do)

notzner J—

(When an

High Court

under S 439 but it may be revised under S 115 C P C, but if the order is made by criminal Court, S 439, Cr P C applies)

The words judgment, order, conviction and sentence are not used in a consistent sense in this chapter, with the result that a clear and consistent scheme as to appeals cannot be evolved from the chapter¹¹

The term "order" in this section means a final order. An interlocutory order is thus not open to appeal¹². See also Note 7 on Section 417.

An appeal is only a continuation of the trial¹³ and consequently the appellate Court, unless otherwise provided, has powers to do only what the lower Court could do and should have done and not to pass any order under any circumstances¹⁴.

The general tendency of the Amending Act of 1923 is to enlarge rather than curtail the right of appeal¹⁵.

1a Forum of appeal — Under ss 407, 408 410 and 411 the forum of an appeal is dependent on the status of the Judge by whom the trial is held. Suppose there is a change in the status of the Judge after the hearing of a case and before judgment is given. Is the forum of appeal to be determined by the Judge's status at the time of the hearing or at the time of the judgment? On this question there is a conflict of decisions. According to the Allahabad High Court¹ the judgment does not form part of a trial under the Code and hence the Judge's status at the time of the hearing and not at the time of the judgment determines the forum of appeal. The Calcutta High Court also holds the same view². But the Sind Judicial Commissioner's Court has held that the status of the Judge at the time of the judgment determines the forum of appeal³. The decision proceeds on the ground that as under this section an appeal lies from a judgment or order and not from a trial, it is the Judge's status at the time of the judgment that determines the forum of the appeal. But with regard to this point the Allahabad High Court thinks that this section only indicates that an appeal is to lie from a judgment or order and has nothing to do with the forum of an appeal⁴.

- (28) 15 AIR 1928 Mad 391 (392) 51 Mad 603 29 Cr L Jour 445 *Anna Nair v Parasuamy*
 11 (04) 1 Cr L Jour 513 (515) 10 Bar L R 321 1904 Upp Bar Rul Cr 1 C 7 *Ms Shue v King Emperor* (For example see the hearing of S 408 on ss 380 562 and 563)
 (25) 12 AIR 1925 Cal 329 (330) 52 Cal 463 26 Cr L Jour 455 *Dahadur Molla v Ismail*
 12 (26) 13 AIR 1928 Oudh 280 (280 281) 1 Luck 48 27 Cr L Jour 191 *Kashi Ram v P L Dikshit*
 13 (14) 1 AIR 1914 Mad 258 (259) 37 Mad 119 15 Cr L Jour 160 *Bals Pedly v Emperor*

v

Also see S 403 Note 1

- 14 (11) 12 Cr L Jour 444 (445 446) 11 Ind Cas 788 7 Nag L R 103 *Sita Ram v Emperor* (Appellate Court cannot inflict a greater punishment than the lower Court)
 (06) 29 Mad 190 (191) 3 Cr L Jour 461 *Muthia Chetty v Emperor* (Case under the Code of 1842 under which appellate Court had no power to require security but under the present Code that Court has such power)
 (08) 7 Cr L Jour 221 (226) 12 Cal W N 438 *Rama Lal v Emperor* (Section 191 applies in case of appeals also)
 (89) 12 Mad 451 (453) 1 Weir 113 *Queen Empress v Sibbappa* (Accused cannot be examined as a witness in criminal appeal)
 15 (25) 12 AIR 1925 Cal 329 (331) 52 Cal 463 26 Cr L Jour 455 *Dahadur Molla v Ismail* (For example ss 406 406A, 415A 418 (2) and 563 (4))

Note 1a

- 1 (38) 25 AIR 1938 All 102 (106) 11 LR (1938) All 157 39 Cr L Jour 345 *Eshwari Ram v Emperor* (Trial by Assistant Sessions Judge — Judge made Additional Sessions Judge before judgment — Appeal lies to Sessions Judge under S 404 and not to High Court)
 2 (34) 19 AIR 1922 C 1460 (461) 33 Cr L Jour 516 *Baramadhi v Magra* (Trial while Magistrate holding second class powers — First class powers given before judgment — Appeal lies to District Magistrate under S 407)
 3 (37) 24 AIR 1937 Sind 22 (22 23) 39 Cr L Jour 350, 30 Sind L R 45 *Jawal v Emperor* (Trial by Assistant Sessions Judge — Judgment in capacity of Additional Sessions Judge — Appeal lies to High Court)
 4 (34) 25 AIR 1938 All 102 (105 106) 11 P (1938) All 157 39 Cr L Jour 345 *Eshwari Ram v Emperor*

2. Appeal to Privy Council — Originally the Criminal Procedure Code did not provide for any appeal to the Privy Council¹ In fact the Privy Council was held not to be a Court of criminal appeal for India² But under the relevant clauses of the Letters Patent granted to the various Chartered High Courts such Courts could grant leave to appeal to the Privy Council in certain cases³ Under those clauses of the Letters Patent the High Courts had to declare that a case was a fit one for appeal to the Privy Council They had therefore to satisfy themselves whether the case fell within the limits prescribed by the

Note 2

1 See (33) 20 AIR 1933 Nag 216 (216) 29 Nag L R 349 34 Cri L Jour 934 *Zaprya Kondba v Emperor*

2 (39) 26 AIR 1939 Cal 682 (685) ILR (1939) 1 Cal 187 41 Cri L Jour 59 C B Plucknett v Emperor 65 Ind App 158 32 Sind L R 476 ILR (1932)

64 Ind App 184 ILR (1937) Lah 371 31 Sind

L R 300 (PC) *Mangal Singh v Emperor*

(36) 23 AIR 1936 P C 169 (170) 37 Cri L Jour 628 (PC) *Attigalle v The King* (Case from Ceylon)

(36) 23 AIR 1936 P C 199 (200) 37 Cri L Jour 833 17 Lah 488 (PC) *Inayat Khan v Emperor*

peror

Scott v Emperor

727 (PC) *Bhagat Singh*

v Emperor

(30) 17 AIR 1930 P C 57 (58) 11 Lah 192 31 Cri L Jour 378 57 Ind App 71 (PC) *Atta Moha mad v Emperor*

(25) 12 AIR 1925 P C 59 (60) 48 Bom 515 26 Cri L Jour 391 (PC) *Rustom v Emperor*

(25) 12 AIR 1925 P C 130 (131) 6 Lah 226 52 Ind App 191 26 Cri L Jour 1059 (PC) *Begu v Emperor*

(27) 9 AIR 1922 P

(21) 8 AIR 1921 P

v Emperor

e Esant v

(19) 8 AIR 1919 P C

Advocate-General of Madras

(19) 8 AIR 1919 P C 108 (108) 20 Cri L Jour 799 (PC) *Bugga v Emperor*

(17) 4 AIR 1917 P C 25 (26) 44 Cal 876 44 Ind App 137 13 Nag L R 100 19 Cri L Jour 471 (PC) *Dal Singh v Emperor*

(15) 2 AIR 1915 P C 29 (30) 42 Ind App 133 16 Cri L Jour 494 42 Cal 739 (PC) *Bal Mukund v Emperor*

(13) 15 Cri L Jour 144 (144) 22 Ind Cas 496 41 Cal 568 40 Ind App 241 (PC) *Clifford v Emperor*

(1864) 1 Suth W R P C 18 (13) 9 Moo Ind App 168 1 Moo P C (N S) 272 1 Sar 660 1 Suther 481 (PC)

In re Joy Kissen Mookerjee

Edujee Byramjee

v Emperor

n v Emperor (Case from

Assam Eastern Provinces))

3 See Letters Patent All Cl 32 Bom Mad and Cal Cl 41 Lah Cl 31 Nag Cl 31 Pat Cl 33 and Rang Cl 39

(30) 26 AIR 1939 Cal 682 (684) ILR (1939) 1 Cal 187 41 Cri L Jour 59 C B Plucknett v Emperor (High Court will grant application for leave in very special and exceptional circumstances — Must direct on to jury is not itself sufficient)

(30) 27 AIR 1935 Mad 793 (793) 37 Cri L Jour 61 (SB), *Ramanuja Ayyangar v Emperor* (Petition for leave to appeal to Privy Council — Important point of law reserved for decision of High Court — Let it on a competent)

(35) 22 AIR 1935 Rang 214 (214) 13 Rang 141 36 Cri L Jour 1239 *H W Scott v Emperor* (Accused convicted by High Court on unanimous verdict of jury — Application under Cl 39 Letters Patent for leave to appeal) — Tests in determining whether case falls within Cl 39 mentioned)

(33) 20 AIR 1933 Nag 216 (216) 29 Nag L R 340 34 Cri L Jour 934 *Zaprya Kondba v Emperor* (A non Chartered High Court cannot grant leave In such cases special leave of Privy Council to be applied for Note Now the Nagpur High Court has got power under its Letters Patent Cl 31 to grant leave)

that guide the Court in grant

Emperor (Limitation on fiction stated)

Nga Hoong v Queen

Privy Council for the entertainment of appeals in criminal matters⁴ An appeal to the Privy Council is now provided for by sub s (4) of S 411A introduced into the Code by Act 26 of 1943. The Privy Council may also grant special leave in special cases⁵ In any case, the Privy Council will not interfere with the course of criminal proceedings in British India unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.⁶

granted by

error.

C R 159 :

ILR (1940) Lah 400 (FC), *Hari Ram Singh v Emperor* (Privy Council may not grant special leave to appeal unless it be shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done)

(39) 26 AIR 1939 Cal 682 (695) ILR (1939) 1 Cal 187 41 Cri L Jour 59, *C B Plucknett v Emperor*. (36) 23 AIR 1936 P C 160 (165) 37 Cri L Jour 679 (PC), *D R Ranouf v, Attorney-General for Jersey*, (There is no Order in Council, Charter or other instrument of authority from which it can be inferred that the King's prerogative to allow an appeal, if so advised, has been taken away in criminal matters)

Special leave granted)

(25) 12 AIR 1925 P C 180 (180). 49 Bom 455 26 Cri L Jour 1419 (FC), *Hanmant Rao v Emperor*, (1864) 1 Suth W R P C 13 (13) 1 Moo P C (NS) 272 1 Sar 860 1 Suther 481 9 Moo Ind App 168 (PC).

In re Joy Kissen Mookerjee

(33) 20 AIR 1933 P C 124 (125). 34 Cri L Jour 322 32 Sind L R 716 (FC), *Duarhanath Varma v. Emperor* (If the High Court refuses, special leave may be obtained from Privy Council)

(Approver's evidence challenged—Other evidence sufficient to support conviction — No interference)

(36) 33 AIR 1946 P C 1 (3), 72 Ind App 270 ILR (1945) Lah 451 223 Ind Cas 189 (FC), *Chanchal Singh v Emperor* (Misreception of evidence)

(45) 32 AIR 1915 P C 140 (143), *Daniel Youth v King* (Privy Council will not interfere with Judge's discretion in holding joint trial)

(43) 30 AIR 1943 P C 211 (216). 45 Cri L Jour 241 210 Ind Cas 589 *Otto George Gfeller v The King* (The Privy Council do not sit as a Court of Criminal Appeal, for them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice)

126

evidence

The King (A mere misdirection on the part of the Court below, as for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character Nor does the Judicial Committee advise interference merely because they themselves would have taken a different view of the evidence admitted)

(43) 30 AIR 1943 P C 4 (5) : 44 Cri L Jour 1 : 203 Ind Cas 453 (FC), *Mallikaraj Dhanraj v The King* (Where in a trial with the aid of assessors the assessors are directed by law to give their opinion in open Court, the failure to do so must *prima facie* amount to such a disregard of the forms of justice as to lead to substantial and grave injustice within the rule adopted by the Board in dealing with criminal appeals)

(41) 25 AIR 1941 P C 132 (133, 134) : 62 Ind App 126 : 1 L R (1942) Lah 35 1 L R (1941) Far 172 : 43 Cri L Jour 1 : 196 Ind Cas 692 (FC) *Malomed N v Emperor*.

- (43) 30 AIR 1943 Lah 210 (210) ILR (1943) Lah 409 44 Cr L Jour 714 208 Ind Cas 27 (FB) *In the matter of L an Advocate* (It would interfere if the trial had taken place in the absence of the accused or if a Court had refused to hear his defence or had prevented him from calling relevant witnesses)
- (17) 4 AIR 1917 P C 25 (26) 39 Ind Cas 311 (316) 44 Cal 876 44 Ind App 137 13 Nag L R 100 16 Cr L Jour 471 (PC), *Dal Singh v Emperor*
- (39) 26 AIR 1939 Cal 682 (684 685) ILR (1939) 1 Cal 187 41 Cr L Jour 59 *C B Plucknett v Emperor*
- (38) 25 AIR 1936 P C 130 (130, 135) 39 Cr L Jour 452 65 Ind App 158 32 Sind L R 476 ILR (1938) 2 Cal 295 (PC) *Babulal Chowhan v Emperor* (Merely because special leave is granted it cannot be said that the ordinary rules limiting the exercise of jurisdiction by the Privy Council in criminal matters cease to apply)
- (37) 24 AIR 1937 P C 108 (113) 38 Cr L Jour 503 (PC) *Alexander Kennedy v The King* (The proposition that in every case in which there was material for a successful challenge to the empanelling of a juror and it was not made for excusable reasons an adverse verdict should be set aside is ill founded and is contrary to the well settled principles laid down by the Privy Council with regard to its intervention in criminal matters)
- (37) 24 AIR 1937 P C 119 (121) 38 Cr L Jour 498 64 Ind App 148 ILR (1937) Bom 711 (PC) *Fakira v Emperor*
- (37) 24 AIR 1937 P C 179 (180) 38 Cr L Jour 573 64 Ind App 134 ILR (1937) Lah 371 31 Sind L R 300 (PC) *Mangal Singh v Emperor*
- (36) 23 AIR 1936 P C 160 (168) 37 Cr L Jour 679 (PC) *D R Ranouf v Attorney General for Jersey* (The Board has always treated applications for leave to appeal and the hearing of criminal appeals so admitted as being on the same footing — No interference on ground of misdirection or irregularity)
- (36) 23 AIR 1936 P C 199 (200) 37 Cr L Jour 833 17 Lah 486 (PC) *Inayat Khan v Emperor*
- (36) 23 AIR 1936 P C 242 (248) 37 Cr L Jour 914 *Mahadeo v The King* (Privy Council will interfere where fundamental rules of practice necessary for safe administration of justice and protection of prisoners have been neglected)
- (68) 28 AIR 1936 P C 289 (301) 37 Cr L Jour 963 (PC) *Stephen Seneviratne v The King* (Trial by jury — Irregular procedure — Judge and jury along with accused and counsel visiting scene of occurrence — Judge alone questioning some witnesses present there — Experiments performed by doctor not called as witness and not sworn — Jury divided and not sitting together at time of experiments — Proceedings held to be irregular so as to call for interference)
- (36) 44 Mad L W 694 (695) 1936 Mad W N 1248 (PC) *Sodeman v Rex* (Whether language used in summing up case to jury was enough clearly to bring matter home to jury is not a question of legal importance and is no ground for interference)
- (83) 22 AIR 1935 Rang 214 (214 218) 13 Rang 141 36 Cr L Jour 1269 *H W Scott v Emperor*
- (27) 14 AIR 1927 P C 44 (49) 5 Rang 53 54 Ind App 96 28 Cr L Jour 259 (PC) *Abdul Rahman v Emperor*
- (32) 19 AIR 1932 P C 234 (234 235) 59 Ind App 233 13 Lah 479 34 Cr L Jour 16 (PC) *Molaidar Singh v Emperor*
- (31) 18 AIR 1931 P C 112 (114) 53 All 163 58 Ind App 152 (PC) *A Pleader v Judges of the High Court of Judicature Allahabad* (No miscarriage of justice — Leave refused)
- (31) 18 AIR 1931 P C 111 (111) 12 Lah 280 58 Ind App 169 32 Cr L Jour 727 (PC) *Bhagat Singh v Emperor* (Leave not granted when there is no case on merits)
- (21) 8 AIR 1921 P C 24 (25) 27 Cr L Jour 174 44 Mad 297 48 Ind App 35 (PC) *Chinnappa Dora v Emperor* (High Court in revison enhancing the sentence to transportation for fourteen years — Sentence unauthorized by law — Substantial injustice)
- (11) 12 Cr L Jour 100 (100) 9 Ind Cas 581 (PC) *Birch v Emperor*
- (13) 14 Cr L Jour 577 (579) 21 Ind Cas 369 36 Mad 501 40 Ind App 193 (PC) *Vasanthakumari Pillai v Emperor* (Reception of inadmissible evidence and its use causing great prejudice to accused and absence of reliable evidence — Substantial injustice done)
- (24) 11 AIR 1924 Cal 515 (519) 26 Cr L Jour 52 *Barendra Kumar v Emperor*
- (25) 12 AIR 1925 P C 305 (306) 27 Cr L Jour 228 (PC) *Shafi Ahmad v Emperor* (Privy Council will not interfere on the ground of misdirection to jury)
- (14) 1 AIR 1914 P C 116 (125 126) 1914 A C 644 41 Cal 1073 8 Low Bar Rul 16 41 Ind App 149 15 Cr L Jour 309 (PC) *Channing Arnold v Emperor* (Do)
- (13) 15 Cr L Jour 144 (144) 22 Ind Cas 496 41 Cal 568 40 Ind App 211 83 L J P C 153 (PC) *Clifford v Emperor* (Do)
- (25) 12 AIR 1925 P C 59 (53) 6 Lah 45 52 Ind App 121 26 Cr L Jour 1090 (PC) *Umra v Emperor* (Wrong interpretation of sections of Acts does not justify interference by Privy Council)
- (7) 25 Mad 61 (98) 28 Ind App 257 11 Mad L Jour 233 2 Weir 271 8 Sar 160 3 Dom L R 540 5 Cal W N 866 (PC) *Subramania Iyer v Emperor*

2a Appeal to Federal Court — The word 'judgment' in s 205 of the Government of India Act, 1935, is comprehensive enough to include a judgment in a criminal case¹ Hence, the Federal Court has jurisdiction in criminal as well as in civil cases² An appeal will, therefore, lie to the Federal Court from the decision of a High Court in a criminal case

3 Limitation — See Note 9 on Section 419

4 "By any other law." — As is seen in Note 1 above, a right of appeal must be conferred expressly by a statute If the right is created by a rule of the Government such a rule must not be *ultra vires* of the statute conferring the rule making power¹ An order may be that of a criminal Court yet there will be no appeal unless one is provided for by the statute² There is no right of appeal when a special or local Act lays down that sentences passed thereunder in criminal cases are *final*³

[See (14) 1 AIR 1914 P C 155 (16^o, 163) 15 Cri L Jour 396 (PC) *Ibrahim v Emperor* (Practice of the Privy Council stated—Case from Hong Kong)]

{(13) 15 Cri L Jour 305 (309) 1914 A C 221 23 Ind Cas 657 (PC) *Louis Eduard Lanier v The King* (Crown was directed to pay costs of successful appellant — Case from Seychelles)

(1887) 12 App Cas 459 (467) 16 Cox C C 241 56 L T 615 36 W R 81 *In re Dillet* (Case from British Honduras)

(04) 8 Cal W N 1111, *Pavinda Khan v Emperor*

(98) 22 Bom 578 (53^o) 25 Ind App 1 7 Sar 270 (PC), *Bal Gangadhar Tilak v Queen Empress*]

Also see S 297 Note 13 and Letters Patent Calcutta, Cl 41, Note 3

Note 2a

1 (39) 26 AIR 1939 FC 43 (54) 40 Cri L Jour 468 ILR (1939) Kar (FC) 13^o 1939 F C R 159 ILR (1940) Lah 400 (FC) *Hori Ram Singh v Emperor*

2 (39) 26 AIR 1939 F C 43 (44 45) 40 Cri L Jour 468 ILR (1939) Kar (FC) 132 1939 F C R 159 ILR (1940) Lah 400 (FC) *Hori Ram Singh v Emperor* (Sulaiman J dubious)

Note 4

1 (91) 15 Bom 505 (509 511) *Queen Empress v Sarya* (Bombay Government R 44 framed under

under the first part of S 2 (1) Workman a Breach of Contract Act to repay sum of money received as advance and on failure to comply with that order sentencing under the second part of S 2 (1) of the Act to a term of imprisonment—No appeal)

(72) 17 Suth W R Cr 11 (11) *Queen v Loydanath Moolerjee* (No appeal to the High Court under Act 37 [XVII] of 1855 from a conviction by the Deputy Commissioner of the Santal Parganas)

(72) 17 Suth W R Cr 11 (12) *In re Mukta Dyce* (Conviction under Contagious Diseases Act 14 [XIV] of

(A Commissioner's order refusing

order of confiscation passed under

of Act 37 [XVII] of 1855)

(70) 14 Suth W R Cr 71 (72), *Queen v Mudhoo Dutt* (Order of Magistrate making defaulter under S 25 Income Tax Act 9 [IX] of 1869—No appeal to Sessions Court)

[See (10) 11 Cri L Jour 390 (391) 6 Ind Cas 640 1910 Pun Re No 14 Cr *Dewan Das v Emperor* (Order of District Magistrate in trials by him as Superintendent of Hill States under orders of Local Government outside British India — No appeal to Chief Court.)]

[Dut see (25) 12 AIR 1925 Rang 12 (13) 2 Rang 3^o 16 Cri L Jour 289 *Mg Po Lon v Emperor*,

3

in the ordinary way The necessary meaning of the wording of S 8 of the Ordinance must be that the right of appeal is allocated and that only in certain cases can convictions be reconsidered and that too not by the High Court as such but by a *persona designata* by the Provincial Government, namely

of Act 37 [XVII] of

and Ordinance Act 3 [III] of

1850 have an appeal in any case tried under that

Where a special or local law provides a special procedure in regard to appeals, such procedure will prevail over that of the Code⁴ Otherwise the Code will be applicable⁵ See Section 5

In *Emperor v. Sibnath Banerji*⁶ their Lordships of the Privy Council have held that Section 205 of the Government of India Act, 1935, provides one of the exceptions referred to in S 404 of the Criminal Procedure Code and hence though an appeal from an order of discharge under S 491 of the Criminal Procedure Code does not lie under the Criminal Procedure Code, such appeal is competent under Section 205 of the Government of India Act, 1935

5 Appeal and revision — See Section 439.

6 Withdrawal of appeals — See Section 423

7. Death of appellant — Abatement of appeal. — See Section 431

8. Transfer of territory and appeal, forum.— See Section 1

405. Any person whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

1. "Ordinarily lie." — The Court to which appeals ordinarily lie is the Court to which appeals are normally and in the majority of cases provided for by the statute¹ A

¹ 1882 S 405, 1872 and 1861—Nil

[See ('10) 11 Cri L Jour 426 (427) 6 Ind Cas 959 1910 Pun Re No 19 Cr, *King Emperor v Mt Alam*

[See however ('93) 1893 Rat 672 (678), *Queen Empress v Louis Francis*. (Under S 85, Public Conveniences Act, no conviction under the Act shall be open to appeal — Held that if a person not

(1933) 20 AIR 1933 Bom 1 (3, 4) 57 Bom 93 34 Cri L Jour 199 (SB), *Balkrishna Hari v. Emperor*

dar v Emperor
ppeal not to High

ingh v Emperor
— Appeal lies to

(69) 6 Bom H C R Cr 45 (46) *Reg v Malhar Langi* (Appeal lies to Sessions Court from decision of Zillah Magistrate under S 16 of the Bombay Fisheries Act)

XI of 1827)
Act, 5 [V] of

ullan Singh
er S. 89 —

Government
such appeals

ordinarily lie))

subordinate Court getting only delegated jurisdiction, as for example, under S 407 sub s (2) of the Code, to hear appeals is not such a Court²

Appeal from order requiring security for keeping the peace or for good behaviour

406.* Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order —

(a) if made by a Presidency Magistrate, to the High Court,

(b) if made by any other Magistrate, to the Court of Session

Provided that the ^a[Provincial Government] may, by notification in the ^b[Official Gazette], direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session^c

Provided, further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub section (3A) of section 123.

a Substituted by A O for "Local Government"

b Substituted by A O for "Local Official Gazette"

Synopsis

- | | |
|------------------------|-------------------------------|
| 1 Legislative changes | 3 Hearing of security appeals |
| 2 Scope of the section | 4 Second proviso |

NOTE to the Synopsis See the Notes indicated for the following topics

Appeals from Additional District Magistrate. See Note 2	Order of Sessions Judge on reference under S 123 —Non-appealable See Note 4
Appeal from order of security compared with other appeals See Note 3	Orders under S 106 not appealable See Note 2
Applicability to order for security under special or local law See Note 2	Retrials in appeals under the section—S 423—Applicability of See Note 3

1. Legislative changes — The Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923, by which this section was substituted for the old S 406 has introduced the following changes in the law

- (i) Under the old section there was no right of appeal in cases of orders under S 118 read with S 107, i e., orders for security for keeping the peace¹ The present section has conferred this right

* Code of 1898, original S 406

Appeal from order requiring security for good behaviour

406 Any person ordered by a Magistrate other than the District Magistrate or a Presidency Magistrate, to give security for good behaviour under S 118 may appeal to the District Magistrate

1882 S 406, 1872 S 267, 1851 S 409

- 2 (03) 26 Mad 656 (658 659) 2 Weir 202 (F B), *Eroma Varier v Emperor* (Benson, J, dissenting)

v *Laribulla Shaukh.*

[See however (16) 3 AIR 1916 Mad 1105 (1106) 16 Cri L Jour 439, *Ramayya v Surayya* (If by Government Notification appeals are presentable to the subordinate Court directly such Court is one to which appeals ordinarily lie)]

Section 406 — Note 1

(13) 14 Cri L Jour 63 (63) - 35 All 103. 18 Ind Cas 351, *Bansari Das v Parlab Singh*.
(09) 10 Cri L Jour 375 (377, 378) . 3 Ind Cas 774 (Bom) *Suleman Adam v Emperor*

- (2) Even in respect of orders in good behaviour cases, there was no right of appeal from the orders of the District Magistrate or the Presidency Magistrate² Under the present section appeals are provided from such orders to the Court of Session and the High Court
- (3) Whereas under the old section appeals lay only to the District Magistrate the present section provides appeals to Courts of Session and the High Court except where there is a Government Notification under the first proviso to the section See Note 2 below
- (4) The law has been made clear as to appeals in cases where proceedings are laid before a Sessions Judge under S 123 of the Code See Note 4 below

2 Scope of the section — The present section, while extending the right of appeal to orders for security for keeping the peace, confines the right only to such orders as fall under S 118. In other words, an order under S 106 as it is not covered by the terms of S 118 read with S 112 still remains non appealable¹ See S 106 Note 23

The jurisdiction to hear appeals in security cases which was vested only in the District Magistrate is now vested in the Sessions Judge and the High Court ordinarily. But power has been given to the Provincial Government by the first proviso to the section to direct that in any particular district notified in the Official Gazette appeals from subordinate Magistrates shall lie to the District Magistrate². Before the amendment of the section appeals from the orders of an Additional District Magistrate also lay to the District Magistrate as the former was held not to be a District Magistrate under S 406³. The same would appear to be the law under the present section in cases covered by the first proviso thereof⁴.

When a special or local Act empowers a Magistrate to proceed under the security sections of chapter VIII of the Code in respect of persons specified in the Act an order by the Magistrate for furnishing security is one under S 118 of the Code, and S 406 applies to such an order⁵.

- (05) 2 Cr L Jour 550 (551) 32 Cal 948 9 Cal W N 860 *Bargachandra Dey v Janmejy Dutt*
 (15) 2 AIR 1915 Nag 113 (113) 11 Nag L R 98 16 Cr L Jour 505 *Emperor v Dalls* (Reason for old law stated)
 (20) 7 AIR 1920 Nag 133 (133) 21 Cr L Jour 591 *Khushal v Emperor* (In the case of an order to keep the peace the District Magistrate's powers were limited to the cancellation of the bonds under S 125)

Emperor
v Emperor

[See (83) 9 Cal 878 (879) *Chand Khan v Empress*.]

Note 2

- 1 25 22 AIR 225 (225) 25 Cal 225 (225) 25 Cal 225 (225) *Emperor v Nga Tun La*
 (Order to furnish security)
 under S 106 being no part of a sentence is not appealable)

- 2 See (32) 19 AIR 1932 Lah 463 (463) 13 Lah 254 32 Cr L Jour 849, *Emperor v Jahangir Chand*
 3 (21) 8 AIR 1921 Cal 317 (348) 48 Cal 874 23 Cr L Jour 229 *Mahendra Bhumj v Emperor*
 4 (32) 19 AIR 1932 Lah 463 (463) 13 Lah 254 32 Cr L Jour 849 *Emperor v Jahangir Chand*
 5 (05) 2 Cr L Jour 317 (319) 3 Low Bur Rul 21 11 Bur L R 120 *Nga Tet Pya v Emperor*
 (Section 17, Burmah Gambling Act empowers a competent Magistrate, who receives information that any person in his jurisdiction earns his livelihood wholly or in part by unlawful gaming to deal with a 110 and
 ere is an

Magistrate under S 3 of the Burmah Opium Law Amendment Act may proceed in accordance with the

The Code does not confer a right of appeal from an order of imprisonment in default of furnishing security passed under S 123⁶

3 Hearing of security appeals—An appeal from an order requiring a person to furnish security to be of good behaviour or to keep the peace is distinguishable from an appeal against a conviction in respect of an offence specifically charged, where the only matter for consideration may be the credibility or otherwise of certain direct and positive evidence¹ In appeals of the former class it is not unreasonable to insist that the appeal should not be disposed of in a summary manner but by a judgment showing on the face of it that the Judge has applied his mind to a consideration of the evidence on the record and of the pleas raised by the appellant²

As to whether an appellate Court hearing appeals under S 406 has the power to order re-trial, see S 423 Note 31 An appellate Court can modify or alter the bond in appeal under cl (c) to S 423³ It has however been held by the Oudh Chief Court that the appellate Court cannot enhance the amount of security demanded by the trial Court⁴ But it has been held by the Judicial Commissioners Court of Sind that an appellate Court has power to extend the period during which security is required to be furnished and thereby extend the period of imprisonment to be suffered in default although power should be exercised only in exceptional circumstances⁵

4 Second proviso—Under sub s (2) to S 193 of the Code where a person has been ordered to give security for a period exceeding one year and does not give such security, the Magistrate (other than a Presidency Magistrate) is bound to lay the proceedings before the Sessions Judge for orders Notwithstanding such reference to the Sessions Judge an appeal from the order of the Magistrate as such lay as a matter of right to the District Magistrate under the terms of S 406 as it stood before the amendment of 1923 Two different Courts were thus likely to be in *seisin* of the same matter at the same time and this state of the law gave rise to conflict of procedure Under the circumstances the High

sect 406 of the Code and demand security under S 118 Against such an order an appeal lies under S 406 of the Code)

(197-01) 1 Upp Bur Rul 907 (227) *Queen Empress v Nga Kyauk Man* (With reference to S 17, Gambling Act.)

6 (35) 2^o AIR 1930 Rang 363 (363) 13 Rang 287 26 Cri L Jour 1510 *Emperor v Nga Tun Lu*

Note 3

1 (16) 3 AIR 1916 All 197 (197) 38 All 393 17 Cri L Jour 309 *Lal Behari v Emperor*

2 (16) 3 AIR 1916 All 197 (197) 39 All 393 17 Cri L Jour 309 *Lal Behari v Emperor*

(12) 13 Cri L Jour 9 (9) 13 Ind Cas 102 (All) *Babu Prasad v Emperor*

(16) 3 AIR 1916 All 180 (181) 17 Cri L Jour 167 *Sarwan v Emperor*

(26) 13 AIR 1906 All 614 (614 615) 27 Cri L Jour 370 *Ram Charan v Emperor* (The preparedness of accused to furnish security does not relieve the Court of this duty)

(09) 9 Cri L Jour 578 (599) 9 Ind Cas 225 (All) *Shyam Lal v Emperor*

(13) 14 Cri L Jour 419 (490) 40 Cal 376 20 Ind Cas 403 *Fudon Hussein v Emperor* (Appellate Court should consider the defence evidence of the accused although the defence counsel did not make any reference to it.)

(29) 16 AIR 19 9 Nag 378 (330 331) 31 Cri L Jour 90 *Kashiram v Asaram*

[See (21) 23 Cri L Jour 378 (378) 67 Ind Cas 202 (All) *Sunehra v Emperor* (Making only some reference is perfunctory

afis Ahsanali v
112 bring matter

(20) 9 AIR 1922 Nag 180 (180) 23 Cri L Jour 394 *Davies v Emperor*

[See (20) 7 AIR 1910 Nag 67 (67) 21 Cri L Jour 350 *Azizul Jabbar Khan v Emperor*]

Also see S 125 Note 9

4 (23) 10 AIR 1923 Oudh 44 (45) 22 Cri L Jour 766 24 O C 236 *Pameshwar Balsh S k v Emperor* (Dees on proceeds on the ground that tenor of S 423 is against increasing the severe penalty imposed by the trial Court)

5 (36) 23 AIR 1936 Sind 120 (125) 37 Cri L Jour 1003 29 Sind L R 353 *Emperor*

(AIR 1914 Sind 100 17 Sind L R 100 26 Cri L Jour 179 relied on)

Courts tried to lay down complex rules of procedure to mitigate the anomalies. It was held that the Sessions Judge should proceed to decide the case under reference before him only on satisfying himself that no appeal had been preferred and in case an appeal had been filed should stay his hand till the disposal of the appeal and that the right of appeal under S 406 was lost as soon as the Sessions Judge passed orders under S 123¹. It was sometimes held that an appeal under S 406 was meant only for cases in which there was no necessity to lay the proceedings before the Sessions Judge². The present section by enacting the second proviso has removed the right of appeal in such cases and simplified the law³. The right of appeal is however revived if pending disposal of the reference security is offered and accepted inasmuch as the acceptance of the security has the effect of automatically terminating the reference⁴. But it may be noted that the said proviso affects only cases of reference by the Magistrate to the Sessions Judge and has no application to cases laid before the High Court by a Presidency Magistrate under S 193.

An order passed by a Sessions Judge on reference under S 123 is not an order of the Magistrate and therefore continues to be non appealable under S 406⁵.

See also the undermentioned case⁶.

Appeal from order refusing to accept or rejecting a surety ***406A.** Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order, —

- (a) if made by a Presidency Magistrate, to the High Court
- (b) if made by the District Magistrate, to the Court or Session or
- (c) if made by a Magistrate other than the District Magistrate to the District Magistrate

a This section was inserted by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1923

1 Scope — An appeal lies to the Sessions Judge from an order of a District Magistrate rejecting sureties¹.

Note 4

Madad v Emperor
1a

v Emperor

Emperor

v Emperor

omed Albar

Emperor v Amir Bala (Decided)

v Ida (Do)

w Au g (Do)

(75) 24 South W R Cr 12 (12) *Queen v Roglo* (Under Code of 1872)

Also see S 123 Note 20 and S 410 Note 1

6 (30) 17 AIR 1930 Pat 274 (276) 9 Pat 131 31 Cr L Jour 958 *Charan Mahto v Emperor* (Where the bond required is for one year the order requires no confirmation but is subject to appeal under S 406 final)

Section 406A — Note 1

1 (34) 21 AIR 1934 Cal 482 (487) 61 Cal 688 35 Cr L Jour 959 *Parbati Charan v Emperor*

407. (1) Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349 ^a[or in respect of whom an order has been made or a sentence has been passed under section 380] by a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals shall be heard by any Magistrate of the first class subordinate to him and empowered by the ^b[Provincial Government] to hear such appeals, and thereupon such appeal or class of appeals may be presented to such subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred

^a These words were inserted by the Code of Criminal Procedure (Amendment) Act 18 of 1903

^b Substituted by A.O. for Local Government

Synopsis

- 1 Convicted on a trial
- 2 Trial held by a second class Magistrate
- 3 Appeals from the Bench of Magistrates of the second class
- 4 Transfer of appeals by the District Magistrate — Sub-section (2)

NOTE to the Synopsis See the Notes indicated for the following topics

Absence of a sentence no bar See Note 1	Whereby ordinary Court of appeal — District Magistrate continues as such See Note 4
Appeal against sentence alone See Note 1	Trial partly as first class and partly as second class See Note 2
Appeals not transferable by District Magistrate See Note 4	What are not convictions on a trial See Note 1
Offence under Cattle-trespass Act 1871 See Note 1	Withdrawal of part heard appeals See Note 4
Transfer of appeal — First class Magistrate not	

1 "Convicted on a trial" — Section 4 of the Code of 1872 defined trial as the proceedings taken in Court after a charge has been drawn up and as including the punishment of an offence. Subsequent Codes have not defined the term trial as such but in S 4 of the present Code the term is distinguished as being different from an inquiry under the Code. A trial under the Code would imply the proceedings in which a person stands before a Court empowered to convict him of some offences alleged against him¹. The essentials of a trial are thus the charge of an offence and the power in the Court to convict the offender for the offence. The term conviction denotes the finding of guilty as distinguished from an acquittal or discharge on a finding of not guilty. On a conviction a sentence will follow in the usual course except as otherwise provided by the Code as for example in S 362. The expression convicted on a trial has thus sole reference to cases in which an accused has been held guilty of an offence². See the language of Ss 213, 258, 262 (2), 306 (2), 307 (2) and (3) and 367.

¹ 1882 S 407 1872 Ss 256, 47 1861 S 412

Section 407 — Note 1

1511 (FB) Venkatachennayya v Emperor

under S 480 a case of conviction on trial)
(The offence may be under special or general law)

law e.g. Merchant Seamen's Act 1 [1] of 1859)

(25) 12 AIR 1953 Rang 1^o (13) 2 Rang 321 26 Cri L Jour 233 Maung Po Lon v Emperor (1

e.g. Upper Burma Ruby Regulation 1897)]

It follows that a decision in which an offence is not involved is not a conviction on a trial. Before the change introduced in 1898 in S 4 (1) (o), an illegal seizure of cattle did not amount to an 'offence and an order under the Cattle trespass Act, 1871 for compensation for illegal seizure was held not to amount to a conviction on trial and not appealable.³ Such an order now amounts to a "conviction on a trial and is appealable." An order under S 488 of this Code directing payment of a monthly allowance in default of maintenance is not a conviction on a trial.⁵ So also, an order under the Workmen's Breach of Contract Act for refund of the amount of advance⁶ or an order imposing a penalty and inflicting a sentence of imprisonment⁷ or to perform a contract under the said Act⁸ or forfeiting the security furnished under chapter VIII,⁹ is not an order of 'conviction on a trial'.

A person sentenced to a fine on summary action under S 480 is not 'convicted on a trial' and an appeal against such a sentence lies only under S 486 and not under this section.¹⁰

The appeal being from a conviction, the absence of a sentence, as in cases falling under S 562, is no bar to an appeal¹¹ nor will an appeal lie against the sentence alone except in cases provided for in S 412 of the Code.¹²

- 3 (96) 23 Cal 442 (445) *Raghu Singh v Abdul Wahab*
 (98) 15 Cal 712 (712) *Dhiku v Deno*
 (86) 10 Bom 230 (231) *Queen-Empress v Raza Lakhma*
 (96) 19 Mad 238 (239) 2 Weir 481 *Queen Empress v Lakhmi Nayakan*
 (88) 11 Mad 959 (360) 1 Weir 712 *In re Khadar Khan*
 (90) 1890 Rat 520 (521) *Queen Empress v Sadashiv*
 (71) 3 N W P H C R 200 (201) *In re Gunesh Pershad*
 (86) 1888 Pun Re No 22 Cr p 54 (55) *Empress v Daksh*
 (79) 1 Weir 711 (712)
 [See (99) 29 Cal 300 (301 302) *Shama v Leckhu Sheikh*
 (1900) 27 Cal 992 (993) 5 Cal W N 32 *Bhagvaths Nask v Gangadhar Mahanty*]
 4 (22) 9 AIR 1922 Bom 191 (191 192) 48 Bom 59 92 Cri L Jour 894 *Barthol Duming Rodris v Papa Dada*
 (07) 5 Cri L Jour 89 (96, 87) 29 Mad 517 *In re Ponnusamy*
 (07) 9 Cri L Jour 121 (121, 122) 4 Low Bur Bul 10, *Emperor v M. Har Ma*
 5 (97) 7 Sath W R Cr 120 (11) *Queen v Gulam Hossein* (The person ordered against is not a person convicted of an offence — Per Peacock C J)
 (63) 5 Bom H C R Cr 91 (82) *Reg v Thaku*
 6 See (19) 6 AIR 1919 Bom 158 (159) 43 Bom 607 20 Cri L Jour 316 *Emperor v Devappa* (But an order on disobedience of the order for refund may involve an offence — *Obiter*)
 [But see (79) 1 Weir 694 (694) *In re Higgins*]
 7 (14) 1 AIR 1914 Sind 79 (80) 7 Sind L R 80 15 Cri L Jour 379 *Thairso v Emperor* (Such an order is the result of a special penal proceeding)
 8 (14) 1 AIR 1914 Cal 909 (909) 15 Cri L Jour 697 *Anulul v Kamarah*
 9 (78) 2 Mad 169 (170) *Ananthachari v Ananthachari*
 10 (42) 29 AIR 1942 Mad 181 (181) 1 L R (1942) Mad 587 43 Cri L Jour 397 198 Ind Cas 549 *In re D K Reddy*
 11 (25) 12 AIR 1925 Cal 329 (330 331) 52 Cal 463 26 Cri L Jour 455 *Bahadur Molla v Ismail*. (Marginal note to the sect on ignores distinction between order and sentence)
 (04) 1 Cri L Jour 513 (345) 10 Bur L R 321 1904 Upp Bur Bul 7, *M. Shue v Emperor*
 (04) 1 Cri L Jour 1098 (1099) 1904 Pun Re No 24 Cr *Emperor v Manohar Das*
 (10) 11 Cri L Jour 152 (153) 5 Low Bur Bul 129 4 Ind Cas 1027, *Ma Chit Su v Emperor*
 (17) 4 AIR 1917 Lah 413 (413) 1917 Pun Re No 20 Cr 18 Cri L Jour 401, *Hyata v Emperor* (Subject to limitation appeal may be filed even after expiry of the bond ordered under S 562)
 [See also (69) 1869 Rat 18 (18) (Accused previously convicted and sentenced—Convict on subsequently for another offence and sentence to run concurrently with former — Though sentence inoperative appeal lies against later conviction)]
 Also see S 562 Note 19
 12 (31) 18 AIR 1931 Pat 351 (351) 32 Cri L Jour 1017, *Sheikh Raghu v Emperor* (Appeal must be heard as a whole)
 See (22) 9 AIR 1922 Nag 71 (72) 23 Cri L Jour 73 *Dhehla Kunbi v Emperor* (Suspension of sentence under S 18 (2) Motor Vehicles Act is part of the sentence on conviction and appeal lies.)
 Also see S 412 Note 1 S 421, Note 1 and S 423, Note 7

2 Trial held by a second class Magistrate. — According to the wording of S 407 it is not the conviction by a second class Magistrate but the holding of a trial by such Magistrate that determines the forum of the appeal.¹ Where a second class Magistrate in the course of the proceedings in the same case is invested with first class powers the question arises whether the appeal lies to the District Magistrate under the section or to the Court of Session. Where the trial was completely held by the Magistrate as a second class Magistrate but the higher powers were conferred only at the time of the judgment there is no doubt that the appeal lies to the District Magistrate.² Similarly, where most part of the trial is held by the Magistrate as a first class Magistrate as for example when, after examining eight prosecution witnesses as second class Magistrate two more prosecution witnesses are examined and charge framed and the case concluded as a first class Magistrate, the appeal lies to the Court of Session.³ Also in cases where only a small part of the trial is held by the Magistrate as a first class Magistrate,⁴ the appeal has been held to lie to the Court of Session, apparently on the ground that if any part of the trial is held by the Magistrate as a Magistrate of the first class and the case has been concluded by him, it must be considered to be a trial held by a Magistrate of the first class. The Madras High Court in *Venkatareddi v Ramayya*,⁵ seems to be of the opinion that a conviction by a first class Magistrate and not the trial is the determining factor. See also the under mentioned case⁶ of the Bombay High Court to a similar effect. It is submitted this is against the current of authority in India. See also S 39, Note 2 and S 410, Note 2.

Where a second class Magistrate submits a case under S 349 to a first class Magistrate, an appeal from the sentence of the first class Magistrate falls under S 403 and not under this section, although the first class Magistrate passes his sentence without taking further evidence and so the trial should be considered to have been held by the second class Magistrate.⁷

3 Appeals from the Bench of Magistrates of the second class — Where a trial Bench is composed of Magistrates of the second class but is invested, as a Bench with first class powers, appeals from the decisions of the Bench lie to the Sessions Judge and not to the District Magistrate.¹

See also S 414, Note 3

4. Transfer of appeals by the District Magistrate — Sub-section (2) — The District Magistrate may, under the powers conferred by the sub section transfer only

Note 2

1 (20) 12 AIR 1925 Pat 472 (172) 26 Cri L Jour 914 *Sheobhajan Singh v Emperor*

(32) 19 AIR 1932 Cal 460 (461) 33 Cri L Jour 516 *Baramaddi v Vagorali*

2 (42) 29 AIR 1912 Pat 107 (108) 43 Cri L Jour 7 197 Ind Cas 87, *Demandan Mahton v Chalitor Mahton* (Judgment is no part of trial)

(32) 19 AIR 1932 Cal 460 (461) 33 Cri L Jour 516 *Baramaddi v Vagorali*

(08) 8 Cri L Jour 48 (49) 4 Low Bur Rul 239, *Emperor v Nga Pao*

3 (43) 30 AIR 1913 Bom 94 (95) 44 Cri L Jour 481 206 Ind Cas 75 (DB) *Emperor v Assan Sakharani*

(27) 14 AIR 1927 Lah 138 (139) 28 Cri L Jour 50, *Durgadas v Emperor*

(27) 14 AIR 1927 Bom 366 (366) 28 Cri L Jour 474 *Emperor v Vaganlal Jhaterchand* (Higher powers were conferred after charge and before conclusion of trial)

4 (25) 12 AIR 1925 Pat 472 (479) 26 Cri L Jour 914, *Sheobhajan Singh v Emperor* (The Magistrate was vested with first class powers sometime before the hearing of the arguments.)

(27) 14 AIR 1927 Lah 398 (399) 8 Lah 203 28 Cri L Jour 781, *Babu Pao v Emperor* (Higher powers conferred when the Magistrate concluded the trial)

5 (28) 15 AIR 1928 Mad 55 (55) 51 Mad 257 29 Cri L Jour 71, (Trial continued as first class Magistrate — Case renumbered after higher powers — Conviction as first class Magistrate)

6 (43) 30 AIR 1913 Bom 94 (95) 44 Cri L Jour 481 206 Ind Cas 75 (DB) *Emperor v Assan Sakharani*

7. (37) 24 AIR 1937 Cal 394 (396) 39 Cr L J 690 1 LR (1937) 2 Cal 469 *Kishore Singh v Emperor*

Note 3

1 (34) 21 AIR 1931 Bom 176 (177) 36 Cri L Jour 592, *Emperor v Dhimabai Silarani*

appeals¹ and, again, only such appeals as he to him "under this section," that is to say, appeals from *convictions*. He cannot transfer any other class of appeals from his Court under this sub-section². Nor will the power to hear appeals on transfer render the Court of the first class Magistrate, the Court to which appeals "ordinarily lie" within the meaning of s. 195 (3). The Court of the District Magistrate will continue to be such Court notwithstanding that appeals under s. 407 may be *presented* to a subordinate Magistrate's Court under the sub-section³.

The power of withdrawal of appeals vested in the District Magistrate can be exercised at any time even though an appeal may be *part* heard before the subordinate Magistrate⁴. Once an appeal is withdrawn the District Magistrate becomes solely responsible for the disposal of the appeal and he is not bound by any opinion formed or recorded by the subordinate Magistrate prior to the withdrawal as to the necessity of examining further evidence in the case⁵.

408.* Any person convicted on a trial held by an Assistant Sessions

Appeal from sentence of Judge, a District Magistrate or other Magistrate of the Assistant Sessions Judge or first class, or any person sentenced under section 349 Magistrate of the first class^a [or in respect of whom an order has been made or a sentence has been passed under section 380] by a Magistrate of the first class, may appeal to the Court of Session :

Provided as follows :

b * * * * *

(b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal^a [of all or any of the accused convicted at such trial] shall lie to the High Court :

(c) when any person is convicted by a Magistrate of an offence under section 124A of the Indian Penal Code, the appeal shall lie to the High Court.

a These words were inserted by the Code of Criminal Procedure (Amendment) Act, 1938 [XVIII] of 1923, Section 112.

b Clause (a) of the proviso was repealed by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), Section 23

* 1882 Ss. 408, 31 ; 1872 Ss. 79, 269, 270, 18 ; 1861 : Ss. 409, 22

Note 4

- (1900) 2 Bom L R 536 (539), *Bas Harlu v. Sitarum Khan* (But not any revisional work)
- (1943) 30 A I R 1943 Mad 50 (51) : I L R (1943) Mad 303 : 44 Cri L Jour 177 · 204 Ind Cas 239, *Rathnaswamy Pillai v. Rajaratnam Pillai* (Appeal under S. 476B)
- (1942) 29 A I R 1942 Mad 181 (182) : I L R (1942) Mad 587 : 43 Cri L Jour 397 : 193 Ind Cas 549 (But see (195) 18 Mad 487 (490) · 2 Weir 165, *Queen Empress v. Subbaraya Pillai* (This ruling was influenced by the words "shall be presented" used in the section in the Code of 1882 — Distinguished in 26 Mad 656))

(For example an appeal under Section 195 (3))

ed Hussein v. M

(193) 30 Cal 394 (396) : 7 Cal W N 114, *Sadulal v. Ramchurn* (For purposes of S. 195 (5))

(1941) 1 Cri L Jour 422 (424) · 27 Mad 124, *In re Subbamma* (Do)

(1929) 16 AIR 1929 Cal 172 (173) · 56 Cal 824 · 30 Cri L Jour 658, *Mohim Chandra v. Emperor*

[But see (195) 18 Mad 487 (490) · 2 Weir 165, *Queen Empress v. Subbaraya Pillai* (This ruling was influenced by the words "shall be presented" used in the section in the Code of 1882 — Distinguished in 26 Mad 656)]

4. (193) 7 Cri L Jour 329 (330) : 31 Mad 277 : 18 Mad L Jour 89, *In re Alagu Ambalam*.

S (193) 7 Cri L Jour 329 (330) : 31 Mad 277 : 18 Mad L Jour 89, *In re Alagu Ambalam*

Also see S. 428, Note 10

Synopsis

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|------------------------------|---------------------------------------|
| 1 Scope | 5 Order or sentence under Section 380 |
| 2 'Convicted on a trial' | 6 Court of Session |
| 3 "Trial held by" | 7 Proviso (b) |
| 4 Sentence under section 349 | 8 Concurrent sentences |
| | 9 Proviso (c) |

NOTE to the Synopsis See the Notes and cited for the following topics

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|--|--|
| Agencytracts See Note 6 | Sections 30 32 and 33 See Note 4 |
| Assistant Sessions Judge becoming Sessions Judge — Appeal See Note 7 | Sentence exceeding four years contrary to Ss 32 and 33—Appeal See Note 4 |
| British Baluchistan See Note 6 | Sentence is substantive sentence See Note 7 |
| District Magistrate as special officer in Native States See Note 7 | Trial for more than one offence See Notes 8 and 9 |
| Legislative changes See Note 5 | Trial partly as first class and partly as second class See Note 3 |
| Merchant Seamen's Act (1 [I] of 1859) See Note 6 | Two Sessions Divisions See Note 6 |
| No appeal by accused sentenced to more than four years—Effect See Note 7 | |

1 Scope — Section 408 is a general provision conferring a right of appeal in the cases mentioned therein. The section, however, must be read subject to the exceptions and modifications embodied in subsequent sections viz., sections 412 413 and 414¹. See also the undermentioned case².

2 'Convicted on a trial.' — The section confers a right of appeal on a person convicted on a trial and hence the absence of a sentence as in cases where he is dealt with under s 502 does not affect his right of appeal¹. See also s 407, Note 1.

3 "Trial held by" — As to whether trial includes judgment see s 410, Note 2 and s 404 Note 1a.

As to an appeal from a conviction where a second class Magistrate is invested with higher powers in the course of the case see Note 2 on s 407 and Notes on s 39. See also s 404 Note 1a.

The word trial in this section is not confined to a trial with the aid of assessors only. It applies to a trial either with the assessors or with the aid of a jury¹.

Section 408 — Note 1

- 1 (37) 24 AIR 1937 Cal 394 (395 396) 38 Cr L Jour 990 1 L R (1937) 2 Cal 469 *Kishori Singh v Emperor* (Sect on 408 does not limit in any way operation of S 413 — Sect on 413 applies even when sentence is passed under S 380 or S 349—First class Magistrate in case submitted to him under S 349 sentencing accused under S 323 Penal Code to fine below Rs 50 — Appeal from such conviction is barred under S 413 notwithstanding S 408)
- (11) 12 Cr L Jour 389 (389) 33 All 510 11 Ind Cas 253, *Alam v Emperor* (Sect on 413 is an exception to the general rule laid down in S 408)
- (31) 18 AIR 1931 Cal 642 (643) 59 Cal 19 33 Cr L Jour 90 *Albar Ali v Emperor* (Do)
- (19) 6 A I R 1919 Pat 556 (557, 559) 20 Cr L Jour 545 4 Pat L Jour 435 *Phakujha v Emperor* (Do)
- (13) 14 Cr L Jour 170 (171) 19 Ind Cas 170 15 Oudh Cas 386 *Sheopal v Emperor* (Do)
- (10) 11 Cr L Jour 159 (152) 4 Ind Cas 1027 5 Low Bur Ral 129 *Ma Chit Su v Emperor* (Sections 412 413 and 414 are exceptions to S 408)
- 2 (10) 11 Cr L Jour 426 (427) 6 Ind Cas 959 1910 Pun Re No 19 *Cr Emperor v Alam Khatun* (Trial of offence under Frontier Crimes Regulation — Trial by first class Magistrate — Appeal lies to Sessions Judge)

Note 2

- 1 (40) 27 AIR 1940 Rang 223 (224) 1940 Rang LR 381 41 Cr L J 877, *Shanjar Sukul v The King*
- (26) 13 AIR 1926 Bom 380 (383) 27 Cr L Jour 673 *Madhav v Emperor*
- (14) 1 AIR 1914 All 543 (544) 37 All 31 16 Cr L Jour 43 *Emperor v Ghante*
- (35) 22 AIR 1935 Mad 157 (158) 53 Mad 517 36 Cr L Jour 589 *Mayandi Nadar v Pala Kuduban*.
- (24) 11 AIR 1914 All 765 (766) 46 All 893 25 Cr L Jour 1214 *Hira Lal v Emperor*

Note 3

- 1 (43) 30 A I R 1943 Oudh 322 (324) 44 Cr L Jour 601 207 Ind Cas 427, *Dhagwantra v Sargoo* (Sessions Judge can dispose of appeal by going into fact and is not bound to order a retrial.)

4. Sentence under section 349 — In a case submitted by an inferior Magistrate under S 349 for severer punishment the District Magistrate or the Subdivisional Magistrate to whom it is submitted cannot pass a higher sentence than he is empowered to inflict under ss 32 and 33¹ See proviso to sub s (2) of S 349 Again S 30 authorizes the Provincial Government to empower the District Magistrate or any Magistrate of the first class to try, as a Magistrate all offences not punishable with death Now, suppose the Magistrate to whom proceedings are submitted under S 349 is a Magistrate empowered under S 30 can he pass a sentence more severe than he is empowered to inflict under ss 32 and 33? It has been held that he cannot do so, that in such a case the said proviso to S 349 will prevail and that even should the Magistrate sentence him to imprisonment for a term exceeding four years, the appeal will lie not to the High Court under proviso (b) to S 408 but only to the Court of Session²

5 Order or sentence under section 380 — The amendment of 1923 making an order or sentence under S 380 appealable to the Court of Session has given legislative sanction to the view expressed to that effect in the undermentioned case¹

6 Court of Session — Where, in a district there are two sessions divisions an appeal from a conviction by a Magistrate having jurisdiction over the whole district lies to the Sessions Judge of the division within which the headquarters of the Magistrate are situate, irrespective of the place of offence¹

Where a sessions division covers two districts an appeal to the Sessions Court can be heard in any one of the places It is a matter of discretion for the Sessions Judge when the matter comes before him on appeal, to decide in which district it shall be heard²

In Agency Tracts to which the Code of Criminal Procedure is extended an appeal from the Agency Magistrate of the first class lies to the Sessions Judge of the Agency Tracts and not to the non agency Sessions Judge³

The Code being extended to British Baluchistan a Court of Session in the said territory has all the powers in respect of appeals as are conferred by the Code⁴ A sentence of the Justice of the Peace under the Merchant Seamen's Act (1 [1] of 1859) is appealable to a Court of Session⁵

7 Proviso (b) — This proviso says 'all or any of the accused convicted at such trial' An appeal therefore by an accused person sentenced for a term not exceeding four years will lie to the High Court¹ even though no appeal has been preferred by another

Note 4

1 (73) 1873 Pan Re No 2 Cr p 3 (3) *Crown v Rahim*

2 (07) 6 Cri L Jour 289 (290) 4 Low Bar Rul 53 *Nga Pya v Emperor*

Also see Note 7 S 34 Note 3 and S 349 Note 19

Note 5

1 (15) 2 A I R 1915 Bom 263 (264) 16 Cri L Jour 738 *Emperor v Bhimappa* (Case submitted to first class Magistrate under S 562 — Conviction by the Magistrate under S 380 is that of a first class Magistrate—Appeal lies to Court of Session)

Note 6

1 (06) 4 Cri L Jour 413 (444) 16 Mad L J 414 1 Mad L Tim 402, *Ambu Podaval v Emperor*

2 (31) 21 AIR 1931 Pat 643 (643) 36 Cri L Jour 371 153 Ind Cas 576 *Deodhar, Bai v Emperor*

3 (19) 13 Cri L Jour 850 (852) 17 Ind Cas 786 (Mad) *Public Prosecutor v Sadananda Patnaik*
[See also (37) 24 AIR 1937 Mad 17 (19) 38 Cri L Jour 81, *Alla Satyam v Emperor* (Sub-divisional Magistrate also exercising powers as Assistant Agent in Agency Tract—District Magistrate also acting as Government Agent — District Magistrate transferring cases (offence in one of them in agency) for trial to Sub-divisional Magistrate—Both cases decided by him in capacity of Sub-divisional Magistrate — Appeal lies to Sessions Judge and not to Government Agent)]

4 (29) 16 AIR 1929 Lah 187 (189) 30 Cri L Jour 918 *Barusfield v Emperor*

5 (1865) 2 Mad H C R 473 (473) 2 Weir 461, *In re W M Fians*

Note 7

1 (15) 2 AIR 1915 All 20 (20) 16 Cri L Jour 353 *Ruchha v Emperor*

(31) 1931 Mad W N 1068 (1068) *Perumal v Emperor*

(07) 5 Cri L Jour 496 (496) 17 Mad L Jour 218, *Palani Koravan v Emperor*

accused who has been sentenced in the same case for a term exceeding four years²

The "sentence" in proviso (b) has reference only to the *substantive* sentence of imprisonment apart from any sentence of whipping or fine or imprisonment in default of fine³

When a Magistrate *empowered under S 30 of the Code* passes a sentence referred to in this proviso, the appeal lies only to the High Court⁴. Where, however, the Magistrate is not so empowered⁵ or has not acted in exercise of such powers⁶ the appeal will lie only to the Court of Session

Where an Assistant Sessions Judge convicts and sentences an accused for a term less than four years an appeal lies only to the Court of Session and the fact that at the time of the appeal the Assistant Sessions Judge himself became the Sessions Judge will not give a right of appeal to the High Court⁷

Where a District Magistrate appointed as a special officer to try a criminal case in a Native State, convicts and sentences the accused for the term mentioned in proviso (b), no appeal will lie to the High Court as he did not act as a Magistrate of the first class under the Code⁸

An order of detention in Borstal School is not a sentence of imprisonment within the meaning of this proviso⁹

For "concurrent sentences," see Note 6 below

-
- (11) 12 Cr L Jour 236 (239) 10 Ind Cas 278 (Lab) *Hardit Singh v Emperor*
 (See '93 1900) 1893 1900 Low Bur Rul 516 (516) *Nag Po Saing v Empress*
 ('97-01) 1 Upp Bur Rul 94 (95) *Queen Empress v Nga Tun Baw*
 (1900) 1900 Pan Re No 12 Cr, p 28 (19) 1900 Pan L R p 56 *Queen Empress v Jas Singh*
 (60) 1880 Pan Re No 36 Cr p 69 (90) *Jeytu Mai v Empress*. (Several charges at one trial against an accused — For the sentence of some charges appeal lying to High Court — Appeal from lesser sentences on other charges also lies to High Court)]
 2 (26) 13 AIR 1926 All 160 (160) 27 Cr L Jour 175 *Debi Din v Emperor*
 ('15) 2 AIR 1915 All 356 (357) 37 All 471 16 Cr L Jour 606, *Hardayal v Emperor*
 ('16) 3 AIR 1916 Lah 441 (441) 1916 Pan Re No 5 Cr 17 Cr L Jour 209, *Ahmad Khan v Emperor*.
 3 (34) 21 AIR 1934 Oudh 433 (433) 35 Cr L Jour 1286, *Khajjan v Emperor*
 (18) 5 AIR 1918 Lah 334 (384) 1918 Pan Re No 19 Cr 19 Cr L Jour 742 *Khuda Baksh v Emperor*
 (1900) 1900 Pan Re No 19 Cr 19 Cr L Jour 742 *Khuda Baksh v Emperor*

Emperor]

4

- (20) 7 AIR 1920 Cal 87 (88) 47 Cal 154 21 Cr L Jour 386, *Kasem Ali v Emperor*]

round (If it appears from the sentence awarded that the Magistrate has acted in the exercise of enhanced powers, appeal lies to High Court)

Lall v Emperor. (In such a case, it is open to the Officiating Sessions Judge, on receipt of the appeal, to either send the case to the High Court for disposal or to admit the appeal and postpone it till the return of the Sessions Judge)

- 8 ('10) 11 Cr L Jour 390 (391) 6 Ind Cas 640 1910 Pan Re No 14 Cr, *Bishen Das v Crown*
 9 (36) 23 AIR 1936 Rang 229 (229 230) 37 Cr L Jour 793 14 Rang 143 *Nga Tha E v Emperor*
 (The only circumstances in which the appeal against such an order will lie to the High Court is when a co-accused, who has been tried together with the juvenile affected by the order, has been sentenced to imprisonment for a term exceeding four years — In such a case the appeal will lie to the High Court under this proviso)

8 Concurrent sentences — In a trial for more offences than one the aggregate of sentences if they are *consecutive* must be deemed as one sentence for purposes of an appeal¹ See also S 35, Note 16

9 Proviso (c) — Under this proviso, when a person is convicted by a Magistrate of an offence under S 124A, Penal Code, the appeal lies to the High Court and not to the Sessions Court. The Sessions Judge entertaining such an appeal acts without jurisdiction.¹

Where in a single trial an accused person is convicted under S 124A of the Penal Code, and also under S 153A of that Code, the aggregate of sentences must be deemed as one sentence for purposes of appeal under S 35, sub s (3) of the Code the *forum* for appeal as the High Court²

409.* An appeal to the Court of Session or Sessions Judge shall
Appeals to Court of be heard by the Sessions Judge or by an Additional
Session how heard Sessions Judge

^a[Provided that an Additional Sessions Judge shall hear only such appeals as the ^b[Provincial Government] may, by general or special order, direct or as the Sessions Judge of the division may make over to him]

a The proviso to the section was inserted by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1923

b Substituted by A O for Local Government

1 Proviso — It is only the Sessions Judge or an Additional Sessions Judge that has jurisdiction to hear an appeal preferred to the Court of Session. The Sessions Judge cannot therefore, make over an appeal under the proviso to an Assistant Sessions Judge for hearing. Nor can he do so under sub s (2) of S 193 of the Code as an appeal is not a 'case' within the meaning of that section¹

The power of the Sessions Judge to make over an appeal to an Additional Sessions Judge is not confined to appeals arising within his territorial jurisdiction but extends also to appeals which might have been transferred to the Sessions Judge by the High Court.²

The Sessions Judge has power to transfer any appeal he likes to the Court of the Additional Sessions Judge including an appeal from an order under S 195³

410.† Any person convicted on a trial held by a Sessions Judge, or
Appeal from sentence an Additional Sessions Judge, may appeal to the High
of Court of Session Court

* 1882 S 409, 1872 and 1861 — Nd

† 1882 S 410, 1872 Ss 80 270, 271 1861 S 408

Note 8

1

peror
v Emperor

[See (11) 12 Cri L Jour 348 (351) 10 Ind Cas 918 38 Cal 214 *Joy Chandra Sarkar v Emperor*]

Note 9

1 (37) 24 AIR 1937 All 466 (467) 38 Cri L Jour 972 *Krishna Chandra v Emperor* (Sessions Judge allowing appeal and reducing sentence — Order is without jurisdiction)

2 (11) 12 Cri L Jour 348 (351) 38 Cal 214 10 Ind Cas 918 *Joy Chandra Sarkar v Emperor* (Obiter)

Section 409 — Note 1

v Abdul Raryah

Sahay v Emperor (Unless

Chandra Kumar Dilshid

v Pt Ramesh Chandra Pandey

1 Appeal from sentence of Court of Session — A conviction by a Sessions Judge for intentional insult to him in Court is equally a conviction on a trial held by the Sessions Judge and an appeal lies to the High Court¹ But an order of the Sessions Judge in a security case referred to him under s 123 of the Code is not a conviction on a trial held by him and no appeal lies to the High Court² Where a Sessions Judge acting under s 428 causes additional evidence to be taken in an appeal and then convicts the accused, the latter is not convicted on a trial held by a Sessions Judge and no appeal lies to the High Court³

A Judge of the Court of the Judicial Commissioner of Sind sitting in a Sessions trial is a Sessions Judge for the purposes of this section⁴ The High Court of Bombay has power to hear appeals from a conviction by the Agent of Mewar under the special jurisdiction conferred on the said High Court by Rule 44 of the Bombay Act 2 (II) of 1846⁵ The High Court of Calcutta has no jurisdiction to hear appeals from Chittagong Hill Tracts as those tracts have been removed from the operation of the existing civil and criminal jurisdiction⁶

For the meaning of 'High Court' in regard to appeals by European British subjects see s 4 (1) (j) of the Code⁷

Where a case has been submitted to the High Court under s 374 for confirmation and the High Court has pronounced a decision thereon no appeal is open to the accused subsequently from the order of the Sessions Judge⁸

As to the matters on which an appeal is admissible see s 418 and Notes thereon

2 Trial held by Assistant Sessions Judge — Judgment pronounced by Additional Sessions Judge — Forum of appeal — See Section 404 Note 1a

411. Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees

1 Appeal from Presidency Magistrate. — The imprisonment for a term exceeding six months in this section has reference only to the substantive term of

* 1882 S 411, 1872 and 1861 — Nil

Section 410 — Note 1

1 (68 69) 4 Mad H C R Cr 146 (147 148) *In re Chappu Menon*

2 (83) 9 Cal 878 (879) *Chand Khan v Empress*

Also see S 123 Note 20 and S 406 Note 4

3 (1900) 27 Cal 372 (375 376) 4 Cal W N 497 *Queen Empress v Ishak*

(71) 15 South W R Cr 33 (34) 6 Beng L R 483 *In re Dhunobur Ghose*

Also see S 428 Note 10

(But see (186) 2 South W R Cr 13 (14 19 24) *Queen v Mohesh Chunder* (Case under S 492 of 1861 Code — No longer law — See 27 Cal 372))

4 (39) 26 AIR 1939 S and 209 (211) 41 Cr L Jour 28 I L R (1940) Kar 249, *Shewaram Jethanand v Emperor* (An appeal lies to the Judicial Commissioner's Court against convictions and sentences passed by a Judge of the Judicial Commissioner's Court sitting in its Sessions Court jurisdiction with a jury only on a point of law)

(25) 12 AIR 1975 S and 249 (250 251 253) 19 Sind L R 309 26 Cr L Jour 562 (FB), *Haji Khudabuz v Emperor* (The definition in S 266 Cr P C does not apply to Chapter XXXI)

5 (17) 4 AIR 1917 Bom 224 (226) 41 Bom 657 18 Cr L Jour 617 (FB) *Nazar Mohamed v Emperor*

6 (1900) 27 Cal 654 (655) *Empress v Sonas Mugh*

7 (10) 11 Cr L Jour 723 (724) 8 Ind Cas 873 13 Oudh Cas 335 *Thomas v Emperor* (Before the amendment of S 4 (1) (j) in 1973 the Court of the Judicial Commissioner of Oudh was not a High Court for the purposes of an appeal by a European British subject from a conviction by a Sessions Judge)

8 (67) 1867 Pan Re No. 33 Cr p 53 (53) *Crown v Soojan Singh*

Also see S 375 Note 4

imprisonment, and does not include the imprisonment which may be contingent on default of payment of fine¹ A substantive sentence of imprisonment for a term of six months cannot, therefore, be combined with any term of imprisonment imposed in default of payment of fine for claiming a right of appeal² Where the sentence does not contain any one of the punishments specified in the section, no appeal lies³ Concurrent sentences against the accused in the same trial cannot be aggregated to bring the case under the section⁴

In a case where a Presidency Magistrate proceeds under S 562 and passes an order for release of the accused on furnishing security for good behaviour thereunder the question arises whether an appeal lies from such an order It has been seen in Note 1 to S 407 that the absence of a sentence is no bar to an appeal from a conviction which underlies an order under S 562 But under the strict terms of S 411 no appeal can lie from a conviction by a Presidency Magistrate unless it is accompanied by one or the other of the sentences specified in the section The answer, therefore in the case under consideration is that no appeal lies⁵

Where the sentence, one of imprisonment, is within the appealable limit an appeal lies although the offender is ordered to be confined in a juvenile jail⁶

***411A. (1)** Without prejudice to the provisions of section 449 any person convicted on a trial held by a High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, appeal to the High Court—

(a) against the conviction on any ground of appeal which involves a matter of law only,

(b) with the leave of the appellate Court, or upon the certificate of the Judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves

Section 411 — Note 1

1 (06) 33 Cal 1036 (1038 1039) 4 Cri L Jour 368 4 Cal L Jour 408 *Shankar Babu v Emperor* (Sentence of eight months in default of giving security—No appeal)

(78) 2 Mad 30 (31 32) 1 Weir 525 *In re Jotharam Dasa*

2 (96) 20 Bom 145 (145) *Empress v Hari Savba*

(78) 2 Mad 30 (31 32) 1 Weir 525 *In re Jotharam Dasa*

(89) 16 Cal 799 (801), *Schein v Empress*

3 (37) 24 AIR 1937 Bom 336 (336) 38 Cri L Jour 985 *Motiram Bhikoba v Emperor* (Sentence of whipping — No appeal — It cannot be assumed that sentence of whipping was passed in lieu of an appealable sentence)

(37) 24 AIR 1937 Cal 413 (413) 38 Cri L Jour 876 1 L R (1937) 1 Cal 123 *Kali Kumar Mitter v*

(*Ram v Emperor* (One day's simple

(15) 2 AIR 1915 Bom 61 (61) 89 Bom 558 16 Cri L Jour 585 *Emperor v Goodlew* (Simple

10 fine)

(Two concur

Also see S 35 Note 16

5 (37) 24 AIR 1937 Cal 413 (414) 38 Cri L Jour 876 1 L R (1937) 1 Cal 123 *Kali Kumar Mitter*

Also see S 562 Note 19

6 (25) 12 AIR 1925 Bom 147 (147) 26 Cri L Jour 454 *Mahomed Noshan v Emperor*

a matter of fact only, or a matter of mixed law and fact, or any other ground which appears to the appellate Court to be a sufficient ground of appeal, and

(c) with the leave of the appellate Court, against the sentence passed unless the sentence is one fixed by law.

(2) Notwithstanding anything contained in section 417, the Provincial Government may direct the Public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding anything contained in section 418, or section 423, sub-section (2), or in the Letters Patent of any High Court, but subject to the restrictions imposed by clause (b) and clause (c) of sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law

(3) Notwithstanding anything elsewhere contained in any Act or Regulation, an appeal under this section shall be heard by a Division Court of the High Court composed of not less than two Judges, being Judges other than the Judge or Judges by whom the original trial was held, and if the constitution of such a Division Court is impracticable, the High Court shall report the circumstances to the Provincial Government which shall take action with a view to the transfer of the appeal under section 527 to another High Court

(4) Subject to such rules as may from time to time be made by His Majesty in Council in this behalf, and to such conditions as the High Court may establish or require, an appeal shall lie to His Majesty in Council from any order made on appeal under sub-section (1) by a Division Court of the High Court in respect of which order the High Court declares that the matter is a fit one for such appeal.

a This section was newly inserted by the Criminal Procedure Amendment Act 1948 (20 [XXVI] of 1943) Section 2

1 Scope of the section — This section is new and was inserted into the Code by the Criminal Procedure Amendment Act, 26 [XXVI] of 1913. It gives a right of appeal against conviction or acquittal in a trial held by a High Court in the exercise of its original criminal jurisdiction. The right of appeal against conviction is absolute when the ground of appeal involves a matter of law. But the leave of the appellate Court or a certificate of the trial Judge that it is a fit case for appeal is necessary when the ground involves any other matter such as a matter of fact. But such leave or certificate is quite essential in respect of an appeal against acquittal whether the appeal involves a matter of law or of fact.

The section also provides for an appeal against sentence with the leave of the appellate Court.

The right of appeal conferred by this section is a substantive right and not a mere matter of procedure. The section has therefore no retro operative operation¹

2 Leave or certificate, when should be granted — Under this section leave or certificate should be granted only when it is thought that had the verdict been given by a judicial jury it would have been a fit case for a successful reference to the

Section 411A — Note 1

1 (44) 31 AIR 1944 Bom 252 (252-253) I L R (1945) Bom 17 46 Cr L Jour 323 215 Ind Cas 59 (DB) *Hasan Abdul Karim v Emperor* (A person convicted on a trial held by a High Court in exercise of its original jurisdiction prior to the coming into force of the Amending Act cannot take advantage of the provisions of S. 411A.)

High Court under S 307 of the Code, and not merely because on the evidence it is possible to take a view different from that taken by the jury¹

3 Powers of appellate Court — Under S 418, where the trial is by jury before a mofussil Court an appeal lies on a matter of law only and, in such a case the High Court can under S 423 (2), reverse the verdict of the jury only if there is misdirection in the charge or misunderstanding by the jury of the law laid down by the Judge. But the powers of a High Court under this section are not so restricted inasmuch as the section empowers a High Court to hear appeals on matters of fact as well as of law notwithstanding anything contained in Ss 418 and 423 (2). Thus, the High Court can in appeal under sub s (1) (b) of this section on a matter involving a question of fact, set aside the verdict of the jury if on a consideration of the facts and all the circumstances of the case it is convinced that the verdict is unreasonable¹. But, although the powers of interference under this section are very wide, it does not necessarily follow that the High Court is bound to exercise it indiscriminately in every case². The general considerations on which the appellate Court has to act under the section are practically the same as those under S 307 of the Code and since even after the introduction of this section the jury remains the sole arbiter of facts and the Judge is still bound by the unanimous verdict of the jury the appellate Court ought to give due weight to its verdict³. Thus where a verdict is based mostly on appreciation of oral evidence, the appellate Court should be slow to interfere when the jury has unanimously disbelieved the witnesses whose testimony is not beyond criticism⁴.

Where the presiding Judge gives a certificate of fitness for appeal due regard must of course be given to his implied opinion that the verdict is wrong. But even then the test for interference remains the same as in a case under S 307 where the Judge disagrees with the verdict and submits the case to the High Court for the ends of justice⁵.

412. Notwithstanding anything hereinbefore contained, where an

No appeal in certain cases when accused person has pleaded guilty and has been convicted by [a High Court], a Court of Session or any pleads guilty Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence

a. These words were inserted by the Criminal Procedure Amendment Act 1943 (26 [XXVI] of 1943) Section 3

1 Scope of bar under the section — The principle underlying the provision is that a plea of guilty by the accused person operates as a waiver of his right to question

* 1882 S 412, 1872 S 273, 1861 — Nil

Note 2

1 (45) 32 AIR 1915 Bom 277 (280) 46 Cri L Jour 635 220 Ind Cas 1 (FB) *Government of Bombay v Inchoya Fernandes*

Note 3

1 (46) 1946 1 Mad L Jour 42 (45) 59 Mad L W 22 (DB), *In re Thiagaraja Bhagavatathar* (The omission in the Code of Criminal Procedure of a provision corresponding to sub-a (1) of S 4 of the High Court when hearing

2 *Government of Bombay v Inchoya Fernandes*

3 (45) 32 AIR 1915 Bom 277 (279, 280) 46 Cri L Jour 635 220 Ind Cas 1 (FB) *Government of Bombay v Inchoya Fernandes*

(46) 33 AIR 1916 Bom 38 (41) 47 Bom L R 938 (FB) *Government of Bombay v Abdul Wahab*

4 (45) 32 AIR 1915 Bom 277 (278) 46 Cri L Jour 635 220 Ind Cas 1, *Government of Bombay v Inchoya Fernandes*

5 (45) 32 AIR 1915 Bom 277 (280, 281) 46 Cri L Jour 635 220 Ind Cas 1 (FB) *Government of Bombay v Inchoya Fernandes*

the legality of the conviction based on such a plea¹ But, before the bar of this section can be applied against a convicted person, the plea of guilty must be really such a plea For instance, a plea which only amounts to an admission of facts alleged and not of the offence,² or a plea of guilty based on a misconception of the law of criminal liability,³ or on a misconception of one's right in property,⁴ or in answer to a charge defectively framed and not properly explained to the accused,⁵ or a plea of guilty obtained by trickery,⁶ is really a plea of not guilty Again it is only in cases where the Court has accepted the plea of guilty and has convicted the accused person on such plea that the right of an appeal from the conviction is taken away⁷ But once the Court has in its discretion accepted the plea such discretion cannot afterwards be attacked as improperly exercised so as to affect the provisions of this section⁸

A plea of guilty with regard to previous convictions equally precludes the appellate Court from reopening the question of the previous convictions in appeal⁹

As a rule, an appeal cannot be admitted on the question of sentence only But this section creates an exception to the rule in cases where the conviction has taken place on an admission of guilt by the accused person¹⁰ In the latter case, the accused is entitled to question in appeal the sentence of the lower Court and the sentence only, either on the ground that the extent of the sentence is beyond what the circumstances of the case required or that the sentence is illegal as not authorized by law¹¹ Where on the plea of guilty of the accused the Court, proceeding under section 562 of the Code, releases him on recognizance and passes no sentence at all, the right of appeal is absolutely barred¹²

Section 412 — Note 1

1 (20) 7 AIR 1920 Cal 592 (522) 21 Cri L Jour 547 *Emperor v Alub Ali* (Plea of guilty must be taken in connection with written statement)

(80) 5 Bom 85 (87) *Empress v Jafar M Talab*

(28) 15 AIR 1928 Rang 49 (49) 5 Rang 710 29 Cri L Jour 115 *Emperor v Nga Lu Gale*

[See (66) 5 Suth W R Cr 52 (52) *Queen v Kurmoo Kurmee*]

2 (19) 5 AIR 1919 Bom 160 (160) 43 Bom 842 20 Cri L Jour 694 *Murari Raghunath v Emperor* (Whether on admitted facts the accused is liable is a question of law)

3 (20) 7 AIR 1920 Cal 592 (523) 21 Cri L Jour 517 *Emperor v Alub Ali*

(69) 11 Suth W R Cr 53 (53) *Queen v Mittun Choudhry* (Followed in AIR 1920 Cal 592 21 Cri L Jour 547)

4 (31) 18 AIR 1931 All 265 (266) 53 All 437 32 Cri L Jour 576 *Emperor v Sat Narain* (Case under S 380 Penal Code)

5 (93) 1900 1893 1900 Low Bur Rul 328 (328) *Nga Nge v Queen Empress*

6 (44) 31 AIR 1914 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Prafulla Kumar Ray v Emperor* (If therefore an accused person who is prosecuted under the Salt Act pleads guilty on being told by the officers of the Salt Department that he would be very leniently dealt with and the salt would be returned to him if he pleads guilty but he is convicted under the Act and the salt is ordered to be confiscated—This section does not apply)

7 (43) 30 AIR 1943 Pat 313 (314) 44 Cri L Jour 801 208 Ind Cas 639 *Krishna Chandra Sinha v Emperor*

(09) 10 Cri L Jour 325 (340) 3 Ind Cas 625 (Cal) *Khudiram v Emperor* (Evidence taken and conviction on evidence)

8 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

9 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

10 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

11 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

12 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

13 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

14 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

15 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

16 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

17 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

18 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

19 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

20 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

21 (18) 18 AIR 1918 Cal 120 (121) 1 L R (1943) 1 Cal 540 45 Cri L Jour 517 212 Ind Cas 109, *Kashinath (Do)*

include a conviction by a Magistrate of the first class)

(9-) 1893 Rat 954 (954) *Empress v Gotind Raghur* (Do)

Also see S 407 Note 1 S 421 Note 1 and S 423 Note 7

11 (80) 5 Bom 85 (87) *Empress v Jafar M Talab* (Case under Presidency Magistrates Act 4 [IV] of 1877)

(9-) 22 Bom 759 (760) *Queen Empress v Kalu*

12 (17) 4 AIR 1917 Lah 413 (413) 1917 Pun Re Sa. 20 Cr 18 Cr LJ 401 *Hayata v Emperor*.

id not

Court cannot strike out the added sentence and decline to go into the merits of the whole appeal on the ground that the original sentence was not appealable¹

Where a trial is commenced before a second class Magistrate and after the conclusion of evidence he is invested with first class powers a sentence of fine not exceeding fifty rupees passed by such Magistrate is one passed by a first class Magistrate and is not appealable under this section²

5 "Sentence of fine" — An award of compensation under S 29 of the Cattle trespass Act 1 [I] of 1871 is not a sentence of fine within the meaning of this section¹ Similarly an order under S 546 of the Code directing payment to the complainant of the court fee paid by him on his complaint was held not to be a sentence of fine² In such cases the fact that the amounts are to be collected as if they were fines is immaterial

The provisions of this section have application to an appeal against a sentence passed under S 490 in view of the provisions of S 496 (2) of the Code Hence where a sentence of fine of Rs 10 has been imposed by a first class Magistrate no appeal lies against the sentence³

6 Combination of sentences for purposes of an appeal — See Note 1 on Section 11

7 "By a convicted person" — For the law as to the right of appeal by a co accused who has been awarded only a non appealable sentence in the same trial see Notes on Section 415A

8 "Explanation" to the section — Under the Code of 1861 there was an appeal when the sentence fixed a term of imprisonment exceeding one month in default of payment of fine of less than fifty rupees¹ This is altered now

Note 4

1 (11) 12 Cr L J 431 (431) 11 Ind Cas 615 (Bom) *Emperor v Keshavlal* (Additional sentence imposed at the request of the accused)

1 (11) 12 Cr L J 431 (431) 11 Ind Cas 615 (Bom) *Emperor v Keshavlal* (Additional sentence

1 position of non appealable sentences

Also see Note 4 & Note 5

2 (43) 30 A I R 1943 Bom 94 (95) 44 Cr L Jour 481 206 Ind Cas 75 (DB) *Emperor v Kisan Sakharai Patil*

(47) 29 A I R 1947 Pat 107 (108) 43 Cr L Jour 7 197 Ind Cas 87 *Deonada Malto v Chaitor Malton*

(40) 27 AIR 1940 Cal 540 (547) 1 L R (1940) 1 Cal 519 47 Cr L Jour 87 *Bijoy Kumar Kundu v Sita Nath Kundu*

Note 5

1 *Modrak v Tapa*

2 of Rs 50 and

Court fees Act which was repealed by

Subbarayudu.

1 L Jour 17 215 Ind Cas 132 (DB)

Dhawan Malan v Emperor

Note 8

1 (72) 1872 Pun Re No 3 Cr p 3 (3) *Fatiah v Mahomed Din*

[See (66) 3 Bom H C R Cr 15 (15) *Reg v Shankar Venkaji*]

414.* Notwithstanding anything hereinbefore contained, there shall be no appeal from certain summary convictions summarily in which a Magistrate empowered to act under section 260 passes a sentence of fine not exceeding two hundred rupees only.

Synopsis

- 1 Legislative changes
- 2 European British subjects
- 3 Magistrate empowered to act under section 260
- 4 Passes a sentence of fine
- 5 Combination of sentences See S 415 Note 1

NOTE to the Synopsis See the Notes indicated for the following topics

Addition of other penalties to fine See Note 4 Illegality in trying a case as summary See
Conviction by Bench of second or third class Note 3
Magistrates—Not within the section See Note 3 Repeal of Section 416—Effect See Note 2

1 Legislative changes — The words of imprisonment not exceeding three months only or after the words passes a sentence and the words or of whipping only at the end of the section were omitted by the Criminal Law Amendment Act 12 (XII) of 1923. By these amendments cases in which a sentence of imprisonment or whipping has been passed have been made appealable.¹

2 European British subjects — Under s 416 of the Code now repealed it was laid down that the provisions of S 414 did not apply to European British subjects.¹

3 "Magistrate empowered to act under section 260" — This section embodies another exception to the right of appeal. It takes away the right of appeal in cases tried summarily under s 260 of the Code where the sentence is one of fine not exceeding Rs 200 only.¹ The restriction in this section applies only to convictions by a Magistrate or a Bench of Magistrates of the first class to whom alone s 260 has reference.² Any conviction therefore by a Bench of Magistrates of the second or third class is appealable under s 407 and is not affected by this section.³

The jurisdiction to try a case summarily must be validly exercised. A Magistrate cannot deprive an accused person of his right of appeal by trying a case summarily without having the power to do so.⁴

As to the constitution and powers of a Bench of Magistrates see S 15

4 "Passes a sentence of fine" — The bar under this section operates only when the specific non appealable sentence mentioned in the section is awarded. Where

* 1882 S 414 1872 S 274 para 1 1861 — N 1

Section 414 — Note 1

1 See (29) 16 AIR 1929 Pat 716 (716) 30 Cr L Jour 869 *Jagdish Prasad v Emperor*
Note 2

1 (06) 3 Cr L Jour 433 (437) 12 Bar L R 59 *Narayansamy v A Diakle*
Note 3

1 (40) 27 AIR 1940 All 517 (518) ILR (1940) All 643 49 Cr L Jour 443 197 Ind Cas 83 *Municipal Board Bareilly v Pam Cepal* (No appeal lies from a decision in a summary trial under S 414. Prevent on of Adult ration Act sentence on accused to pay a fine of Rs 200)

2 (86) 9 Mad 36 (37) We r 460 *Queen Empress v Narayansamy*
{See (83) 9 Cal 96 (9) 11 Cal L Rep 493 *Hawaladar Fay v Jagu Mean* (A Bench of Magistrates consisting of an Assistant Magistrate with second class powers and two or more Honorary Magistrates is a Bench with first class powers as per Government order in Calcutta)}

3 (86) 9 Mad 36 (37) 2 We r 460 *Queen Empress v Narayansamy*

4 (79) 4 Cal 18 (19) 3 Cal L Rep 44 *Empress v Colam Mahommed* (Magistrate is not entitled to split up an offence for giving him off summarily jurisdiction)

(32) 19 AIR 1937 Lab 189 (189) 33 Cr L Jour 104 *Robert Ja'n Bradley v Emperor* (Summary trial by Magistrate not empowered)

therefore, no sentence is passed at all, as for example, an order under S 562 is passed,¹ this section has no application and an appeal lies from the conviction. See also Notes on S 407. So also, when the sentence is any other than of a "fine not exceeding Rs 200 only," the right of appeal is not taken away. It has been held that a sentence of fine of Rs 50 coupled with suspension of licence under the Motor Vehicles Act is not a sentence of fine only within the meaning of this section and an appeal is not barred.² This view, however, does not seem to be correct. See S 415, Note 1. To a case where, in addition to a non appealable sentence, a further order to furnish security for good behaviour is passed, this section has no application.³ But an order of confiscation under the Excise Act in addition to a non appealable sentence has been held not to make the case appealable.⁴

5. Combination of sentences — See Section 415, Note 1

415. "An appeal may be brought against any sentence referred to

Proviso to sections 413 and 414 in section 413 or section 414^a [by which any punishment therein mentioned is combined with any other punishment] but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

Explanation — A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

^a These words were substituted for the words 'by which any two or more of the punishments therein mentioned are combined' by the Repealing and Amending Act, 1945 (6 [VI] of 1945) S 8 and Second Schedule

Synopsis

- 1 Combination of sentences.
- 2 Order for security to keep the peace

NOTE to the Synopsis See the Notes indicated for the following topics

Amendment in 1923 of Sections 413 and 414 and not of Section 415 also — Effect. See Note 1	Security for good behaviour under Section 31A of Rangoon Police Act. See Note 2
Combination of two sentences of fine. See Note 1	Sentences in same trial and not separate cases. See Note 1
Concurrent sentences—Aggregation. See Note 1	

1. Combination of sentences — Prior to the amendment of the section by Act 6 [VI] of 1945, instead of the words 'by which any punishment therein mentioned is combined with any other punishment,' which occur therein now, the words "by which any two or more of the punishments therein mentioned are combined" were used. It has

^a 1882 S 415, 1872 S 274, 1861 — Nil

Note 4

Emperor	lar Sukul
Also see S 562, Note 19	Emperor
2 (33) 20 AIR 1933 Rang 329 (330) 35 Cri L Jour 116, <i>Garanand Singh v. Emperor</i> (The order of	Nyun v
	d behaviour
	nder in this
	f sentence)
	nder S 49,
	otton under

already been seen in Note 2 on S 413 that S 415 is intended by the Legislature as a proviso or an explanation to Ss 413 and 414. Section 415 was not altered by the Amending Act of 1923 and remained as it stood before. Sections 413 and 414 were amended in 1923. In understanding the meaning of S 415 as it stood prior to the amendment of 1945 above referred to, it will be necessary to notice how the law stood under Ss 413 and 414 before their amendment in 1923. The old S 413 laid down that no appeal lay in cases in which a sentence of imprisonment not exceeding one month only or of fine not exceeding Rs 50 only or of whipping only was passed. The old S 414 also contained the same three kinds of alternative punishments. It followed that if each of the two sections barred an appeal only in case there was a sentence, either of a petty imprisonment only or of a petty fine only or of whipping only, the right of appeal was not taken away when any two or more of the alternative punishments were jointly awarded, though each of the said punishments, taken by itself, was of the extent not appealable under the said sections.¹ This position was only made clear in S 415. The words "any two or more of the punishments therein mentioned" in that section as it stood prior to the amendment of 1945, were clearly referable to any two or more of the punishments of imprisonment, fine and whipping mentioned in Ss 413 and 414 as they stood before the amendment in 1923.

Now, by virtue of the amendment in 1923, the punishment of whipping is taken out of S 413 and whipping as well as imprisonment are taken out of S 414. But the words "any two or more of the punishments therein mentioned" were retained in S 415. In view of the fact that now S 414 mentions only one punishment, what is the meaning of the words "any two or more of the punishments therein mentioned" in S 415 as it stood prior to the amendment of 1945? It could very well be urged that those words, while meaning punishments of the two kinds mentioned in S 413, also included several punishments of the same kind mentioned in Ss 413 and 414. This view derived support from the fact that Ss 413 and 414 say that no appeal lies from a sentence of fine, etc. thus implying that if there are two or more sentences of fine, etc. the bar will not apply. When there were two or more such sentences, it did not matter if the aggregate of these sentences did not exceed the limits of duration or amount fixed by Ss 413 and 414. It was thus held by the Chief Court of Oudh² that a person convicted under S 417 of the Penal Code and S 24 of the Cattle trespass Act, and fined Rs 50 and Rs 20 respectively by a Magistrate in the exercise of summary powers was not deprived of the right of appeal by the terms of S 414 on the ground that two punishments of the nature mentioned in S 414 have been combined. In a Calcutta case,³ the High Court accepted the contention that S 413 mentions only a sentence of fine, etc., and does not, therefore, affect a case of two or more sentences

Section 415 — Note 1

1 (11) 12 Cri L Jour 389 (389, 390) 33 All 510 11 Ind Cas 253 *Alam v Emperor* (Imprisonment for one day and Rs 50 fine—*Held* appeal lay—It is not necessary that the accused must have actually suffered imprisonment to claim right of appeal.)

(79) 3 Cal L Rep 511 (512), *Empress v Haradhan Tamuli* (Rs 20 on one charge and imprisonment for one month on another—Appeal lay as to whole.)

(69) 1 N W P H C R 302 (303) (Imprisonment for one month and Rs 40 fine.)

(78) 2 Cal L Rep 511 (512) *In re Sher Mahomed*.

[See (97) 1902 Pun L R No 45 Cr, p. 170 (171), *Crown v Pura* (Imprisonment for one month and whipping under old section.)

(78) 3 Cal L Rep 405n (405n) *Mohesh Mundi v Bholanath* (An order against accused persons jointly and severally for payment of money to the complainant is not a "fine" imposed against the accused. Such order added to an imprisonment of one month will not make the case appealable.)

2 (37) 24 AIR 1937 Oudh 524 (527-528) 39 Cri L Jour 1062 13 Luck 618 *Mahrand Sing v Ganga* (Punishment includes punishment of the same kind also.)

(32) 19 AIR 1932 Oudh 27 (27) 7 Luck 501-33 Cri L Jour 278 *Kandhari v Emperor*

3 (31) 18 AIR 1931 Cal 642 (643) 59 Cal 19-33 Cri L Jour 90, *Alalbar Ali v Emperor* (It is to be noted, however, that the aggregate of the two fines in this case was more than Rs 50 although this aspect does not appear to have influenced the decision.)

of fine. In the later Calcutta cases⁴ however, the above contention was rejected and it was held that two sentences of fine must in the aggregate, be above Rs 50 in order to avoid the bar of S 413. This view was also held by the Allahabad,⁵ Bombay⁶ Madras⁷ Nagpur⁸ and Patna⁹ High Courts and by the Sind Judicial Commissioners Court¹⁰. The above conflict of decisions is now set at rest by the amendment of this section by Act 6 [VI] of 1945 which makes it clear that the section only applies where any other punishment than one mentioned in S 413 or S 414 is combined with such punishment.

A combination of sentences will give a right of appeal only if the sentences are in the same trial and not in separate cases¹¹.

On the question whether concurrent sentences of imprisonment can be aggregated under S 415 for escaping the bar of S 413 and S 414 (as it stood before the amendment of 1923) there was a difference of opinion. In some cases it was held¹² that such sentences could not be aggregated and in others that they could¹³. The amendment in 1923 of S 35 of the Code has now settled the point by upholding the former view.

Where the sentence is of a fine of Rs 45 and disqualification to hold licence under the Motor Vehicles Act, the sentence is not appealable, as the order of disqualification cannot be specified under S 367 (2) of the Code¹⁴.

2 Order for security to keep the peace — The section says that the fact of a convicted person being ordered to furnish security to keep the peace will not alter the non appealable nature of the sentences mentioned in Ss 413 and 414¹. In a case decided by the Rangoon High Court² where in a summary trial an accused person was convicted and sentenced to three months imprisonment and was also ordered to give security for good behaviour under S 81A of the Rangoon Police Act it was held that an appeal lay

4 (30) 26 AIR 1939 Cal 274 (274, 275) 40 Cri L Jour 652 I L R (1939) 1 Cal 825 *Kali Charan Sardar v Adhar Mandal*

(32) 18 AIR 1932 Cal 551 (552) 59 Cal 1131 33 Cri L Jour 704 *Nawab Ali Haji v Jomab Bibi* (Two sentences of fine of Rs 20 and Rs 15 against an accused and of Rs 20 and Rs 30 against another—Held appeal barred)

5 (43) 30 AIR 1943 All 18 (19) I L R (1912) All 947 44 Cri L Jour 189 204 Ind Cas 810 *Lalji v Emperor*

(42) 29 AIR 1842 All 338 (337) I L R (1942) All 665 43 Cri L Jour 716 200 Ind Cas 768 *Gorakh Prasad v Emperor*

6 (26) 13 AIR 1928 Bom 416 (416) 27 Cri L Jour 926, *Shadlingappa Gurulingappa v Emperor* (Two sentences of fine of Rs 50 and Rs 30—It was held that there was one sentence of fine exceeding Rs 50)

7 (40) 27 AIR 1940 Mad 111 (112) 41 Cri L Jour 403 I L R (1939) Mad 1035 *In re Lalaramayya*

8 (40) 27 AIR 1940 Nag 264 (265) 41 Cri L Jour 544 I L R (1912) Nag 143 *Provincial Government v Dhuram Nanhya* (Case under S 414)

9 (43) 30 AIR 1943 Pat 122 (123) 21 Pat 753 41 Cri L Jour 401 205 Ind Cas 440 (DB) *Dargah v Emperor*

10 (36) 23 AIR 1936 Sind 40 (40) 37 Cri L Jour 455 *Emperor v Hemandas Devansingh* (Case under S 414)

11 (60) 6 Suth W R Cr 51 (51, 52) *Queen v Morley Sheikh*

(68) 10 Suth W R Cr 3 (4) 1 Beng L R A C Cr 3 *Queen v Nagard Paramanik*.

12 (18) 14 Cri L Jour 254 (254) 40 Cal 631 19 Ind Cas 510 *Asiz Sheikh v Emperor*

(21) 8 AIR 1921 Cal 152 (152) 23 Cri L Jour 275 *Abdul Jabbar v Emperor* (Magistrate of first class—Concurrent sentences of one month for each offence—S 413 held to apply)

13 (12) 18 Cri L Jour 877 (877) 17 Ind Cas 813 (Cal) *Abdul Khalek v Emperor*

(11) 12 Cri L Jour 891 (392) 11 Ind Cas 255 (Cal) *Beps Behary Dey v Emperor*

14 (4) 32 AIR 1915 Mad 27 (28) I L R (1915) Mad 315 46 Cri L Jour 300 217 Ind Cas 233 *In re Subramania Ayyar*

[But see (33) 20 AIR 1933 Rang 399 (330) 65 Cri L Jour 116 146 Ind Cas 545, *Garanand Singh v Emperor* (Order of suspension of licence is part of sentence)]

Note 2

1 (04) 1 Cri L Jour 1054 (1055) 7 Oudh Cas 338, *Meghu v Emperor*

(33) 22 AIR 1935 Rang 363 (363) 36 Cri L Jour 1510 13 Rang 237, *Emperor v Nga Tun Lu*

Also see S 106 Note 23 and S 123 Note 2

2 (09) 9 Cri L Jour 363 (363, 370) 41 Oudh Ral 353, *Kalhan v Emperor*

under S 408 and that the right thereto was not taken away by S 414 (as it stood before the amendment) on the ground that the sud security was also ordered. It was observed that an appeal lay under S 408 and that reading Ss 414 and 415 together an appeal was barred under S 415 only in cases where there was an order for security to keep the peace and not where, under a special Act, there is an order for security for good behaviour.

415A. Notwithstanding anything contained in this Chapter, when

Special right of appeal more persons than one are convicted in one trial, and in certain cases an appealable judgment or order has been passed in respect of any such persons, all or any of the persons convicted at such trial shall have a right of appeal

Synopsis

- | | |
|--------------------------|-------------------------|
| 1 Scope and object | 2 Sections 415A and 412 |
| 1a Sections 415A and 411 | 3 Sections 415A and 449 |

1. Scope and object — This section was newly introduced by the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923. It was intended to remove doubts that previously, in certain cases, the Courts

was passed was also entitled to appeal,¹ and in other cases it was held that such accused had no right of appeal.² The controversy is now set at rest by the enactment of S 415A which recognizes the right of appeal on behalf of an accused person against whom a non appealable sentence is passed in a trial in which an appealable judgment is passed against any of the accused persons.³

The Sind Judicial Commissioners Court has held that the words 'appealable judgment' and 'right of appeal' in the section should be read together and that the extent of the right of appeal is the same in the case of all the co accused. So where an appealable judgment is passed against A and there is no appealable judgment against B and A is entitled only to appeal as regards his sentence and not as regards his conviction B can also only appeal as regards the sentence, if any, passed against him and cannot appeal as

Section 415A — Note 1

- 1 (16) 3 AIR 1916 All 236 (337) 38 All 395 17 Cri L Jour 513 *Lal Singh v Emperor*
 (16) 3 AIR 1916 Lah 193 (194) 1915 Lun Re No 30 Cr 17 Cri L Jour 27 *Emperor v Laurati*
 (16) 3 AIR 1916 Lah 302 (303) 1916 Pun Re No 16 Cr 17 Cri L Jour 173 *Emperor v Jaisukh*
 (19) 6 AIR 1919 Pat 556 (557-560) 20 Cri L Jour 545 4 Pat L Jour 435 *Phaku Jha v Emperor*
 (Per Atkinson J contra)
 (20) 7 AIR 1920 Iat 802 (803) 22 Cri L Jour 297 *Bisicanath Singh v Emperor* (Even though the accused had applied to Appellate Court only to refer his case to High Court for revision)
 (13) 14 Cri L Jour 140 (171) 15 Oudh Cas 386 19 Ind Cas 170 *Sheopal v Emperor*
 (09) 9 Cri L Jour 356 (358) 4 Low Bur Rul 351 (FB) *Ba Thai v Emperor*
 (08) 9 Cri L Jour 368 (370) 4 Low Bur Rul 359 *Kathan v Emperor*
 2 (17) 4 AIR 1917 All 372 (373) 39 All 519 18 Cri L Jour 684 *Phola v Emperor*
 (17) 4 AIR 1917 All 410 (411) 39 All 233 18 Cri L Jour 516 *Husain Khan v Emperor*
 (23) 10 AIR 1923 All 609 (609) 24 Cri L Jour 679 *Jhagru v Emperor*
 (14) 1 AIR 1914 Mad 433 (434) 15 Cri L Jour 371 *In re Uruma Mudali*
 (18) 5 AIR 1918 Mad 918 (918) 40 Mad 591 18 Cri L Jour 451 *In re Venkatakrishnayya*
 (19) 6 AIR 1919 Mad 1103 (1103) 19 Cri L Jour 623 *In re Annasami Madavan*
 (17) 4 AIR 1917 Sind 34 (35) 10 Sind L R 156 18 Cri L Jour 72 *Unar Gools v Emperor*
 (70) 7 Bom H C R Cr 35 (37) *Rag v Kalubhas*
 (11) 12 Cri L Jour 63 (63) 9 Ind Cas 310 (Mad) *In re Glode Palays Pamas cam*
 (23) 10 AIR 1923 Mad 95 (96) 24 Cri L Jour 69 *In re Muffoor Mowden Hajee*
 3 (31) 18 AIR 1931 Cal 642 (643) 52 Cal 19 33 Cri L Jour 90 *Akbar Ali v Emperor*
 (23) 22 AIR 1923 Cal 329 (332) 57 Cal 463 26 Cri L Jour 435 *Bithadur Moha v Ismail* (Even where the appealable judgment is a proceeding under S 362)
 (33) 22 AIR 1935 Mad 157 (157) 54 Mad 517 36 Cri L Jour 549 *Mayandi v Pa's*
 (See also) (26) 13 AIR 1926 Bom 342 (342) 27 Cri L Jour 673 *Majhar v Emperor*

regards his conviction⁴ But the Rangoon High Court has held that the section confers a general right of appeal and that although the co accused (by virtue of whose right of appeal the other accused gets his right of appeal) can only appeal as to his conviction and not as to his sentence the other accused can appeal as to both⁵

1a Sections 415A and 411 — A and B are jointly tried and convicted by a Presidency Magistrate A is sentenced to six months imprisonment and B is dealt with under S 562 without any sentence being passed against him A is not entitled to appeal under this section because under the terms of S 411 there being no sentence against B, there is no appealable judgment against B (A himself cannot appeal because the sentence against him is not of the appealable level)¹

2 Sections 415A and 412 — A and B are jointly tried and both are convicted on their plea of guilty But no sentence is passed on A and he is dealt with under S 567 But an appealable sentence is passed against B Can A appeal? No the reason is that B himself can only appeal as to the extent or legality of the sentence passed against him and A's right of appeal cannot be more extensive than that of B and as no sentence at all has been passed against A, he cannot appeal²

3 Sections 415A and 449. — Where leave to appeal is granted under S 419 of the Code to one of two accused persons jointly tried by the High Court sessions leave to appeal should be granted to the other accused also by reason of the provisions of this section¹

416.⁴ [Saving of sentences on European British subjects] (*Repealed by the Criminal Law Amendment Act, 1923 (12 [XII] of 1923), S 26*)

417.[†] The "[Provincial Government] may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court

a. Substituted by A O for Local Government

* Code of 1898 S 416

416 Nothing in sections 413 and 414 applies to appeals from sentences passed under Chapter XXVIII on European British subjects

1882 S 416, 1872 S 274 para 3 1861 — Nil

† Code of 1882 S 417 — Same

Code of 1872 S 272 paras 1 and 2

272 The Local Government may direct an appeal by the Public Prosecutor or other officer specially or generally appointed in this behalf from an original or appellate judgment of acquittal but in no other case shall there be an appeal from a judgment of acquittal passed in any criminal Court

No appeal in case of acquittal, except on behalf of Government

Such appeal shall lie to the High Court and the rules of limitation shall not apply to appeals presented under this section

Code of 1861 — Nil

4 (31) 18 AIR 1931 Sind 151 (150) 20 Sind L R 337 37 Cri L Jour 1140 *Tejmal v Emperor*
5 (10) 27 AIR 1916 Rang 293 (224) 1940 Rang L R 381 41 Cri L Jour 877 *Shanlar v The King*

Note 1a

1 (37) 21 AIR 1937 Cal 413 (114) 38 Cri L Jour 876 1 L R (1937) 1 Cal 123 *Kali Kumar Miller v Emperor*

Note 2

1 (31) 18 AIR 1931 Sind 151 (150) 25 Sind L R 337 32 Cri L Jour 1140 *Tejmal Jagmal v Emperor* (Words: appealable judgment and right of appeal in section should be read together and the right of appeal should be the same in the case of both a co-accused)

Note 3

1 (27) 14 AIR 1927 Cal 307 (308) 54 Cal 57 28 Cri L Jour 481, *Gallagher v Emperor* (Though the other accused is not a European British subject)

Synopsis

1. Scope and applicability of the section
- 2 "The Provincial Government"
- 3 "May direct"
- 4 "Public Prosecutor"

5. "High Court"

- 6 Order of acquittal
- 7 Interlocutory orders

8 Limitation See A I R Commentaries on the Limitation Act 2nd (1942) Edn Article 167

NOTE to the Synopsis See the Notes indicated for the following topics

Acquittal of serious charge though conviction of some other charge See Note 6

Amendment of charges — Order — If applicable See Note 7

Appeal by accused as well as by Government See Note 3

Dismissal for non-appearance under S 247 — Is acquittal See Note 6

High Court not to question power of Provincial Government See Note 3

Inapplicable to Bengal Act 12 (XII) of 1932 See Note 1

Legislative changes See Note 1

No right of appeal to private person See Note 2

Not controlling S 439 See Note 1

Object is to remedy injustice and not to get High Court's opinion on abstract points of law See Note 1

Order under Section 118 — Not acquittal See Note 6
Power of Provincial Government — Nature and exercise See Note 3

Refusal to try for want of jurisdiction — No appeal See Note 7

Sections 414 and 260 — Summary acquittal See Note 1

Sessions Judge or District or Deputy Magistrate — No power in cases of acquittal See Note 5

Who can move Provincial Government See Note 3

Withdrawal of complaint under S 249 — Is acquittal See Note 6

1 Scope and applicability of the section — Section 407 of the Code of 1901 prohibited appeals from a judgment of acquittal of any criminal Court and an order of acquittal was therefore, conclusive¹ The extraordinary remedy of an appeal against an acquittal received a statutory recognition for the first time in 1872² in the interests of public safety, peace and order³

But the Legislature has by no means overlooked the fact that an appeal against an acquittal is an exception to the general principle of criminal law and is one which needs considerable safeguarding Such safeguards are three in number namely —

(a) that the right of appeal shall be exercised by the Provincial Government only,

(b) that every such appeal shall be made through the Public Prosecutor

(c) that every such appeal shall be tried by the High Court only

Before, therefore a person acquitted can undergo any further trial for the offence of which he has been acquitted the highest executive authority must hold that it is desirable the highest legal authority must advise that it is legal and proper and the highest judicial authority must find that it is just that the order should be set aside⁴

The object of the section is only to enable the Provincial Government to have a wrongful acquittal converted into a conviction or to have a re trial and not to enable it to obtain from the High Court opinions on abstract questions which do not arise on the facts established⁵

Section 417 — Note 1

1 (69) 11 Suth W R Cr 29 (34) (FD) *In re Gorachand Ghose*

(66) 5 Suth W R Cr 2 (3) *Queen v Toyab Sheikh*

(66) 5 Suth W R Cr 45 (46) *Queen v Gorachand* (Under S 401 Court may set aside judgment of acquittal for error in point of law)

(67) 8 Suth W R Cr 47 (49 51 59) *Beng L R Sup Vol 750 Queen v Sheikh Da u*

Har Singh,
all

3 (10) 11 Cri L Jour 66 (66) 1909 Pun I e No 15 Cr 4 1st Cas 661, *Emperer v Harnaman*
Also see 423 Note 15

4 (01) 1 Cri L Jour 674 (681 685) 17 C P L R 75, *Emperer v Ali Guba*

5 (10) 11 Cri L Jour 61 (65) 4 1st Cas 663 1909 Pun I e No 14 Cr *Emperer v Fa ch Din*

(11) 12 Cri L Jour 364 (371) 11 1st Cas 137 1911 Pun I e No 10 Cr, *Emperer v Eiru*

§ 431, for abatement of appeal under this section

{ 34 } 21 AIR 1931 Pesh 129 (132) 36 Cri L Jour 443, *Government Advocate, North West Frontier Province v Amir Hamza* (Where two opinions can be formed on the evidence and one of them has been formed by the trial Court, appellate Court will not disagree even if the balance of probabilities be

[See (07) C Cri L Jour 287 (288, 289) 4 Low Bar Bul 49, *Emperor v Yena* (Acquittal in incompetent appeal—Acquittal may be set aside — But in particular circumstances of case High Court did not consider it necessary to do so)]

Ind Cas 57, attal should

Consequently a private person has no right of appeal under this section³. But so far as the wording of this section is concerned, there is nothing in it to show who can move the Provincial Government to direct an appeal under this section. It is a matter of practice that the Provincial Government is and can be moved by private individuals or by the Police through the District Magistrate or by the latter himself as the head of the criminal administration in his district⁴.

3 "May direct" — The power given to the Provincial Government by this section is of an exceptional and unusual character. It should be sparingly used¹ and with circumspection² care and caution³. It is a special weapon intended for exceptional occasions and which is to be only used after most anxious consideration and in cases which are themselves of great public importance or in which a principle is involved, it cannot be expected that the Government will dull the edge of that statutory provision by utilizing it freely in cases which are of no or little general interest⁴. The making of a direction under

not ordinarily be interfered — Government not thinking that there was miscarriage of justice and no exceptional requirements for interference—No re trial should be ordered in revision.)

(94) 22 Cal 164 (170), *Deputy Legal Remembrancer v Karuna Baistobi*

(16) 3 AIR 1916 Low Bur 16 (17) 8 Low Bur Rul 356 17 Cri L Jour 91 *Graham & Co v Elsty*
(See (14) 1 AIR 1914 Mad 628 (631) 39 Mad 1028 15 Cri L Jour 236, *In re Shinnu Goundan*.)

3 (27) 14 AIR 1927 Nag 170 (173) 23 Nag L R 40 28 Cri L Jour 523 *Sher Khan v Anwar Khan*
(31) 19 A I R 1931 Rang 86 (86) 8 Rang 671 32 Cri L Jour 929 *Emperor v Maung Tun Nyan*
(High Court satisfied that subordinate Court took erroneous view of evidence it is bound to act on this evidence and convict the accused.)

4 (37) 24 A I R 1937 Sind 100 (101) 38 Cri L Jour 665 *Karachi Municipal Corporation v Thasomal Khushaldas* (The normal procedure for the party aggrieved is to apply to the District Magistrate who will then refer the matter if he thinks proper to Government and Government can if they think proper sanction proceedings under S 417.)

(23) 10 AIR 1923 Lah 163 (166) 24 Cri L Jour 433 *Mul Singh v Emperor*

(22) 9 A I R 1922 Mad 502 (503) 45 Mad 913 23 Cri L Jour 593 (FB) *Sankaralinga Mudaliar v Narayana Mudali*

(25) 12 AIR 1925 Pat 321 (322) 26 Cri L Jour 516 *Anant Singh v Hari Charan*

(28) 15 AIR 1928 Sind 176 (176) 30 Cri L Jour 251 *Emperor v Dito*

(92 95) 1 Upp Bur Rul 47 (47) *Queen Empress v Nga Tun H in* (District Magistrate)

Also see S 439 Note 12

Note 3

1 (44) 31 AIR 1914 Sind 124 (130) 46 Cri L Jour 759 270 Ind Cas 457 *Emperor v W S Priestley*
(Should be used only where there is no reasonable doubt upon record as to guilt of accused.)

(43) 30 AIR 1913 Mad 33 (33 34) 44 Cri L Jour 188 201 Ind Cas 306 *Public Prosecutor v Murthuja Khan Sahib* (It is not usual for the Crown to prefer an appeal against an appellate judgment on a point of fact unless the judgment is perverse.)

(38) 25 AIR 1938 Sind 80 (81) 39 Cri L Jour 501 32 Sind L R 589 *Emperor v Gulab Shah* (Should be used only where there is no reasonable doubt upon record as to guilt of accused.)

(81) 4 All 148 (149) 1881 All W N 159 *Empress of India v Qayadin* (Judgment of acquittal honest and not unreasonable—Appeal against such judgment should be dismissed.)

(31) 18 A I R 1931 All 712 (716) 32 Cri L Jour 1073 *Emperor v Baldeo Koeri* (In respect of pure question of fact powers are enforced only in those cases where through incompetence stupidity or perversity of subordinate tribunal, such unreasonable or distorted conclusions are drawn from evidence as to produce positive miscarriage of justice.)

(20) 7 AIR 1900 Bom 217 (219) 21 Cri L Jour 17 *Emperor v Salharani Manyi* (Discretion to exercise power appertains to Government and is not subject to control by High Court.)

(24) 11 AIR 1904 Bom 335 (337) 25 Cri L Jour 76 *Emperor v Moti Koda* (Do)

(15) 2 AIR 1915 Mad 8 (9) 9 S nd L R 17 16 Cri L Jour 604 *Emperor v Kadir Buz* (Do)

2 (33) 20 AIR 1933 Mad 230 (230) 34 Cri L Jour 918 *Public Prosecutor v Mayandi Nadar*

3 (38) 25 AIR 1938 S nd 103 (113) 39 Cri L Jour 630 1 L R (1939) Eac 41 *Emperor v Pursumal Gerimal*

(98) 21 All 122 (126) 1898 All W N 205 *Queen Empress v Tammal*

(04) 1 Cri L Jour 781 (790) 1904 Pun Re No 7 Cr *Emperor v Chhattar Singh*

4 (26) 13 AIR 1926 Pat 176 (179) 51 Pat 25 27 Cri L Jour 235 *Siban Rai v Hajrant Dass*

(29) 16 AIR 1909 Pat 139 (140) 7 Pat 579 30 Cri L Jour 673 *Waris Kunjra v Emperor*

(94) 1894 Pun Re No 15 Cr p 31 (35) *Queen Empress v Khushal Singh*

(14) 12 Cri L Jour 364 (370) 11 Ind Cas 137 1911 Pun Re No 19 Cr (FB) *Emperor v Kiru*

this section should be limited to those instances in which there is a grave miscarriage of justice⁶ or where it is required in the interests of justice and of the public⁶

The exercise of the discretion is not subject to control by the High Court and cannot be questioned in dealing with such appeals⁷

Can an appeal under this section be preferred by the Provincial Government against an order of acquittal when an appeal preferred by the accused against his conviction has already been heard and decided by the High Court? This question can only arise in cases where an accused person is acquitted of a graver charge but convicted of a lesser charge on the same facts. In such a case, both the Provincial Government and the accused person have a right of appeal. If both the appeals are preferred they should ordinarily be heard together, but if the appeal of the accused person is heard and decided by a High Court before the Provincial Government has appealed, is the appeal of the Provincial Government barred? A Full Bench decision of the Nagpur Judicial Commissioner's Court⁸ has held, overruling the view of the same Court in an earlier case,⁹ that an appeal against an acquittal for a major offence can be preferred by the Provincial Government although an appeal preferred by the accused against his conviction for a minor offence has been heard and decided by the High Court. But, where the appeal by the accused is pending hearing, it should be postponed, if in the opinion of the standing counsel for the Government it is likely that the Government will appeal against the acquittal so that both may be heard together. But it need not be postponed if there is only a possibility that the Government may desire to appeal.

4. "Public Prosecutor."—Under this section, it is the Public Prosecutor that is to be directed to present an appeal to the High Court. The term "Public Prosecutor" is defined in clause (t) of S. 4 (1) of the Code. Section 402 provides for the appointment

[But see ('39) 26 AIR 1939 Lah 406 (409) : 49 Cri L Jour 942, *Shamlal v Chamanlal* (If a Judge or the Executive Government find that an obvious error in a decision has been committed, whether the question involved is of greater or lesser public importance, a case of injustice is established and one in which it is the duty of Government to make an appeal — Per Ram Lal, J., in the Order of Reference)]

5 ('42) 29 AIR 1942 Pat 66 (59) : 43 Cri L Jour 44 : 196 Ind Cas 604 (DB) *Emperor v Gourshanhar*

6. ('81) 4 All 146 (149, 150) : 1861 All W N 159, *Empress of India v. Gayadin*,
('94) 18 All 212 (214) : 1894 All W N 49, *Queen-Empress v. Robinson*

L Jour 91, *Graham & Co v Elsey*

[See ('04) 1 Cri L Jour 674 (684) : 17 O P L R 75, *Emperor v Mt. Gulbi*]

[See also ('41) 28 AIR 1941 Bom 416 (411) : 43 Cri L Jour 174 : 197 Ind Cas 502 (DB), *Vinayak Atmaram v Shantaram Janardhan* (Government cannot avoid the obligation of appealing in a proper case by lending support to a revision application brought by the complainant — S 439, cl (5) referred to)]

('23) 10 AIR 1923 Lah 601 (603) : 26 Cri L Jour 337, *Ganga Singh v Ramzan*, (Complainants had remedy in Civil Courts)]

7. ('04) 1 Cri L Jour 674 (686) : 17 C P L R 75, *Emperor v Mt Gulbi* (Apart from the merits of the appeal itself)

('20) 7 AIR 1920 Bom 217 (219) : 21 Cri L Jour 17, *Emperor v Sakhararam Manaji*

('24) 11 AIR 1924 Bom 335 (337) : 25 Cri L Jour 786, *Emperor v. Moti Khoda*

('18) 5 AIR 1918 Lah 41 (45) : 1917 Pan Re No 43 Cr. : 19 Cri L Jour 65, *Emperor v Ajran*

('15) 2 AIR 1915 Sind 8 (9) : 9 Sind L R 17 : 16 Cri L Jour 604, *Emperor v Kadir Buz* (Acquittal reversed)

8. ('32) 19 AIR 1932 Nag 121 (124, 125) : 29 Nag L R 233 : 33 Cri L Jour 649 (FD), *Mohammadigul Rohilla v Emperor*. (Contra Niyogi, A. J. C., agreeing with AIR 1932 Nag 73 : 33 Cri L Jour 723)
Also see S 430, Note 1.

9. ('32) 19 AIR 1932 Nag 73 (74) : 33 Cri L Jour 728, *Emperor v. Modkha* (Overruled by AIR 1932 Nag 121 : 29 Nag L R 233 : 33 Cri L Jour 649 (FD))

generally or in any case or for any specified class of cases, one or more officers called 'Public Prosecutors'." Therefore, an appeal against an acquittal presented to the High Court by the Superintendent and Remembrancer of Legal Affairs, Bengal, who by Notification has been appointed by the Provincial Government to be, by virtue of his office, Public Prosecutor in all cases heard by the High Court of Bengal in the exercise of its appellate jurisdiction, is not incompetent.² But the Legal Remembrancer of Bengal cannot be deemed to be the Public Prosecutor for the Province of Behar, from the mere fact that he has been directed by the Government of Behar and Orissa to present such an appeal without his being appointed as such and when there is already a Public Prosecutor for the Province of Bihar.³

5 "High Court" — An appeal under this section lies only to the High Court. So a District Magistrate¹ or a Deputy Magistrate² or a Sessions Judge³ has no right to entertain an appeal against an order of acquittal.

6 Order of acquittal — The words 'conviction' and 'acquittal' are not applied in the Code to an order under S 218 and are inapplicable to it. Therefore, an order of a Sessions Judge setting aside the order of a Magistrate calling upon a person to furnish security for good behaviour is not an order of acquittal within the meaning of this section so as to enable the Provincial Government to prefer an appeal under this section.¹

An order dismissing the complaint for the non appearance of the complainant under S 247 is an order of acquittal within the meaning of this section.² So also an order according sanction to compound an offence under S 345 amounts to an order of acquittal by force of the words 'shall have the effect of an acquittal in sub s (6) of that section and hence an appeal under this section lies against such order'.³

The words appellate order of acquittal mean and include all orders of an appellate Court by which a conviction is set aside.⁴

The 'acquittal' contemplated in the section need not be on all the charges made against the accused. The Provincial Government is not deprived of its right to appeal in cases where an accused person has been acquitted of a serious charge merely because at

Note 4

1 (14) 1 AIR 1914 Cal 560 (560) 41 Cal 425 15 Cri L Jour 46 *Emperor v Gaya Prasad* (Fact that certain person has been directed to present appeal under this section does not involve his appointment as Public Prosecutor)

2 (19) 6 AIR 1919 Cal 203 (203) 46 Cal 544 20 Cri L Jour 170 *Superintendent and Remembrancer of Legal Affairs Bengal v Tularam Barodia*

3 (14) 1 AIR 1914 Cal 560 (560 561) 41 Cal 425 15 Cri L Jour 46 *Emperor v Gaya Prasad*

Note 5

1 (91) 1891 AL WN 120 (120 121), *Empress v Hardeo Singh*

(03) 7 Cal WN 493 (494) *Bishun Das Ghose v Emperor*

(07) 11 Cal WN xci (xci) *Dwarkanath Shahu v Emperor*

(83) 7 Mad 213 (214) 2 Weir 477, *Ranganamam Ayyangar v Narasimhulu Nayal*

2 (02) 26 Mad 478 (480) 13 Mad L Jour 263 2 Weir 483 *Sama Ayya v Emperor* (Reversal by Deputy Magistrate of order acquitting accused on charge of theft is invalid)

3 (04) 1 Cri L Jour 700 (701) 1 All L Jour 415 *Siyad Khan v Emperor* (Order of acquittal passed by Magistrate without any charge being framed or evidence for defence taken)

(98) 2 Cal WN cclvi (cclvi) *Baroda Nath v Karan Sheikh*

[See also (11) 12 Cri L Jour 575 (576) 12 Ind Cas 839 (All) *Darbars Mal v Emperor*]

Note 6

1 (28) 15 AIR 1928 All 1 (1 2) 29 Cri L Jour 92 *Emperor v Baba Ram*

(26) 15 AIR 1926 Oudh 329 (329 530) 1 Luck 231 27 Cri L Jour 626, *Emperor v Samat Deen*. (But Local Government has right to apply in revision)

(83) 9 Cal 878 (879) *Chand Khan v Empress*

2 See Note 7 on S 247

3 (45) 32 AIR 1945 Nag 104 (104) 1 L R (1945) Nag 505 47 Cri L Jour 119 211 Ind Cas 208 (DB), *Provincial Government, Central Provinces and Berar v Bapin Singh Choudhary*

4 (75) 24 Suth W R Cr 41 (41) *Govt of Bengal v Gokool Chunder Choudry*

the same trial, he was convicted of a less serious charge⁵ So, where an accused charged with a serious charge is acquitted of that charge but is convicted of a less serious one it is open to the Government to prefer an appeal so far as the charge on which he was acquitted is concerned⁶ The view held in the undermentioned cases⁷ that an 'acquittal' means a complete acquittal on all the charges is no longer correct since the decision of the Privy Council in *Kishan Singh v Emperor*⁸

7. Interlocutory orders—There is no appeal provided against any *interlocutory order* So where a Sessions Judge declines to try a case on the ground of want of jurisdiction, there is no order of acquittal and no appeal lies against such an order¹ On the question whether it is open to the Government to prefer an appeal on an order of the Sessions Judge refusing to amend or add new charges there is a difference of opinion In *Queen Empress v Vaji Ram*,² Telang J, held that 'the appeal allowed was only from any original or appellate order of acquittal and the order refusing to allow additional charges is not an order which falls within those terms especially when it is not even an order which can be said to form the basis of the order of acquittal or a necessary condition of its tenability'

However, in *Emperor v Stewart*,³ while Rupchand Bilaram, A J C, agreed with this view of Telang J, Kinnaird, J C, held that although the section gives no power of appeal against an order refusing to amend charges if such order is followed by an original or appellate order of acquittal the Provincial Government may direct an appeal to be presented

8 Limitation—See A I R Commentaries on the Limitation Act, 2nd (1942) Edition Art 157

418. (1) An appeal may lie on a matter of fact as well as a

Appeal on what matters admissible case the appeal shall lie on a matter of law only

(2) Notwithstanding anything contained in sub-section (1) or in section 423, sub section (2), when, in the case of a trial by jury any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law.

* 1882 S 418, 1872 S 271, 1851 S 408

5 (25) 12 AIR 1920 Oudh 793 (725) 26 Cri L Jour 1364 *Sitaram v Emperor*

6 (44) 31 AIR 1944 All 137 (141) 1 L R (1944) All 403 46 Cri L Jour 38 215 Ind Cas 213 (FB) *Zamir Qasim v Emperor* (Per Iqbal Ahmad C J—Section 417 is applicable not only to the trial of a complete but also of a partial acquittal)

(28) 15 AIR 1928 P C 251 (256) 50 All 722 55 Ind App 390 29 Cri L Jour 828 (PC) *Kishan Singh v Emperor* (Sections 302 and 304)

(77) 2 Cal 273 (276 277) *Empress of India v Judoonath Gangooly* (Sections 302 and 304)

(30) 17 AIR 1930 Lah 338 (340) 32 Cri L Jour 56, *Emperor v Sada Singh* (Section 302 and Ss 302/109)

(25) 12 AIR 1925 Oudh 723 (725) 26 Cri L Jour 1364 *Sita Ram v Emperor* (Sections 302 and 304)

7 (28) 15 AIR 1928 Lah 230 (231) 29 Cri L Jour 905, *Emperor v Giam Singh* (Change of conviction from S 353 to S 352 does not amount to acquittal under S 353 and no appeal lies)

[See (27) 14 AIR 1927 Lah 369 (370) 8 Lah 136 28 Cri L Jour 508 (508) *Fazal Khan v Emperor* (Trial under S 302—Conviction under S 304 does not amount to acquittal under S 302)]

8 (28) 15 AIR 1928 P O 251 (256) 50 All 722 55 Ind App 390 29 Cri L Jour 828 (PC)

Note 7

1 (12) 13 Cri L Jour 169 (170) 13 Ind Cas 921 34 All 118, *Emperor v Ram Nareish Singh*

Also see S 404 Note 1

2 (92) 16 Bom 414 (428)

3 (27) 14 AIR 1927 Sind 28 (29) 21 Sind L R 55 27 Cri L Jour 1217 (But see the observations of Rupchand Bilaram A J.C., p 39)

Explanation. — The alleged severity of a sentence shall, for the purposes of this section, be deemed to be a matter of law.

a The original Section 418 was renumbered as sub-section (1) of that section and sub s (2) was inserted by the Code of Criminal Procedure (Amendment) Act, 18 [XVIII] of 1923 S 115

Synopsis

1. Scope and applicability of the section.

2 Trial by jury

3 "On a matter of law only"

4 Sub-section (2)

NOTE to the Synopsis See the Notes indicated for the following topics

Assessor cases tried by jury See Note 2

Inadmissible evidence or want of evidence — Question of law See Note 3

Misdirection — Non-direction — Matter of law See Note 3

One charge by jury and another as assessors See Note 2

Petition to state illegalities See Note 2

Questions of fact in a jury case — When considered by High Court See Note 1

Section inapplicable to assessor cases or to trial by Magistrates See Note 1

Sufficiency of evidence — Question of fact See Note 3

Verdict of jury — Final on facts See Note 2

1. **Scope and applicability of the section** — This section provides that an appeal will be on a matter of *fact* as well as a matter of *law*, except where the trial is by jury in which case an appeal will be on a matter of *law* only.

The section applies equally to all criminal appeals, whether made by the Provincial Government against an acquittal or made by accused person against a conviction¹. Thus, where in a jury case the Provincial Government preferred an appeal against an acquittal on questions of fact, it was held that the appeal was incompetent². But, in a case tried by a Judge with the help of assessors³ or by a Magistrate,⁴ it is competent for the Provincial Government to appeal against an acquittal both on the question of law and on the question of fact. The section does not in any way curtail the powers of the High Court to deal with questions of fact as well in a jury case in a reference under s 307⁵ or under s 374⁶ of the Code.

The section does not apply to cases tried by a jury in a High Court or a Court of Session under the provisions of chapter XXXIII of the Code. In those cases under s 449

Section 418 — Note 1

1 (93) 20 All 459 (164) 1899 All W N 117 *Queen Empress v Prag Dal*

(1899) 20 All 459 (164) 1899 All W N 117

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(17) 4 AIR 1917 Cal 637 (687) 17 Cri L Jour 9 *Deputy Legal Membrancer Dhar v Matuldhari Singh* (There are no special rules for dealing with evidence in such appeal on questions of fact)

S (87) 9 All 420 (424, 425) 1887 All W N 39 *Queen Empress v Macarthy*

(17) 4 AIR 1917 All 173 (175) 39 All 349 18 Cri L Jour 491 *Ikrammuddin v Emperor*

(28) 15 AIR 1929 All 207 (211) 50 All 625 29 Cri L Jour 353 (F B) *Emperor v Shera* (No allegation of misdirection by trial Judge or misunderstanding of law by jury — High Court can revise verdict.)

(73) 20 Suth W R Cr 1 (4) 11 Beng L R 14 *Queen v Koonjo Seth*

(25) 12 AIR 1925 Lah 401 (402) 6 Lah 98 26 Cri L Jour 1241, *Emperor v Bimal Parshad* (High Court can interfere though finding of jury is not perverse or manifestly wrong)

Also see S 307 Note 11

6 (37) 24 AIR 1937 S ud 162 (163, 164) 31 Sind L R 22 33 Cri L Jour 1008, *Khadim v Emperor*

(36) 23 AIR 1936 Cal 73 (83) 37 Cri L Jour 394 63 Cal 929 *Benoyendra Chandra v Emperor*

(97-98) 2 Cal W N 49 (50) *Queen Empress v Chavradhari Goola*

(24) 11 AIR 1924 Cal 225 (C 98) 26 Cri L Jour 5 *Hassenu lah Sheikh v Emperor*

(21) 8 AIR 1911 S ud 84 (86, 87) 15 S ud L R 103 23 Cri L Jour 33 (F B) *Gul v Emperor* (High Court can go behind unanimous verdict of jury and substitute its own verdict)

[See (73) 19 Suth W L Cr 57 (57) *Queen v Jaffer Ali*]



an appeal lies to the High Court on a matter of fact as well as a matter of law. See S 419 and Notes thereunder.

The section does not confer a right of appeal from the verdict and judgment in a trial held at the sessions of the High Court⁷ But a Judge of the Sind Chief Court sitting in its Sessions Court jurisdiction is a *Sessions Judge* and an appeal lies to the Chief Court against a conviction recorded on a trial held before him sitting with a jury⁸ See also S 266, Note 4 Under S 411A an appeal now lies from the verdict and judgment in a trial held at the sessions of the High Court

2 Trial by jury. — An appeal under this section in cases tried by jury lies on matters of law only and the appellate Court cannot go into the facts of the case¹ Where facts are in issue the verdict of a jury is absolutely final and must be given effect to The section jealously guards the right of the accused to the finality of the verdict of the jury, so that an appellate Court cannot, by going into a question of fact, substitute its own opinion for the verdict of the jury.²

7. (33) 22 AIR 1935 Rang 67 (69) . 13 Rang 101 : 36 Cri L Jour 593 (FD), *H. W. Scott v. Emperor*
8. (44) 31 AIR 1944 Sind 65 (66) : I L R (1944) Kar 239 : 45 Cri L Jour 505 : 212 Ind Cas 79 (DB), *Emperor v. Hundraj Lachiram*.
(39) 26 AIR 1939 Sind 209 (211, 212) 41 Cri L Jour 23 : ILR (1940) Kar 249, *Sewaram v. Emperor*

Note 2

1. (45) 32 AIR 1945 All 182 (183, 184) : 1 L R (1945) All 127 : 46 Cri L Jour 687 : 220 Ind Cas 411, *Ghulam Husain v. Emperor* (Mere statements in the grounds of appeal that the charge to the jury is full of misdirections and non-directions and that the verdict of the jury is perverse, are not sufficient to clearly foreshadow the point of attack against the charge to the jury, which the grounds should indicate.)
(43) 30 AIR 1943 Bom 74 (75) : 44 Cri L Jour 411 : 205 Ind Cas 411 (DB), *Malaprasad Shikharai v. Emperor*.
[See (66) 6 Suth W R Cr 1 (1), *Queen v. Grishchunder Dundoo* (A person tried by a jury is entitled to an appeal on the facts if the offence was committed before the passing of the Penal Code.)]
2. (44) 31 AIR 1944 Cal 39 (40) : 45 Cri L Jour 468 : 211 Ind Cas 624 (DB), *Abdul Jabbar Molla v. Emperor*. (Jury has to decide whether identification evidence is satisfactory — Direction by Judge to reject such evidence — Jury still convicting — High Court cannot interfere with verdict.)
(43) 30 AIR 1943 Mad 527 (529) : 44 Cri L Jour 766 : 208 Ind Cas 265, *Vridichand Sorcar v. Emperor*
(39) 26 AIR 1939 Bom 437 (439, 460) : 1 L R (1939) Bom 648 : 41 Cri L Jour 176, *Emperor v. Jinas Soma*. (To lightly interfere with verdict of a jury with which Sessions Judge has agreed would be to reduce trial by jury in India to a farce.)
(37) 24 AIR 1937 All 193 (196) : 1 L R (1937) All 419 : 38 Cri L Jour 465, *Manjia v. Emperor*.
(17) 4 AIR 1917 All 173 (175, 176) : 39 All 348 18 Cri L Jour 491, *Ikarammuddin v. Emperor* (Appellate Court cannot look at evidence and find accused guilty of offence with which he was not charged and which was not laid before jury.)
(94) 1894 Rat 730 (732), *Queen Empress v. Dalappa* (The section gives finality to verdict of jury when there has been no error of law nor misdirection.)
(01) 25 Bom 680 (692) : 3 Bom L R 278 (FD), *King-Emperor v. Parbhushankar*. (The words in section "where trial was by jury" mean "where trial in fact was by jury" and not "where trial should have been by jury")
(19) 6 AIR 1919 Cal 514 (518) : 46 Cal 895 : 20 Cri L Jour 371, *Rameshchandra v. Emperor*. (Evidence prejudicial to accused wrongly admitted—Judge directing jury to discard it—Verdict of guilty by jury—Conviction should be set aside.)
(84) 10 Cal 1029 (1030), *Gort of Bengal v. Parameshwar Mullick*.
(94) 21 Cal 935 (976, 977), *Wafadar Khan v. Queen Empress*.
(97) 25 Cal 230 (231), *Ali Fakir v. Queen-Empress*.
(11) 12 Cri L Jour 193 (195) 10 Ind Cas 684 (Cal), *Rashidazzaman v. Emperor*.
(1865) 2 Suth W R Cr 5 (5), *Queen v. Gopal Dass*.
(67) 8 Suth W R Cr 3 (3), *Queen v. Mt. Bhooldea*.
(70) 13 Suth W R Cr 26 (26), *Queen v. Shuruffooddeen*.
(71) 16 Suth W R Cr 19 (20), *Queen v. Rutton Dass*. (No evidence before jury on which accused could be convicted — Verdict of guilty cannot be sustained.)
(72) 18 Suth W R Cr 45 (46), *Queen v. Nidheeram Bagdee*.
(90) 14 Mad 36 (37, 38) : 2 Weir 390, *Queen-Empress v. Chinna Tetan*.

The words "where the trial was by jury" mean "where the trial was *in fact* held by jury" and not "where the trial ought to have been held by jury" and, therefore, where the accused is tried by a jury in a case which ought to have been tried with the aid of assessors, trial will be treated as one by a jury and no appeal lies except on a matter of law.³ The contrary view held in the undermentioned decisions⁴ can no longer be considered to be good law.

Where an accused person is tried on one charge by a jury and on another charge by the Judge with the aid of the same jury as assessors an appeal will lie against conviction on the latter charge on a question of *fact* as well as on a question of law.⁵ In the undermentioned case⁶ it was held that where the charge tried by the jury and the charge tried by the Judge with the aid of the same jury as assessors are so connected together that if the facts relating to the former charge cannot be challenged, the conclusion will be irresistible that the conviction on the latter charge is properly made, the appellant can challenge the facts on which his conviction on the former charge is based. As appeals in cases tried by a jury can only be on a point of law every petition of appeal should state

(64) 2 Weir 488 (489), *In re Golt Pleader* (Want of accuracy in stating effect of evidence may amount to misdirection in law)

(31) 18 AIR 1931 Oudh 171 (171) 6 Luck 705 32 Cri L Jour 858, *Mangal Singh v Emperor* (Severity of sentence is matter of law)

(34) 21 AIR 1934 Oudh 122 (122) 35 Cri L Jour 566 *Shubrat v Emperor*.

(31) 18 AIR 1931 Pat 379 (381) 11 Pat 145 32 Cri L Jour 1197, *Aghore Dutta v Emperor*

(98) 2 Cal W N 702 (718) *Queen Empress v Bhairab Chunder*.

(29) 15 AIR 1929 Mad 1186 (1189) 51 Mad 956 30 Cri L Jour 317 (TB), *Veerappa Goundan v Emperor*

[See (66) 5 Suth W R Cr 40(40) *Queen v Hulloodhur Ghosh* (Rejection of appeal preferred out of time)]
Also see S 493 Note 40.

3 (38) 25 AIR 1938 Cal 51 (57 65 66) 1LR (1938) 1 Cal 290 39 Cri L Jour 161, *Goloke Behari v Emperor* (Per McNair J Biswas J contra)

(37) 24 AIR 1937 Cal 750 (759, 760) 1 LR (1937) 2 Cal 315 39 Cri L Jour 182 *Ekabbar Mandal v Emperor*

not invalid—Accused who does not take objection in trial Court cannot complain afterwards)

(98) 25 Cal 555 (557) *Surja Kurmi v Queen Empress*

(79) 4 Cal L Rep 405 (409) *In re Bhootnath Dey*

[See (31) 1931 Mad W N 109 (130) *Ramanna v Emperor* (Obiter)]

Also see S 269 Note 3

4 (72) 18 Suth W R Cr 59 (59) *Queen v Narkoo*

(75) 21 Suth W R Cr 30 (30) *Queen v Doorga Churn Shome* (Judge's charge was treated as his judgment)

5 (38) 25 AIR 1938 Cal 51 (57 65 66) 1LR (1938) 1 Cal 290 39 Cri L Jour 161, *Goloke Behari v Emperor*

6 (41) 25 AIR 1941 Nag 94 (95) 1LR (1941) Nag 157 42 Cri L Jour 154 191 Ind Cas 371 (DE), *Meenjhal v Emperor* (In a case when a man is on trial for his life every ambiguity in the law of

procedure should be resolved in his favour)

lower Court)

[See (70) 14 Suth W R Cr 37 (37) *Queen v Abdool Kareem*]

5 (18) 5 AIR 1918 Mad 871 (872) 18 Cri L Jour 346, *Farappa Goundan v Emperor*

6 (41) 25 AIR 1941 Nag 94 (95) 1LR (1941) Nag 157 42 Cri L Jour 154 191 Ind Cas 371 (DE), *Meenjhal v Emperor* (In a case when a man is on trial for his life every ambiguity in the law of

procedure should be resolved in his favour)

distinctly in what respect the law has been contravened. It is not for the Court to through the records and find out any illegality that may arise⁷

3 "On a matter of law only"—A misdirection or non direction by the to the jury is a matter of law. If the verdict has been influenced by evidence, which inadmissible or proceeds on no evidence at all, this is again a matter of law¹. Reception of inadmissible evidence which has not influenced the verdict does not the trial²

The sufficiency or otherwise of evidence is not a matter of law, whether the believes the evidence to be sufficient or not is a pure question of fact³

The explanation to the section recognizes another matter of law, namely: alleged severity of a sentence⁴. See also the undermentioned cases⁵

4. Sub-section (2) — This subsection was added in 1923. Before that it held in a series of cases¹ that where in a trial by jury, of several accused, one accused was sentenced to death and others to lesser punishments, and all of them appeal the High Court, on a reference under s 374 in respect of the person sentenced to death could go into the facts, but in dealing with the appeals of other persons, they must

7 (45) 32 AIR 1945 All 162 (164) 11LR (1945) All 127 46 Cri L Jour 687 220 Ind Cas 411, *G. Husain v Emperor* (It is not enough to state in the grounds of appeal that the charge to the jury, full of misdirections and non-directions and the verdict of the jury is perverse. The line and point of attack must be clearly foreshadowed)

(1664) 1 Sath W R Cr 21 (21), *Queen v Gopaul Bhareewala*
Also see S 419, Note 6

Note 3

1 (30) 17 AIR 1930 All 24 (26) 31 Cri L Jour 33, *Emperor v Mohammad*
(103) 27 Bom 626 (632) 5 Bom L R 599, *Emperor v Vaman Shivram*
(67) 7 Sath W R Cr 6 (6), *Queen v Chand Bagdee* (Conviction on no evidence)
(71) 15 Sath W R Cr 46 (47), *Queen v Bahar Ali Kahar* (Total absence of all evidence to show prisoner had committed crime)

(90) 17 Cal 642 (667) (FB), *Queen Empress v O'Hara* (Judge read to jury statements which have been admitted in evidence)

(32) 19 AIR 1932 Cal 295 (296) 33 Cri L Jour 477, *Gulam Asghia v Emperor*
(16) 3 AIR 1916 Mad 851 (854) 39 Mad 449 16 Cri L Jour 294, *Annabi Muthurayan v Emperor* (Admission of inadmissible evidence without warning jury)

2 (14) 1 AIR 1914 P C 155 (164) 15 Cri L Jour 320 (P C), *Ibrahim v Emperor*
(30) 17 AIR 1930 Pat 247 (251) 9 Pat 474 31 Cri L Jour 721, *Sohrai Sao v Emperor*
3 (1665) 2 Sath W R Cr 3 (3), *Queen v Muddun Sardar* (Deposition of single credible witness sufficient in law)

4 (31) 18 AIR 1931 Oudh 171 (171) 6 Luck 705 32 Cri L Jour 858, *Mangal Singh v Emperor* (Conviction under Ss 366/368, Penal Code — Sentence of seven years' rigorous imprisonment)

Emperor (

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(Burden of proving innocence put on accused — It is error of law)
(37) 24 AIR 1937 All 195 (196) 11LR (1937) All 419 38 Cri L Jour 485, *Manja v Emperor* (i supposing that he had no jurisdiction to disagree with verdict of jury—it is a matter of law)

(36) 23 AIR 1936 Oudh 268 (269) 37 Cri L Jour 749, *Bundesha v Emperor* (Sessions Judge jurisdiction to hold inquiry into the alleged misconduct of juror. The question whether the Judge should or should not hold an inquiry is a matter within his discretion and the High Court will not interfere appeal unless it is convinced that the Sessions Judge exercised a wrong discretion)

(24) 15 AIR 1929 Cal 827 (828) 30 Cri L Jour 51, *Abdul Bariq v Emperor* (Jury practically abdicated their functions in favour of the Judge—Retrial ordered)

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confined to matters of law and could not enter into the facts. This anomaly has been removed by the insertion of this sub section which provides that when in the case of a trial by jury, one person is sentenced to death, and another to lesser punishment, the second accused may appeal on a matter of fact as well as on a matter of law.²

See also the case noted below.³

419.* Every appeal shall be made in the form of a petition in

Petition of appeal writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367

Synopsis

- | | |
|--------------------------------------|---|
| 1 Scope of the section | 8 Withdrawal of appeals See Note 8 on S 423 |
| 2 Copy of judgment to accompany | 9 Limitation See A I R Commentaries on the Limitation Act 2nd (1942) Edn Arts 150 154 and 185 |
| 3 Who can present petition of appeal | 10 Stamp |
| 4 Presentation to be in person | 11 Petition in non-appealable cases |
| 5 To whom appeal should be presented | 12 Territorial jurisdiction |
| 6 Contents of petition | |
| 7 Form of petition | |

NOTE to the Synopsis See the Notes indicated for the following topics

- | | |
|---|---|
| Absence of completed judgment See Note 2 | Irrelevant or scandalous matters about trial Judge See Note 6 |
| Accused to be asked of their intention to appeal See Note 9 | Legislative changes See Note 8 |
| Accused with conflicting interests — No appeal by same pleader See Note 3 | Limitation in civil and criminal appeals See Note 9 |
| Additional points by supplementary petition See Note 6 | Memo of appearance See Note 3 |
| Allegation against capacity of jurors—Affidavit in time to file counter-affidavit before hearing See Note 7 | No verification of appeal petition needed See Note 7 |
| Appeal out of time See Note 9 | Non mention of plea in memo of appeal—Allowed if whole trial vitiated See Note 6 |
| Dispensation with copy of judgment See Note 2 | Putting in petition box — No presentation See Note 4 |
| False statement in appeal petition — No offence See Note 3 | Rejection of appeal for want of copy of judgment See Note 2 |
| Form of appeal applicable to jail appeals also See Note 1 | Sending by post See Note 4 |
| Form even if no grounds See Note 7 | Single judgment in joint trial of several accused—Single or separate appeals See Note 7 |
| Illegalities in a trial by jury See Note 6 | Three accused — Appearance by a pleader — Presentation by another pleader for one accused only See Note 3 |

1 Scope of the section — Section 420 deals with the presentation of appeals from jail. This section is general and prescribes the form in which a petition of appeal, whether from jail or otherwise is to be presented.¹

1882 S 419 1872 S 275 1861 S 416

2 (37) 21 AIR 1937 Sind 162 (154) 31 Sind L R 82 35 Cri L Jour 808 Khadim v Emperor (See on 376 of the Code should be read with S 418 (2))

maintain the conviction)

Section 419 — Note 1

1 (91) 13 AU 171 (179) 1691 AU W 49 (FD), Queen-Express v Pohn

Where an appeal is presented through the officer in charge of the jail under S 470 and is dismissed summarily under S 491 no further appeal can be brought under this section. Nor does an appeal lie from the order of the High Court dismissing the previous appeal under S 421³. See also Note 9 on S 421.

2 Copy of judgment to accompany — Every petition of appeal should normally be accompanied by a copy of the judgment¹. The absence of a complete judgment in the record is however not a ground for refusing to entertain the appeal².

Where a petition of appeal is not accompanied by a copy of the judgment the appeal may be rejected³.

The Court may however in its discretion in proper cases *dispense with* the copy of the judgment⁴. Where three accused preferred a joint appeal with a single copy of judgment but furnished stamps necessary for three separate copies of judgment it was held that the Court should in exercise of the discretion dispense with separate copies of judgment and hear the appeal⁵. Similarly where the full order appealed against was furnished along with one of the connected applications it was held that the production of the judgment in other applications might be dispensed with⁶.

3 Who can present petition of appeal — Under the Code of 1872 there was no specific provision as to who should present an appeal and it was held that any person authorized by the appellant could present it¹. Under the Code of 1887 and the present Code only the *appellant* or his *pleader* can make such presentation. The word *pleader* includes a *mukhtear* appointed with the permission of the Court² and he is entitled to present an appeal on behalf of his party. Presentation by a pleader's clerk is considered equivalent to a presentation by the pleader and is valid³. But a person who is not a pleader's clerk and one over whose conduct and action he has no control has no power to present an appeal on behalf of the party⁴. Where a petition of appeal on behalf of three accused was signed under a *vakalat* by their pleader but the presentation was made by another pleader who had a *vakalat* only from one of the accused it was held that the appeal should be treated as properly presented⁵.

Where two accused have conflicting interests they should not appeal through the same pleader⁶.

2 (40) 27 AIR 1940 Oudh 371 (375) 15 Luck 703 41 Cr L Jour 682 188 Ind Cas 760 *Raj Kumar v Emperor* (Appeal from jail summarily dismissed — Order of dismissal signed and dated though not sealed — Subsequent appeal through counsel is not maintainable)
(40) 27 AIR 1940 Oudh 369 (371) 41 Cr L Jour 711 15 Luck 669 *Jodha v Emperor*

peror
n peror

Note 2

- 1 See (74) 1874 Rat 82 (89 83) (Copy in prisoner's own language is sufficient)
- 2 (79) 2 We r 438 (439)
- 3 (34) 21 AIR 1934 All 206 (207) 56 All 299 35 Cr L Jour 441 *Dansgopal v Emperor* (Order rejecting appeal is not judgment within meaning of S 369)
- 4 (29) 16 AIR 1929 Lah 614 (614 615) 30 Cr L Jour 235 *Paramanand v Mohan Lal*
- 5 (03) 5 Bom L R 704 (704) *Emperor v Sitaram*
- 6 (29) 16 AIR 1929 Lah 614 (614) 30 Cr L Jour 235 *Paramanand v Mohan Lal*

Note 3

- 1 (77) 1 Mad 304 (304) 2 Weir 469 *In re Subba Aitala*
- (81) 6 Bom 14 (15) *Imperial v Shitram Gundu*

peror

- 4 (97) 21 Mad 114 (115) 2 Weir 470 *Empress v Ramaswami*
- 5 (97) 2 Weir 470 (471) *In re Vithu Mera Latai*
- 6 (36) 21 AIR 1936 Lah 853 (860 861) 17 Lah 771 39 Cr L Jour 115 *Mulhe v Emperor*
- (90) 1630 Pan Re No 13 Cr p 25 (25 26) *Hira v Empress*

such a plea, though not taken in the memorandum of appeal, will be allowed to be raised at the hearing of the appeal⁵

7 Form of petition — Even if the prisoners wish to state no grounds for their appeal still their appeal must, according to law, be in the form of a petition.¹ There is no provision of law which requires the petitioner to verify the petition of appeal²

Where appeals are filed by several persons convicted by a single judgment in a joint trial, they should, according to the Judicial Commissioner a Court of Nagpur be made separately³ The practice in the Chief Court of Oudh seems to be that such persons can file a single appeal with a single copy of judgment⁴ The Lahore High Court has also held that a joint appeal is legal where the interests of the accused are common⁵

Where the memorandum of appeal alleges that one of the jurors was hard of hearing, another ignorant of English and unable to follow the arguments in Court such facts should be supported by an affidavit before the appeal comes on for hearing in time so that the Crown could make the necessary enquiries and file counter affidavit⁶

8 Withdrawal of appeals — See Note 8 on Section 423

9 Limitation — See A I R Commentaries on the Limitation Act 2nd (1947) Edition, Articles 150 154 and 155

10. Stamp — The appeal petition presented by a pleader on behalf of an appellant in *duress* need not bear a court fee stamp as per clause 17 of s 19 of the Court fees Act¹ The appellants who are not in custody, cannot take advantage of the unstamped copy of the judgment of the lower Court which the appellants, who were in prison were entitled to use Those appellants who were not in custody, must affix the necessary stamp²

See also the A I R Commentaries on the Court fees Act 1st (1944) Edn, Section 19, Note 6

11 Petition in non appealable cases — Though a petition has been filed as an appeal where no appeal lies the High Court can deal with it as in revision¹

12 Territorial jurisdiction — Appellate jurisdiction existing at the time of presentation of an appeal is not lost by the subsequent transfer of territory¹

5 (31) 18 AIR 1931 Oudh 113 (113) 6 Luck 386 32 Cri L Jour 91 *Ram Lalan v Emperor*

Note 7

1 (70) 13 Suth W R Cr 69 (69) *Empress v Natto Gopal Paulit*

2 (79) 1879 Pan Re No 17 Cr p 45 (46) *Ghanaya v Empress*

(89) 12 Mad 451 (453) 1 Weir 113 *Queen Empress v Subbayya*

3 (27) 14 AIR 1927 Nag 48 (48) 27 Cri L Jour 1962 *Maharaj Singh Gond v Emperor*

4 (17) 4 AIR 1917 Oudh 329 (330) 18 Cri L Jour 512 *Mt Dalasha v Emperor*

5 (36) 23 AIR 1936 Lah 859 (860) 17 Lah 771 38 Cri L Jour 115 *Mulhe v Emperor*

6 (32) 19 AIR 1932 Pat 302 (303) 34 Cri L Jour 83 *Emperor v Rashbehari Lal*

Note 10

1 (18) 5 AIR 1918 Nag 125 (126) 14 Nag L R 77 19 Cri L Jour 494 *Emperor v Maroti Tels* (10 Cal 61 followed.)

(24) 11 AIR 1924 Rang 160 (160) 1 Rang 510 25 Cri L Jour 277, *In re Court fees Act S 19 (revd)*

(29) 9 AIR 1922 Upp Bar 14 (15) 23 Cri L Jour 121 4 Upp Bar Ral 72 *Jaganath v Emperor*

2 (82) 2 Weir 467 (467) *In re Venkata Konda Reddy*

Note 11

1 (05) 2 Cri L Jour 105 (106) 2 All L Jour 173 *Gajju v Emperor*

Note 12

1 (05) 2 Cri L Jour 105 (106) 2 All L Jour 173 *Gajju v Emperor* transfer of territory at not gone

Procedure when appellant in jail appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper appellate Court

1 "Copies accompanying the same" — A copy of the judgment should accompany appeals presented to jail officers under this section in the same manner as an appeal under § 419. Appeals not accompanied by such copies should not be forwarded to the appellate Court, but should be returned to the appellant¹. When a prisoner in jail applies through the Superintendent of the jail for a copy of judgment in order to prefer an appeal it is the Magistrate's business to procure and forward the copy applied for or to arrange that this should be done.* See Note 2 on Section 419.

2 Presentation to the officer in charge of the jail. — The presentation to the officer in charge of the jail is good and sufficient whatever delay there may be in forwarding the petition to the appellate Court¹ Every facility such as pen paper and ink should be given to the prisoner in jail to enable him to prepare his petition²

3 "Forward such petition and copies to the proper appellate Court" — A vacation Judge can hear and dispose of an appeal from jail¹ According to the Criminal Circulars issued by the Calcutta High Court, the officer in charge of the jail should not forward petitions of appeal from prisoners to the High Court in cases in which sentences or orders have already been passed by an appellate Court on appeal. In such cases parties should apply to the High Court by motion made by a pleader in open Court² According to the said Circulars the petition of appeal against sentences or orders passed by the Sessions Judge presented to officer in charge of the jail, should be forwarded by such officer direct to the High Court intimation of the fact being at once given to the Sessions Judge whose sentence or order is appealed against³ All communications from the officer in charge of the jail to the Sessions Judge relative to appeals of the prisoners to him should be made to the Judge direct and not through the District Magistrate who has no concern with the decision of the Sessions Judge in appeal and the appellate Court should certify its decision to the Magistrate from whose decision the appeal has been preferred and such Magistrate should inform the appellant in writing through the officer in charge of the jail of the result of the appeal⁴

4 Limitation — See A I R Commentaries on the Limitation Act 2nd (1947) Edition Articles 150 151 and 153

5 Stamp — See Note 10 on Section 419

6 Appointment of counsel in appeals from jail -- See the undermentioned case:

* 1952 \$ 420 1972 \$ 277 . 1981 \$ 419

Section 420 — Note 1

1 (67) 8 South W R Cr C r 7 (7) Criminal Circular No 9

2 (30 96) 1 Upp Bur Rul 5 (3 6) *Maung Za Kye v Queen Empress*
Note 2

(1) $\frac{1}{2}$

1 (23) 10 AIR 1973 Mad 496 (42-), 46 Mad 3-2 24 Cri L Jour 432 *Kunlammad Han v Employer*

2 (69) 12 South W R Cr Cr 5 (5) Criminal Circular Memo No. 8 of 1957

3 (6") 8 Soth W R Cr Cr 5 (5) Criminal Circular No. 9 of 1967

4 (69) 12 Suth W R Cr Cr 1 (1) Criminal Circular No. 6 of 1969

1 (27) 14 AIR 1927 Oudh 369 (375) 2 Luck 631 29 Cr 1 Jour 129 *Emm. Jevard v. Emperor*
(Practice of not allowing applicants from jail to argue in person is in their interest.)

421.* (1) On receiving the petition and copy under section 419 or section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

Provided that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so

Synopsis

- | | |
|---|---|
| 1 Scope and applicability of the section. | 6 "May call for the record of the case" — Sub-section (2) |
| 2 "Shall peruse the same." | 7 Judgment and record of reasons |
| 3 "May dismiss the appeal summarily" | 8 Withdrawal of appeal See Note 8 on S 423 |
| 4 "No sufficient ground for interfering" | 9 Review See Note 1 on S 430 |
| 5 Right of appellant to be heard — <i>Proviso</i> . | 10 Revision |
| | 11 Appeal |

NOTE to the Synopsis See the Notes indicated for the following topics

Admission of appeal — No bar to consideration of appealability later See Note 1	Immediate dismissal of barred appeal See Note 2
Appeal—Admission, as to one charge and rejection as to other—Undesirable See Note 1	No admission of appeal as to sentence only See Note 1
Appellant to be heard before dismissal as barred See Note 2	No alteration of sentence in dismissing appeal summarily See Note 1
Applicability to convictions and acquittals alike See Note 1	No re-opening of whole appeal after considered decision of some points See Note 1
Co-accused—Summary rejection though admission of appeal by the other See Note 3	No summary rejection after admission See Note 1
Dismissal under this section and one under S 423 —Difference See Note 1	Notice of hearing to be given See Note 5
Disposal of appeal on merits even in the absence of appellant See Note 2	Right of hearing in jail appeals under S 420 See Note 5
Hearing before admission — If affects right of hearing after sending for records See Note 6	Sending for record—Not admission of appeal See Note 6
Hearing includes right of reply and reference to copies of evidence See Note 6	Summary dismissal — Remand on appeal therefrom See Note 7
	What is not reasonable opportunity of hearing See Note 5
	What is reasonable opportunity See Note 6

1 Scope and applicability of the section. — This section gives an appellate Court a summary power of dismissing an appeal, if after perusing the petition and the copy of judgment, and, if necessary, the records and if after hearing the appellant or his

* Code of 1882 S 421 — Same

Code of 1872 S 273

278 The Appellate Court

Rejection

it considers that there is no sufficient ground for questioning the correctness of the decision or for interfering with the sentence or order appealed against

Before rejecting the appeal the Court may call for and peruse all or any part of the proceedings of the lower Court, but shall not be bound to do so

Code of 1851 S. 417

417. It shall be competent to the Appellate Court to reject the appeal if on a perusal of the petition of appeal and the copy of the sentence or order appealed against and after hearing the appellant or his counsel or agent if they appear the Court shall consider that there is no sufficient ground for questioning the correctness of the decision or for interfering with the sentence or order appealed against. Before rejecting the appeal the Court may call for and peruse any part of the proceedings of the lower Court, but shall not be bound to do so

pleader, it considers that there is no sufficient ground for interference¹ The essential difference between the dismissal of an appeal under this section and its dismissal under S 423 is that in the latter case the appeal is disposed of after *trial* whereas in the former, the Court by summarily dismissing it refuses to *try it at all*² Even where an appeal has not been summarily dismissed, the Court is not precluded, when it hears the appeal under S 423 from deciding whether an appeal lies³

The provisions of this section apply both to appeals presented under S 417 against orders of acquittal and to other appeals⁴ As to whether this section applies to appeals under S 476B, see Note 4 on Section 476B

The appellate Court, while acting under this section cannot dispose of the appeal piecemeal So where an appellent was convicted at one trial on two separate charges, and the appellate Court admitted the appeal with regard to one charge and summarily dismissed the appeal with regard to the other it was held that the procedure though not illegal, was unusual and undesirable⁵

An appeal can be dismissed summarily only when the appellate Court considers that there is no sufficient ground for interfering Hence where the appellate Court considers that there is sufficient ground for interfering with regard to the sentence though not with the conviction it is not a case for summary dismissal of the appeal⁶ Nor can the appellate Court admit an appeal with restrictions Thus, it cannot admit an appeal with regard to sentence only⁷ The whole appeal will be open to consideration for the final hearing⁸ The reason is that the terms of the section exclude the possibility of partial summary dismissal *e g* in so far as the conviction is appealed against⁹

The Bombay High Court has held that when the High Court on a criminal appeal considers that the conviction should be maintained but that the sentence is too severe the difficulty of having to hear the entire appeal unnecessarily can be avoided by first reducing the sentence in the exercise of its revisional jurisdiction and then dismissing the appeal summarily on the ground that there is no further cause for interference¹⁰

But it has been held that where the other points have been specifically considered and a definite order of dismissal on other points has been passed the whole appeal cannot be re opened again¹¹

Section 421 — Note 1

- 1 (83) 5 All 396 (387) 1883 All W N 72 *Empress v Sajwan Lal*
- (81) 1881 Pan Re No 31 Cr p 81 (82 83) *Budruddin v Empress*
- (20) 7 AIR 1920 Pat 663 (665 666) 21 Cr L Jour 609 *Panchi Mandar v Emperor*
- 2 (90) 6 C P L R Cr 24 (26) *Empress v Patiram*
- 3
- 4
- 5
- 6 Emperor
(PC) Emperor
- 7 *Daku Paut*
- 7 (47) 29 AIR 1912 Pat 46 (47) 43 Cr L Jour 24 196 Ind Cr 549 *Sudhar Kumar Neogi v Emperor*
- (37) 24 AIR 1937 Bom 149 (149) 38 Cr L Jour 572 1 L R (1937) Lom 365 *Dhanor Fils v Emperor* (Practice of marking appeals as admitted with regard to sentence only not in accordance with the Code)
- (35) 22 AIR 1935 1 C 89 (91) 36 Cr L Jour 838 62 Ind App 129 62 Cal 943 (PC) *Emper v v Daku Raut*
- 8 (14) 1 AIR 1914 Cal 276 (277) 14 Cr L Jour 420 (187) 41 Cal 406 *Nafar Sheikh v Emperor*
- (25) 12 AIR 1915 Pat 453 (454 455) 41st 254 26 Cr L Jour 807 *Gajra Singh v Emperor*
- (31) 18 AIR 1931 Pat 351 (351) 32 Cr L Jour 1017 *Fajlu v Emperor*
- Also see S 407, Note 1 S 417 Note 1 and S 423 Note 7
- 9 (35) 22 AIR 1935 1 C 89 (91) 36 Cr L Jour 838 62 Ind App 129 62 Cal 943 (PC) *Emper v v Daku Raut*
- 10 (37) 24 AIR 1937 Bom 149 (149) 38 Cr L Jour 572 1 L R (1937) Lom 365 *Dhanor Fils v Emperor*
- 11 (33) 20 AIR 1933 Pat 33 (39) 11 Pat 69 34 Cr L Jour 112 *Kulj P D v Emperor*

While summarily dismissing an appeal under this section, an appellate Court cannot alter¹² or enhance¹³ or reduce¹⁴ the sentence or modify the order appealed from in any other way¹⁵

An appeal once admitted cannot be dismissed summarily under this section¹⁶

Unless an appeal is dismissed summarily, the appellate Court is bound to take notice under S 422 and to send for the record of the case under S 423¹⁷

The dismissal of an appeal temporarily, as for instance, the dismissal of an appeal till the decision of a civil suit, is unknown to law. If necessary, the appellate Court can postpone the decision of an appeal in a proper case¹⁸

2 "Shall peruse the same." — There is no provision in the Code for the dismissal of an appeal on account of the non appearance of the appellant or his pleader. The appellate Court is bound, even in the absence of the appellant or his pleader, to peruse the judgment and the record, if it has been sent for, and decide the appeal judicially¹

The section contemplates an appeal that can be properly put upon the file of the Court. Therefore, an appeal preferred out of time and without any explanation of the delay, may be dismissed at once,² but if the appellant is represented by a pleader, he

v *Empress*

No power by S 26 of Act 11 [XV] of 1874, to

enhance sentence)

(77) 1877 Pnn Re No 14 Cr, p 31 (31), *Ganda Singh v Dhana*

14 (86) 1886 Rat 304 (305), *Queen-Empress v Gourind Rao* (Case should be reported to High Court or

Goalin
ish Kumar

62 Ind App 129 (P C)

Emperor v Dahu Raut (Privy Council pointed out the inappropriateness of using the expressions 'admitted' and 'admission' in reference to appeals which are not summarily dismissed)

Also see S 423, Note 2

18 (18) 5 AIR 1918 All 247 (248) 19 Cri L Jour 358 *Lachhmi Narain v Bindrabai*

Also see S 430, Note 2

Note 2

1 (38) 25 AIR 1938 Sind 171 (172) 1 L R (1939) Kar 204 39 Cri L Jour 890, *Emperor v Balumal Hotchand* (Judge must use independent discretion after reading copy of judgment.—Failure of accused to prosecute appeal is no ground for summary dismissal)

(35) 22 AIR 1935 Pat 460 (460) 37 Cri L Jour 93 *Gulab Das v Emperor*

(23) 10 AIR 1923 All 175 (175) 24 Cri L Jour 662, *Ramchandrar v Emperor*.

Appeal dismissed on account of non

Emperor

(30) 17 AIR 1930 Lah 659 (659) 11 Lah 242 31 Cri L Jour 979, *Roora v Emperor*

(09) 9 Cri L Jour 553 (554) 2 Ind Cas 247 5 Nag L R 76, *Rafanchand v Emperor*

(19) 6 AIR 1919 Pat 51 (56) 20 Cri L Jour 271, *Shambehara Singh v Emperor*

Emperor

v Emperor

King v Nga Da Sein
in addition to judgment

Also see S 423, Note 2

2 (75) 1875 Rat 90 (90) *Reg v Gulab Karim*

should be given an opportunity of being heard in the matter of determining whether the delay should be excused and the appeal admitted.³

3. "May dismiss the appeal summarily." — The powers conferred by this section, on the appellate Court, should be exercised sparingly and with great caution¹ and with judicial discretion² Where important or complicated questions of fact and law are involved, or where disputed questions of title to immovable property are involved, the Court should not summarily dismiss an appeal but should send for the record and hear the appeal fully and decide³ It is however not *illegal* to do so⁴

The fact that the appeal of one co accused has been admitted does not take away the power of the Court to dispose of the appeal of another accused summarily⁵

4. "No sufficient ground for interfering" — Unless the Court is satisfied that there is no sufficient ground for interfering in accordance with the relief sought in the appeal, the appeal cannot be dismissed *summarily* under this section¹ As to whether the appellant is bound to satisfy the Court that there is sufficient ground for interfering with the conviction, see Note 14 on S 423

5 Right of appellant to be heard—Proviso —The proviso gives an appellant or his pleader, in cases of appeals filed under S 419, the right to a reasonable opportunity of being heard in support of the appeal¹ The proviso, by its words, restricts this right to

3 ('27) 14 AIR 1927 Bom 445 (446) 28 Cri L Jour 653, *Emperor v Nurudin*

Note 3

1 ('86) 8 All 514 (515) 1886 AD W N 177, *Queen Empress v Ram Narain*, (Reasons, however concise, should be given)

(22) 9 AIR 1922 Pat 552 (552) 24 Cri L Jour 477, *Padarath Kurmi v Emperor*.

(33) 20 AIR 1933 Pat 160 (160) 34 Cri L Jour 1017, *Mt Thakuri v Emperor*

2 ('18) 5 AIR 1918 Cal 106 (106) 19 Cri L Jour 228, *Kailash Chandra v Emperor*

(10) 11 Cri L Jour 631 (632) 8 Ind Cas 379 13 Oudh Cas 309, *Aman Ali v Emperor* (Discretion should be exercised upon sound and reasonable lines)

(82) 1892 Pun Re No 35 Cr, p 42 (46), *Lal Khan v Empress*

3 ('97) 1897 Rat 916 (917) *Queen Empress v Adam Isaq*

(18) 5 AIR 1918 Cal 106 (106) 19 Cri L Jour 228, *Kailash Chandra v Emperor*

(20) 7 AIR 1920 Cal 891 (892) 22 Cri L Jour 349, *Rahimadda v Emperor*

(06) 4 Cri L Jour 57 (57) 29 Mad 236, *Rangachari v Emperor* (Conviction based on evidence of witnesses whose credibility is impeached by accused on reasonable grounds)

(24) 11 AIR 1924 Mad 895 (895) 26 Cri L Jour 411 48 Mad 305, *In re Turka Hussain Sahib*

(18) 5 AIR 1918 Pat 653 (654) 19 Cri L Jour 209 3 Pat L Jour 389, *Sukhdeo Pathak v Emperor*.

r (Credibility of pro-

(06) 10 Cal W N cxxxv (cxxxvi) *Damra v Emperor* (Impropriety of summary dismissal, having regard to nature of defence)

Also see Note 6

4 ('31) 18 AIR 1931 Cal 264 (264) 32 Cri L Jour 568, *Safar Ali v Emperor*

5 ('05) 5 Cal W N 332 (334), *Jagat Chandra Sarma v Lal Chand Das*

Note 4

1 ('35) 22 AIR 1935 P C 89 (92) 62 Cal 983 36 Cri L Jour 838 62 Ind App 129 (PC), *Emperor v Daku Pant* (Appellate Court thinking that conviction should stand but that sentence may be too severe — Appeal should not be dismissed summarily)

Note 5

1. ('23) 12 AIR 1925 Lah 355 (356) 26 Cri L Jour 1169, *Muhammad Sadiq v Emperor*

(29) 16 AIR 1929 Nag 150 (151) 30 Cri L Jour 791, *Chandra Shekar v Rajaram*

(70) 1870 Rat 29 (30), *Reg v Bechar Palsambar*

(Appex-

cases coming under S 419 and, therefore, does not apply to appeals presented under S 420 from jail. Hence in the cases of jail appeals, the Court can summarily dismiss the appeal on perusal of the papers without calling upon the appellant to appear.² But although a convicted person presenting his appeal from jail has no right to be heard in person under this section still, whenever the appellate Court considers it desirable that the accused should be heard, it has power to direct the production of the prisoner before it for disposing of the appeal.³

Where, however, the appellant from jail has also preferred an appeal through a pleader the appellate Court is not competent to dismiss the appeal without giving the pleader an opportunity of being heard.⁴

Under the proviso, the opportunity that is to be given of being heard should be reasonable. Reasonable opportunity cannot be said to have been given to the appellant or his pleader in the following cases, viz:

- (1) Where the appellate Court calls upon the pleader to argue the appeal on the same day that it is presented, and refuses to grant him time to acquaint himself with the evidence in the case.⁵
- (2) Where on the presentation of a petition by a pleader, time is wanted for some other pleader to argue the case but the Court calls on him to argue it himself then and there.⁶
- (3) Where an appeal signed by a pleader is presented in person by the appellant and the Court without giving time for the pleader to come and argue the case, forthwith calls upon the appellant himself to argue.⁷

But there is nothing in the section to prevent the appellate Court from hearing the appellant's pleader at the time of presentation, if the pleader himself desires to do so. No further opportunity need be given in such a case.⁸

As to what is reasonable time, it has been held that at least a week's time should be given.⁹ Where an appeal was filed in the headquarters of an appellate Court on 26th July 1875 and notice was given for hearing on 28th July 1875 at a place many miles from

(00) 4 Cri L Jour 57 (57) 29 Mad 236 *Rangachariu v Emperor* (Memorandum of appeal signed by pleader and presented by appellant—Reasonable opportunity to pleader to appear and argue should be given)

Also see S 423 Note 9

2 (38) 20 AIR 1938 Bom 279 (281) 89 Cri L Jour 578 11LR (1938) Bom 357 *Jalam Bharatsingh v Emperor* (Per Beaumont C J — General rule that no one should be condemned unheard cannot apply to appeal)

(91) 13 All 171 (180 187) 1891 All WN 48 *Queen Empress v Pokpi*

(27) 14 AIR 1927 Sind 223 (223) 20 Sind L R 189 27 Cri L Jour 933 *Loung v Emperor*

(23) 10 AIR 1923 Mad 476 (432) 46 Mad 382 24 Cri L Jour 439 *Kunhammad Haji v Emperor*

3 (38) 25 AIR 1938 Bom 279 (280 281) 39 Cri L Jour 578 11LR (1938) Bom 357, *Jalam Bharatsingh v Emperor*

4 (06) 4 Cri L Jour 373 (373) 3 All L Jour 693 1906 All WN 303 *Bhauani Dehai v Emperor*

(26) 13 AIR 1926 All 178 (179) 48 All 298 26 Cri L Jour 1621 *Emperor v Mewa Ram*

5 (41) 28 AIR 1941 Mad 802 (802) *Nalakanta Ayyar v Thatha Pichasakaran* (Appeal closed on same day on which it is presented without giving adjournment to pleader for argument and accused acquitted—Order held should be set aside)

(05) 2 Cri L Jour 58 (59) 7 Bom L R 89 *Emperor v Gurshida Balapa*

(09) 9 Cri L Jour 401 (402) 30 Cal 385 1 Ind Cas 868 *Ramtolal Dusad v Emperor*

6 (09) 10 Cri L Jour 491 (492) 4 Ind Cas 37 (Mad) *In re Munchi Reddi*

(15) 2 AIR 1915 Upp Bur 11 (12) 2 Upp Bur Rul 57 16 Cri L Jour 533 *Nga Shue Himun v Emperor*

7 (06) 4 Cri L Jour 57 (57) 29 Mad 236 *Rangachariu v Emperor*

8 (27) 14 AIR 1927 Bom 361 (361) 28 Cri L Jour 467, *Emperor v Dasavanappa Dasata*

(30) 17 AIR 1930 Mad 863 (864) 53 Mad 865 32 Cri L Jour 40 *Narasimhamurthi v Emperor*

9 (21) 11 AIR 1924 Mad 835 (835) 49 Mad 385 26 Cri L Jour 411 *Turka Hussain Sahib v Emperor*

(09) 9 Cri L Jour 401 (402) 1 Ind Cas 868 36 Cal 385 *Ramtolal Dusad v Emperor*

the headquarters, it was held that the appellant was not given a reasonable opportunity¹⁰ Where a general notice was posted in the court-house, stating that appeals will be heard for admission only on the first Court day next after presentation, it was held that it was not in compliance with this section and a time should be fixed in each case and notice should be given to the appellant or his pleader, in such case¹¹

Where no notice at all is given to the appellant or pleader of the date to which the appeal is posted, it is a clear case where no opportunity has been given to be heard¹² No notice to the Crown is necessary before dismissing an appeal against a conviction summarily¹³

The further question arises whether, after the appellant or his pleader has been heard, and the Court then sends for the records of the case, the Court is bound to give opportunity to the appellant or his pleader to be heard again on the records All that the section requires is that the pleader shall have a reasonable opportunity of being heard, before there is a summary dismissal, and once having heard him, it is not obligatory on the Court to hear him again when it sends for the record, though it may do so, if the Court or the pleader desires it¹⁴ But a contrary view, namely, that the Court is bound to hear the pleader a second time after the record is sent for and received has been taken in the undermentioned cases¹⁵ It is submitted that the view is not justified by the language of this section and is also against the weight of authority.

The right of being heard in support will include the right of reply¹⁶ as well as the right to refer to certified copies of the evidence¹⁷

6. "May call for the record of the case" — Sub-section (2). — Under this sub section, the Court may, before dismissing an appeal, call for the record of the case but it is not bound to do so¹ Although a Judge would be acting within his powers in

10. (75) 24 Soth W R Cr 60 (60), *In re Huss Pershad*

11. (82) 5 Mad 11 (12) 2 Weir 472, *Malan v Queen*

12. (19) 6 AIR 1919 Pat 54 (55, 56) 20 Cr L Jour 271, *Shambehari Singh v Emperor* (When

13.
14.
15.

14. (39) 26 AIR 1939 Cal 541 (541, 542) 40 Cr L J 839 ILR (1939) 1 Cal 314, *Akramaddin v Emperor*
ending for record

¹ Dhattragram
ton v Emperor

(Dissenting from AIR 1917 Pat 331 18 Cr L Jour 639)

(27) 14 AIR 1927 Bom 361 (361) 28 Cr L Jour 467, *Emperor v Basantappa*

(08) 10 Cr L Jour 204 (204, 205) 2 Sind L R 39, *Emperor v Jitago*

15. (36) 23 AIR 1936 Cal 294 (295) 37 Cr L Jour 831, *Jitendra Nath Gorai v Emperor* (There is not much use in sending for the record if the Judge is not prepared to hear the pleader)

(32) 19 AIR 1932 Cal 397 (398) 33 Cr L Jour 602, *Hatem Ali v Emperor* (Doubts but follows on the grounds of stare decisis, AIR 1926 Cal 161 27 Cr L Jour 412 and AIR 1926 Cal 174 27 Cr L Jour 382, but it is not clear from the reports of the latter two decisions whether the pleader had already been heard once)

(17) 4 AIR 1917 Pat 331 (332) 18 Cr L Jour 639, *Jaydeo Rao v Kali Rao* (Dissenting from AIR 1930 Pat 499 9 Pat 764 31 Cr L Jour 1131)

(See also (26) 13 AIR 1926 Cal 161 (161) 27 Cr L Jour 412, *Surenbra Nath v Emperor* (In this case the High Court set aside the order of the lower Court on the ground that it had dismissed an appeal summarily without giving an opportunity to the appellant a pleader to be heard after the receipt of the records—but it is not clear whether the pleader had been heard already once)

(26) 13 AIR 1926 Cal 174 (175) 27 Cr L Jour 392, *Lalit Kumar v Emperor* (D.L.)

16. (11) 12 Cr L Jour 9 (9, 10) 9 Ind Cas 65 33 Cal 307, *Amanat Sardar v Nayaundra Dastur*

17. (08) 9 Cr L Jour 55 (56) 11 Oadh Cas 360, *Manga v Emperor*

Note 6

1. (31) 18 AIR 1931 All 555 (556) 33 Cr L Jour 252, *A'la'la Dastur v Emperor*.

rejecting an appeal without calling for the records, such a course is, ordinarily, very inconvenient and should not be adopted.² A Court is not required to call for the records in an appeal in which the only question is a mere question of fact and the judgment of the Court below is so plain and clear that calling for the record would be a mere waste of time, but it is not right to reject an appeal summarily when a point of law which, on the face of it, is not without substance, has been raised or when the judgment is a long and intricate one requiring, obviously, careful consideration.³

A mere sending for the record under this section is not tantamount to an admission of the appeal, as the Court has power to dismiss an appeal under this section even after calling for the record.⁴

When sending for the record, the Court should note in the order-sheet the points for which it is sending for the record.⁵

7. Judgment and record of reasons — A Court, when dismissing an appeal summarily under this section, is not required to write a judgment in conformity with the provisions of S 367.¹

Although the law does not fetter the discretion of an appellate Court in dismissing appeals summarily and it can do so without recording any reasons for so doing,² it is

- (30) 17 AIR 1930 Mad 663 (364) 53 Mad 865 32 Cri L Jour 40, *Narasimhamurthi v Emperor*
 2 (83) 1833 All W N 145 (145), *Empress v. Jugal Kishore*
 3 (18) 5 AIR 1918 Pat 653 (654) 19 Cri L Jour 209 : 3 Pat L Jour 339, *Sulhdeo Pathak v. Emperor*
 (82) 1832 Pun Re No 33 Cr, p 42 (46), *Lal Khan v Empress*. (Discretion allowed should be exercised on sound judicial principles)

Also see Note 3

4 See (75) 1 All 1 (5) (FB), *Queen v Gholam Ismail*

5 (39) 25 AIR 1939 Pat 12 (12, 13) 39 Cri L Jour 254, *Basdeo Koiri v Emperor*

Note 7

- 1 (40) 27 AIR 1940 Oudh 369 (371) 41 Cri L Jour 711 15 Luck 662, *Jodha v Emperor*
 (14) 1 AIR 1914 All 311 (311, 312) 36 All 496 15 Cri L Jour 512, *Kundan v Emperor*
 (16) 3 AIR 1916 All 197 (197) 39 All 393 17 Cri L Jour 309, *Lal Behari v Emperor*
 (95) 17 All 241 (242, 243) 1895 All W N 69 (FB) *Queen Empress v Nannhu*
 (93) 20 Bom 540 (541), *Queen Empress v Warubai*
 (93) 21 Cal 92 (96), *Rish Behari Das v Bal Gopal Singh*. (Court can reject appeal without the formality of either a recorded judgment or reasons of any description)
 (26) 13 AIR 1926 Lah 196 (197) 27 Cri L Jour 23, *Nasir Md Khan v. Hara Singh* (Not reasons of any description necessary)
 (02) 25 Mad 534 (534) 2 Weir 473, *King Emperor v Krishnappa*
 (17) 4 AIR 1917 Nag 203 (204) 13 Nag L R 169 18 Cri L Jour 993 *Ram Rao v Emperor*
 (93) 6 C P L R Cr 24 (24, 26), *Empress v Patiram*. (Order of summary rejection under S. 421 does not amount to judgment.)
 (10) 11 Cri L Jour 631 (632) 8 Ind Cas 379 13 Oudh Cas 309, *Aman Ali v Emperor* (Still the matter being one for discretion of the Court, it is very important that such discretion should be exercised upon sound and reasonable lines.)
 (18) 5 AIR 1918 Pat 597 (597) 19 Cri L Jour 151 2 Pat L Jour 693, *Gurubari Behara v Emperor*

Chinnathrahi
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 Court's judgment
 ter S. 421 and is

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advisable to record its reasons for summary dismissal, in view of the possibility of such an order being challenged by an application for revision, in which case they will show that the Court had really considered the points raised in the appeal and that the appeal was without foundation³. Therefore, though the appellate Court has power to dismiss an appeal summarily without giving reasons, if the High Court finds that the Court has not applied its mind to the consideration of the facts of the case, it will remand the case back to be heard on the merits⁴.

8 Withdrawal of appeal — See Note 8 on Section 423

9 Review — See Note 1 on Section 430

10 Revision — It is within the power of the High Court in revision to say, after considering the facts of each particular case, whether or not the appellate Court has exercised a proper discretion in acting under this section and either remand the appeal to the lower appellate Court to be heard on its merits¹ or to go into the case itself and

- (05) 2 Cr L Jour 344 (344) 9 Cal W N 623 *Nitya Pal v Beni Madhab*
 (29) 16 AIR 1929 Cal 773 (773) 31 Cr L Jour 474 *Kalachand Ghose v Tatu*
 (81) 1881 Pun Re No 31 Cr, p 81 (83) *Budruddin v Empress*
 (1900 02) 1 Low Bur Rul 270 (271) *Taung Do v Crown*
 (26) 13 AIR 1926 Lah 196 (197) 27 Cr L Jour 2, *Nasar Md Khan v Hara Singh*
 3 (35) 25 AIR 1939 Pat 366 (367) 39 Cr L Jour 732, *Bala Bux v Emperor*
 (37) 33 Cr L Jour 232 (233) 166 Ind Cas 494 (Pat) *Brij Mohan v Dwarath Singh*
 (30) 17 AIR 1930 Pat 331 (331) 31 Cr L Jour 760 *Thakur Sahu v Emperor*
 (86) 8 All 514 (315) 1886 All W N 177 *Queen Empress v Ram Narain*

- (24) 11 AIR 1924 Cal 642 (643) 23 Cr L Jour 733 *Ram Hari v Santosh Kumar*
 (33) 20 AIR 1933 Cal 515 (515 516) 34 Cr L Jour 812 *Abdul Latif v Ahmad*

v Emperor

Emperor

jaram (Judgment

- on the face of it that the Court has perused the petition of appeal and the judgment appealed against)
- (20) 7 AIR 1920 Pat 522 (523) 21 Cr L Jour 139 *Ganesh Ram v Gyan Chand* (Judgment should show that the Court has considered all the arguments advanced before it and the evidence in the case)
- (22) 9 AIR 1922 Pat 552 (552) 24 Cr L Jour 477 *Padarath Kurmi v Emperor*
 (25) 12 AIR 1925 Pat 183 (184) 25 Cr L Jour 1237 *Jagaranath Singh v Emperor*
 (35) 22 AIR 1935 Pat 32 (33) 36 Cr L Jour 191 *Jagarnath Dubey v Ghinhu Dubey*
 (35) 22 AIR 1935 Pat 37 (38) 36 Cr L Jour 261, *Barjoo Mahla v Emperor*
 4 (30) 17 AIR 1930 Pat 590 (590) 32 Cr L Jour 86 *Krishna Pati v Emperor*
 (3) 22 AIR 1935 Pat 37 (37) 36 Cr L Jour 261 *Barjoo Mahla v Emperor*
 (35) 22 AIR 1935 Pat 32 (33) 36 Cr L Jour 191 *Jagarnath Dubey v Ghinhu Dubey*
 (05) 9 Cal W N ccxxix (ccxxix) *Kalka Khan v Emperor*
 (16) 5 AIR 1918 Pat 660 (660) 19 Cr L Jour 304 *Ram Kant Pandit v Emperor*
 (16) 5 AIR 1918 Pat 597 (597) 19 Cr L Jour 151 2 Pat L Jour 695 *Gurubari Behara v Emperor*
 (See (35) 25 AIR 1938 Pat 176 (176) 39 Cr L Jour 340 *Chhatu Gope v Emperor* (Order not showing that records were examined or evidence appreciated — Order set aside — It is to be noted however that under this section the appellate Court is not bound to send for record of case)

Note 10

- 1 (36) 37 Cr L Jour 904 (905) 164 I C 270 (Cal) *Manmatha Nath v Union Board of District*
 (16) 5 AIR 1918 Pat 660 (660) 19 Cr L Jour 304 *Ram Kant Pandit v Emperor*
 (16) 5 AIR 1918 Pat 597 (597) 19 Cr L Jour 151 2 Pat L Jour 695 *Gurubari Behara v Emperor*

dispose of it²

11 Appeal. — A judgment by a Judge of a High Court dismissing an appeal under this section is an order made in a criminal trial in appeal and therefore no appeal lies from such an order¹

422.* If the Appellate Court does not dismiss the appeal summarily, Notice of appeal it shall cause notice to be given to the appellant or his pleader, and to such officer as the ^a[Provincial Government] may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal,

and, in cases of appeals under ^b[section 411A, sub section (2) or section 417,] the Appellate Court shall cause a like notice to be given to the accused

^a Substituted by A. O. for Local Government

^b These words were substituted for the word and figures section 417 by the Criminal Procedure Amendment Act 1943 (96 [XXVI] of 1943) S 5

Synopsis

- 1 Notice — General
- 2 Notice to appellant or pleader
- 3 Notice to accused
- 4 Notice to complainant respondent

- 5 Officer appointed by the Provincial Government
- 6 Time and place of hearing
- 7 Burden of proof in criminal appeals

NOTE to the Synopsis See the Notes indicated for the following topics

Change of time or place of hearing See Note 6
Dismissal without fixing date or place See Note 6
Legislative changes See Note 2
No admission of appeal for limited purposes only
See S 421 Note 1
No dismissal of appeal for default of appearance
See S 421 Note 2

Notice to accused to whom compensation awarded under S 250 See Note 3
Notice to appellant in spite of presence of his pleader See Note 2
Notice to complainant in appeal against order under S 545 See Note 4
Officers appointed in several provinces See Note 5

1 Notice — General — Where an appeal has been admitted notice under this section must be served on the persons mentioned therein before the appeal could be finally disposed of under section 423¹

The notice must be served personally on the person to be served and only if after due diligence it cannot be served personally can it be served on any adult male member of the family (See Ss 69 and 70) So where the notice of an appeal was served on an accused person's father it was held that the officer who was entrusted with the service should swear to an affidavit that he made his best endeavours to effect personal service but that he could not do so²

* 1882 S 422, 1872 Ss 62 269, 279 1851 — Nil

- (19) 6 AIR 1919 Low Bur 154 (150) 19 Cri L Jour 316 *Nga Da Myit v Emperor*
(81) 1881 Pun Re No 31 Cr p 81 (82) *Budruddin v Empress*
(80) 1880 Pun Re No 35 Cr p 42 (46 49) *Lal Khan v Empress*
2 (18) 5 AIR 1918 Pat 600 (600) 19 Cri L Jour 304 *Ram Kant Pandit v Emperor*
(06) 3 Cri L Jour 385 (397) 10 Cal W N 445 *Isswar Chandra Das v Emperor*
(18) 5 AIR 1918 Pat 597 (597) 19 Cri L Jour 151 2 Pat L Jour 695 *Gurubari v Emperor*
(10) 11 Cri L Jour 631 (630) 13 Oudh Cas 309 8 Ind Cas 379 *Aman Ali v Emperor*

Note 11

- 1 (03) 1 Weir 789a (783a) *In re Chinna Karuppan*

Section 422 — Note 1

- 1 (35) 22 AIR 1935 P C 89 (90) 36 Cri L Jour 838 62 Ind App 129 62 Cal 983 (FC) *Emperor v Daku Raut*
2 (80) 1882 All W N 170 (170 171) *Empress v Sundar*
Also see S 70 Note 1

Where in spite of due notice having been given the parties or their pleaders fail to appear at the hearing of the appeal, but only appear on the date fixed for delivery of the judgment the appellate Court is not bound to hear them.⁴

Where in an appeal against an order of acquittal in respect of several accused notices were issued to all the accused but were served only on some of them it was held that the appeal could be heard in respect of those accused upon whom notices had been served.⁵

3 Notice to accused — Under this section notice is necessary to the accused only in cases where there is an appeal against acquittal under S 411A (2) or under S 417. A notice to the accused person therefore, to whom compensation is ordered to be paid under S 400 is unnecessary¹. But seeing that he is the only person interested in upholding the order it is desirable that notice should be given to him². But the High Court will not interfere in revision on the ground of want of notice unless there is some illegality in the order³.

4 Notice to complainant-respondent — Under this section a complainant respondent cannot claim as of right to be heard in the appeal. The matter is one which is left in each case to the discretion of the Court.¹

4 (23) 10 AIR 1923 Nag 208 (208) 23 Cri L Jour 752 *Nyazulhan v Emperor*
Also see S 340 Note 7

Note 2

1 (81) 10 Cal L Rep 57 (60), *In re Gopal Chandra Mundle*
(83) 1883 Lnp Re No 7 Cr n 9 (9), *Miran Baksh v Empress*

Note 3

1. Emperor

uäden

(06) 3 Cr L Jour 453 (459) 22 Mar 187 *Fraser v. Palaniappan*.

(15) 2 AIR 1915 Mad 910 (940 942) 33 Mad 1091 16 Cr L Jour 124 Venkatarama Iyer v
Krishna Iyer

(20) 13 AIR 1926 S and 143 (144) 20 Sund L R 41 27 Cr L Jour 245 *Memorandum v Ibrahim*

(1979) 9 Cr I Jour 150 (150) 33 Mad 89 1 Ind Cas 79 *Irishak/Agwa Naga v Buxappa*

3 (00) 9 CRI L Jour 150 (150 151) 33 Mar 89 1 Ind Cas 79 Ambalagari Nagi v Laxmi

(21) 8 AIR 1921 Mad 241 (241) 22 Cr L J 683 Krishna Rao v Narayana Das

Note 4

1 (12) 29 AIR 1910 F 71 5 (6) ILR (1911) Kar 451 43 Cr L Jo r 345 19~ 101 Cas 2~1 PC Tarz

1. *Journal of the American Medical Association*, 1997; 277: 1033-1037.

but it is not in any case bound to do so)

Though there is no provision in case of an order under S 515 of the Code with regard to notice to the *complainant* to whom compensation has been awarded one of the fundamental principles of law is that no order should be passed to the detriment or prejudice of a party without giving him an opportunity of being heard in defence. In that view notice should, in the exercise of the appellate Court's discretion be given to a complainant of the hearing of an appeal against a conviction in a case in which the complainant has been awarded compensation². Where notice of appeal has been given to complainant the Court should give him reasonable opportunity to engage a pleader and also give that pleader reasonable time to prepare his case. But the failure to give full opportunity to complainant is no ground for interference in revision when the order of acquittal passed by the appellate Court is proper³. So also the fact that notice of appeal was not served on the complainant respondent is no ground for interference where no injustice has been occasioned thereby⁴. See also Section 515 Note 16.

5 Officer appointed by the Provincial Government — Under this section notice should go to the officer appointed by the Provincial Government in this behalf.

The officer appointed by the Provincial Government in Bombay is the District Magistrate¹. In Bengal the officer appointed by the Provincial Government is the District Magistrate except where the order of a Sessions Judge is in appeal in which case the Sessions Judge is such officer². In the Punjab also it is the District Magistrate³. In Madras

(37) 24 AIR 1937 Nag 123 (124) 38 Cri L Jour 433 *Kartikram v Emperor* (Notice to complainant—Absence of not illegal though it is desirable to issue notice if he is likely to be prejudiced otherwise)
(87) 24 AIR 1937 Nag 894 (396) 39 Cri L Jour 75 1 L R (1938) Nag 157, *Raghunath Mal v Patram* (It is open to appellate Court in exercise of its discretion to hear the complainant in suitable cases)

(36) 23 AIR 1936 Rang 247 (248) 37 Cri L Jour 832 14 Rang 744 *Htinda Meah v Anamale Chettyar*

(74) 7 Mad H C R App xl (xli) 2 Weir 476

Also see S 423 Note 9

2 (43) 30 AIR 1943 Mad 565 (566) 44 Cri L Jour 788 208 Ind Cas 460 *Ranga Konar v Pallava Vattachi*

(36) 23 AIR 1936 Nag 144 (144 145) 38 Cri L Jour 76 1 L R (1936) Nag 147 *Balwant Ganesh v. Motilal Nathuram*

(36) 23 AIR 1936 Rang 247 (248) 37 Cri L Jour 832 *Htinda Meah v Anamale Chettyar* (Failure to give notice is not however an illegality)

(26) 13 AIR 1926 Cal 1054 (1055 1056) 53 Cal 969 27 Cri L Jour 1086 *Dharasa Now v Suldeo*
3 (43) 30 AIR 1943 Mad 565 (566) 44 Cri L Jour 789 208 Ind Cas 460 *Ranga Konar v Pallava Vattachi*

4 (42) 29 AIR 1942 Mad 465 (466) 43 Cri L Jour 743 201 Ind Cas 521 *Mariabossas v Arokiasami* (Accused convicted and ordered to pay compensation to complainant—Appeal by accused—Notice sent to Crown and not to complainant—Conviction set aside and with it order to pay compensation—Notice to complainant held was not essential and order of acquittal cannot be interfered with in revision)

(37) 24 AIR 1937 Nag 123 (124) 38 Cri L Jour 433 *Kartikram v Emperor*

(17) 4 AIR 1917 Nag 122 (123) 14 Nag L R 131 19 Cri L Jour 927, *Mangal Chand v Mohan*
[See (33) 20 AIR 1933 Mad 277 (277 278) 33 Cri L Jour 596 *Kalathi Mudali v Yenkalseth Mudali*]

Note 5

1 " " " " *Shivlingappa*

2 " " " " *nd v Jesa Ram*

3 See also Rules and Orders of the High Court of Judicature at Calcutta (1931)

PART D — NOTICE OF APPEAL

The following notifications under S 400 of the Code of Criminal Procedure prescribing the officers to whom notice is to be given of an appeal which is not summarily rejected are re-printed for information and guidance

* Appellate Court
cer as the Local
ed to direct that,

the officer is the District Magistrate in cases other than sessions cases and the Public Prosecutor in the case of the High Court and in sessions cases⁴

As to Oudh and Central Provinces see below⁵

No 108 597 dated 8th February 1893

II. Punjab Government Notification No 1761, dated the 7th December 1893

With reference to S 422 of Act V of 1893, the Code of Criminal Procedure, prescribing that any Appellate Court which does not reject an appeal summarily shall cause notice to be given to such officer as the Local Government may appoint in this behalf of the time and place at which such appeal will be heard, the Hon'ble the Lieutenant Governor is pleased to direct, in supersession of notification No 108, dated 8th February 1893, that in the case of appeals other than those which he to the District, or specially empowered Magistrate, the Appellate Court shall cause notice of the time and place of the hearing of such appeal to be given :

- (1) to the Government Advocate, in all cases in which the sentence is one of death, transportation for a life or transportation or imprisonment for a term of not less than ten years,
- (2) to the Magistrate of the District, in other cases

III. Punjab Government Notification No 206, dated the 10th February 1903

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Frontier Province, as well as the District Magistrate concerned as directed in Punjab Government Notification No 108 597, dated 8th February 1893

4 (15) 2 AIR 1915 Mad 236 (237) : 15 Cri L Jour 618, *Guruswami Nairan v Tirumurthi Chetti*

(21) 8 AIR 1921 Mad 291 (292) : 22 Cri L Jour 593, *Krishna Kone v. Narayana Dass*

(25) 12 AIR 1925 Mad 375 (376) : 25 Cri L Jour 1389, *Mustafa Routhier v Shanmuga Thetan.*

See also the Criminal Rules of Practice and Orders of High Court of Judicature, Madras (1931) .

Rule 240 The following officers are the officers to whom notices of appeal shall be given under S 422, Code of Criminal Procedure .

.....

is against
Court of

Session;

- (4) The Agent and Manager of the Madras and Southern Mahratta Railway and the Agent of the South Indian Railway in appeals against convictions for Railway offences in connexion with those railways respectively,
 - (5) The District Forest Officer in appeals against convictions for forest offences, except in cases of offences relating to unreserved lands. In such cases notice shall be given to the Revenue Divisional Officer who ordered the prosecution,
 - (6) Officers of the Salt and Excise Department in charge of circles in appeals against convictions for Salt and Excise offences in their circles, and in appeals to the High Court in Abkari cases, to the Inspector of Excise, Madras Town Circle,
 - (7) The Crown Prosecutor for the Town of Madras in appeals to the High Court from the judgments or orders of the Presidency Magistrate and the Public Prosecutor in other appeals to the High Court
5. *The Oudh Criminal Rules (1926)*

Rule 3 As soon as the date is fixed, the appellate Court shall cause notice to be given to the appellant as well as to the District Magistrate who shall inform the appellate Court whether any one will appear to support the conviction

Rule 4. In all criminal appeals before Sessions Judges notice shall be given to Government Pleaders, whether such appeals be presented by pleaders or agents or received through the Superintendent of jails

Criminal Circulars of the Judicial Commissioner, Central Provinces (1919) :

Rule 10 The following are the officers to whom notices of appeal shall be given under S 422 of the Code :

- (1) The District Magistrate in all appeals filed before the Court of Session of Judicial Commissioner,
- (2) The Prosecuting Inspector or Sub-Inspector of Police in appeals to the District Magistrate's Court or to Courts of Magistrates subordinate to the District Magistrate

Where the District Magistrate is the officer who is to receive the notice and the appeal is filed in his Court and heard by himself no notice to him is necessary⁶ But where the appeal is transferred to a joint Magistrate for hearing the fact that it was originally filed before the District Magistrate does not relieve the joint Magistrate of his duty of giving notice to the District Magistrate⁷

An omission to issue notice to the Crown as required by this section is no ground for interference in revision with the appellate order at the instance of the complainant when the Crown supports the order of acquittal passed in appeal⁸ But an order of acquittal passed without notice to the Crown can be challenged in an appeal under Section 417⁹

6 Time and place of hearing — Under this section the notice should specify the time and place at which the appeal will be heard. The Court of appeal should fix a date for hearing and determine it on that day. Where the appeal was directed to be heard in January without fixing a date and the appeal was taken up and dismissed on a particular day without any information to the appellant as to the time of hearing it was held that the dismissal was improper¹. So also a notice to an appellant's pleader that his appeal would be heard next day wherever the Court happened to be encamped is not sufficient². An appeal posted for hearing at one place cannot be heard and dismissed at another place without giving notice to the appellant or his pleader of the change of place³. So also an appeal posted for hearing on a particular date cannot be heard on a date previous to that fixed⁴.

Where a pleader appeared at 10 A M to argue the criminal appeal on the day notified for hearing and was informed that the appeal was disposed of on merits at 30 A M the appeal was ordered to be restored and re heard by some other Magistrate as the pleader did not appear to have wilfully absented himself⁵. See also the under mentioned case⁶.

7 Burden of proof in criminal appeals — See Note 14 on Section 473 and the under mentioned cases¹.

- 6 (13) 10 AIR 1903 Bom 74 (74) 24 Cri L Jour 700 *Emperor v Sivalingappa Dasappa*
 (24) 11 AIR 1904 Lah 675 (675) 25 Cri L Jour 209 *Ramechand v Jesa Ram*
 (21) 8 AIR 1921 Mad 281 (283) 22 Cri L Jour 583 *Krishna Kone v Narayana Dass*
 7 (25) 12 AIR 1905 Mad 375 (376) 25 Cri L Jour 1389 *Mustafa Rauter v Shanmuga Thevar*
 8 (43) 30 AIR 1943 Mad 566 (566 567) 44 Cri L Jour 791 208 Ind Cas 480 *Sundaramier v Chinnapalan Ambalam*
 9 (42) 29 AIR 1942 Mad 356 (356) 43 Cri L Jour 768 201 Ind Cas 515 *Public Prosecutor v Karuppana Kone*

Note 6

- 1 (81) 1881 All W N 46 (46) *Empress v Wasir Khan*
 2 (20) 7 AIR 1900 Bom 318 (318) 21 Cri L Jour 373 *In re Arjun Talhoo*
 3 (91) 1891 Pun Re No 7 Cr p 16 (17) *Bahawal v Queen Empress*
 (0) 2 Cri L Jour 66 (66) 1905 Pun Re No 11 Cr *Nihal Singh v Emperor*
 4 (82) 2 We r 475 (475) *Shanmugam Chettiar v Alaga Numbia Pillai*
 5 (37) 1937 Mad W N 91 (91 02) *Venkatakrishna Iyappa v Emperor*
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date passed without hearing arguments cannot be sustained)

Note 7

- 1 (9) 23 Cal 347 (310) *Milan Khan v Sagai Depars* (Rule in civil appeals that burden lies on appellant to prove decision of lower Court is wrong does not apply to criminal appeals by convicted person — In such cases if appellate Court feels a reasonable doubt as to the guilt of the accused it must acquit him)
 (8) 11 Cal L J 25 (23 30) *Profap Chunder v Empress* (Sound rule to apply in trying criminal appeal where questions of fact are in issue is to consider whether the conviction is right)

423. (1) The Appellate Court shall then send for the record of

Powers of Appellate Court the case, if such record is not already in Court
in disposing of appeal After perusing such record, and hearing the appel-
fant or his pleader, if he appears, and the Public Prosecutor, if he appears
and in case of an appeal under [section 411A, sub section (2) or section 417],
the accused, if he appears, the Court may, if it considers that there is no
sufficient ground for interfering, dismiss the appeal, or may —

(a) in an appeal from an order of acquittal, reverse such order and
direct that further inquiry be made, or that the accused be retried
or committed for trial, as the case may be, or find him guilty and
pass sentence on him according to law,

(b) in an appeal from a conviction, (1) reverse the finding and sen-
tence, and acquit or discharge the accused, or order him to be
retried by a Court of competent jurisdiction subordinate to such
Appellate Court or committed for trial, or (2) alter the finding,
maintaining the sentence, or, with or without altering the finding
reduce the sentence, or, (3) with or without such reduction and
with or without altering the finding, alter the nature of the
sentence but, subject to the provisions of section 106, sub-
section (3), not so as to enhance the same,

(c) in an appeal from any other order alter or reverse such order

(d) make any amendment or any consequential or incidental order
that may be just or proper

(2) Nothing herein contained shall authorize the Court to alter or
reverse the verdict of a jury, unless it is of opinion that such verdict is

* Code of 1882 S 423

The words subject to the provisions of S 106 sub-s (3) were added in cl (b) (3) and cl (d)
was newly inserted otherwise the section was the same

Code of 1872 Ss 280 284 and 272 para 3

280 The appellate Court after perusing the proceedings of the lower Court and after hearing
Appellate Court may the appellant his counsel or agent if they appear and the Public Prosecutor
alter or reverse finding Government Pleader or other officer empowered by Government or by the
and sentence or sentence Magistrate of the district in that behalf if he appears may alter or reverse
a sentence the finding and sentence or order of such Court and may if it see reason to
do so enhance any punishment that has been awarded

Provided that if the appeal is from the sentence of a Magistrate of any class the appellate
Court shall not inflict a greater punishment than might have been inflicted by a Magistrate of the
first class

Procedure in case of 284 When any Court has convicted a person of an offence not triable
conviction by Court not by such Court the appellate Court shall annul the conviction and sentence
having jurisdiction of such Court and direct the trial of the case by a Court of competent
jurisdiction

272

The High Court may in any case so appealed direct a new trial by another Court or may pass
such judgment sentence or order as may be warranted by law

Code of 1861 Ss 419 and 427

419 The appellate Court after perusing the proceedings of the lower Court and after hearing,
Appellate Court may the plaintiff or his counsel or agent if they appear may alter or reverse the
call for the proceedings finding and sentence or order of such Court but not so as to enhance any
of lower Court punishment that shall have been awarded

Court of appeal has to 427 When a Court subordinate to a Court of Session shall have
proceed in case of con- convicted a person of an offence not triable by such Court it shall be
viction by a Court not competent to the appellate Court to annul the conviction and sentence of
having jurisdiction such Court and to direct the trial of the case by a Court of complete
jurisdiction

erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him

a These words were substituted for the word and figures Section 417 by the Criminal Procedure (Amendment) Act 1943 (No 5) of 1943) Section 5

Synopsis

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|---|--|
| 1 Scope of the section | 22 "Acquit or discharge the accused" |
| 2 'Shall then send for the record' | 23 Order him to be re-tried' |
| 3 "After perusing the record" | 24 'By a Court of competent jurisdiction' |
| 4 Dismissal of appeal for default if can be set aside See Notes on Section 430 | 25 Discharge and re trial — If both can be ordered |
| 5 Refusal to entertain appeal on ground that conviction ought to have been under non appealable section | 26 Effect of re trial on offences of which accused had been acquitted in trial Court |
| 6 Admission of appeal does not preclude objection as to its admissibility | 27 Ordering re trial for enhancing sentence |
| 7 Appeal cannot be admitted merely for reviewing sentence | 28 Remand for passing sentence or for writing proper judgment |
| 8 Withdrawal of appeal | 29 Effect of order for re-trial in appeal |
| 9 Parties must be given an opportunity of being heard | 30 'Or committed for trial' |
| 10 Notice of appeal See Notes on Section 422 | 31 'Alter the finding' |
| 11 Connected appeals—Hearing of | 32 Reduction of sentence |
| 12 Appointment of assessors in appeal | 33 'Alter the nature of the sentence but not so as to enhance the same' |
| 13 New plea | 34 'Appeal from any other order — Clause (e)' |
| 14 Appreciation of evidence by the appellate Court | 35 Subsequent events—Power to take notice of |
| 15 Appeal from acquittal—Clause (a) | 36 Power to direct sentences to run concurrently |
| 16 Appeal from acquittal—Order for further enquiry | 37 Appellate Court cannot canvass previous convictions |
| 17 Appeal against acquittal—Power to order re trial | 38 Appellate Court when to report to the High Court |
| 18 Re-trial of appeals | 39 'Any amendment or any consequential or incidental order'—Clause (d) |
| 19 Find him guilty and pass sentence' | 40 Verdict of jury—Sub-section (2) |
| 20 Appeal from conviction—General | |
| 21 'Reverse the finding and sentence' | |

NOTE to the Synopsis See the Notes indicated for the following topics

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| Abatement of offence—Conviction for by appellate Court—When can be passed and when not See Note 31 | Appeal from conviction — No further inquiry See Notes 16 and 20 |
| Acquittal — Interference by appellate Court See Note 15 | Appellate Court — No power to make order which would make entire proceeding infructuous and absurd See Note 39 |
| Admission — Objection as to absence of sufficient cause for delay or as to non-appealability of sentence can be taken See Note 6 | Appellate Court—No power to remit any sentence See Note 30 |
| 'Alter — In clause (c)—Meaning See Note 34 | Appellate Court — Not to report to High Court without deciding appeal See Note 38 |
| Appeal—No admission for reviewing sentence only — If admitted appellant to be heard on merits See Note 7 | Appellate Court—Powers of See Notes 1 and 9 |
| Appeal—No dismissal on ground of sentence being without jurisdiction See Note 5 | Appellant in jail — Not represented by pleader — Entitled to appear in person See Note 9 |
| Appeal—No summary dismissal See Note 9 | Clause (d) — No application to matters arising pending appeal or to matters at stage of admission See Note 37 |
| Appeal from acquittal—Grounds not contained in objections not to be considered See Note 15 | Clause (d)—Orders not falling within—Examples. See Note 39 |
| Appeal from acquittal — Power to order re trial is discretionary See Notes 17 and 23 | Co accused — Appeal by one alone — Appellate Court can reduce sentence on other in the ends of justice See Note 32 |
| Appeal from conviction — Appellate Court cannot remand simply for examination afresh of certain witnesses. See Note 20 | Commitment — For commitment by appellate Court offence need not be exclusively triable by Sessions Court See Note 30 |
| Appeal from conviction—Mere reversal is acquittal. See Note 21 | Commitment refused in view of considerable expense incurred already by accused and other circumstances. See Note 30 |

"Consequential or incidental" — Meaning and examples See Note 32

Conviction affirmed—Sentence cannot be reversed absolutely See Note 32

Conviction for two offences — Whole prosecution evidence disallowed — Whole conviction to be set aside See Note 14

Discharge on ground of insanity — Retrial can be directed See Note 25

Entry of appellate Court to go through record See Note 3

Entire record lost — Fresh trial ordered See Note 2

Evidence — Objection as to admissibility — Not to be allowed in appeal for first time See Note 13

Evidence — Review by appellate Court — Independent judgment to be exercised See Note 14

'Find him guilty' — Words not limited to offences with which accused was charged in lower Court See Note 19

'Finding' — Is not limited to finding on law point See Note 31

Finding of fact of trial Court — Power of appellate Court to interfere See Note 14

High Court — Power as appellate Court See Notes 1 and 22

High Court — Lower as revision Court See Notes 1 and 22

Improper evidence admitted by lower Court — Appellate Court should see whether there still remains sufficient evidence to sustain conviction — See Note 14

Jury — Objection to jury trial — Not to be allowed in appeal for first time See Note 13

Lower Court decision — Presumption as to correctness See Note 14

New trial — Merely for enhancing punishment — To be used sparingly See Notes 27 and 1

No appeal by accused — Conviction not to be quashed on ground of loss of record See Note 2

Non appealable sentence — Illegally corrected into appealable one — Appeal lies See Note 3

No summary dismissal — Records to be sent for See Note 2

Pleader appearing without vakalatnama — Time may be granted for production See Note 9

Power under this section — Large enough to invoke English rule that repugnancy in verdict is by itself sufficient for quashing conviction See Note 40

Powers under this section — Subject to other provisions of law See Note 1

Presumption of innocence of accused — Effect of lower Court's decision on it See Note 14

Previous conviction — Appellate Court cannot go into legality See Note 37

Question of law — New plea in appeal See Note 13

Remand — No remand for passing legal sentence See Note 24

Retrial — Charges under Ss 302 and 201, Penal Code — S 201 charge withdrawn — Conviction under S 302 — Retrial even for charge under S 201 can be ordered See Note 26

Retrial order can be passed even subsequent to setting aside conviction and sentence See Note 17

Retrial — No retrial on particular point See Note 23

Retrial — When will not be ordered See Note 23

Retrial — When can be ordered See Notes 17 and 23

Retrial — Whether can be before appellate Court See Note 24

'Retried' — Includes retrial on appeal See Note 18

Section 106 (3) — Order as to additional security under is not enhancement See Note 33

Section 118 — Appeal against order under — No retrial or further enquiry can be ordered See Note 34

Section 250 — Order under, cannot be passed under clause (d) by appellate Court See Note 39

Section 418 and this section See Note 40

Section 439 and this section — Distinction See Note 1

Sections 514, 476, 185 and 250 (3) See Note 34

Section 537 and this section See Note 40

Self-defence — New plea in appeal — When can be raised, See Note 13

Sentence by appellate Court — Whether enhancement See Note 33

Separate sentences in separate trials — High Court can direct them to run concurrently See Note 36

Subsequent discovery of evidence — No ground for setting aside acquittal or ordering retrial See Note 17

Subsequent events — Not to be looked into See Note 35

Summary rejection of appeal under S 421 — Sentence cannot be reduced See Note 32

Trial Court competent to inflict maximum sentence — No new trial for enhancing sentence See Note 27

Two appeals — To be kept and dealt with separately See Note 11

Two appeals — Making cross references to evidence and judgment irregular See Note 11

Two cross-charges tried separately — But one judgment — No prejudice — Conviction valid See Note 11

1. Scope of the section. — This section prescribes the powers of the appellate Court in disposing of an appeal. The powers conferred on the appellate Court are as ample as those of the High Court on revision, S 422 with the exception of the power to

enhance the sentence¹ Where the appellate Court is the High Court itself it has not only the powers under this section, but also those under S 439 As an *appellate Court* it can, under this section, alter the conviction to one for an offence of which the accused was acquitted by the lower Court but it has no such power in revision As a *revision Court* it can enhance the sentence passed by the lower Court though as an appellate Court it has no such power Thus by a combination of Ss 423 and 439, the High Court in appeal can convict the accused of an offence of which he had been acquitted and also enhance the sentence² Where an appeal is before the High Court the accused may be warned that at the hearing of the petition, he may be called on to show cause why the sentence should not be enhanced³ But the stage at which the revisional powers can be exercised does not arise until the peremptory provisions of Ss 422 and 423 have been complied with thus the High Court cannot if it does not dismiss the appeal summarily under S 421, act under S 439 without notice under S 422 and without sending for the record under S 423⁴

There is another distinction between this section and S 439 Under the latter section findings of *fact* are not ordinarily open to review and a proviso against altering an acquittal into a conviction has been expressly added therein On the other hand this section is concerned with the powers of a Court of Appeal when the *facts* are before the Court and in the absence of a proviso limiting the powers as to alteration of findings such a proviso cannot be implied⁵

The powers of the Court under this section must be read subject to other provisions of law limiting the right of interference to the extent specified by such provision. See the undermentioned cases⁶

Section 423 — Note 1

- 1 (35) 22 A I R 1835 P C 89 (92) 36 Cr L Jour 838 62 Ind App 129 62 Cal 983 (P C) *Emperor v Dahu Rau*¹
- 2 (41) 28 AIR 1941 Lah 465 (468 470) 1 I L R (1842) Lah 129 43 Cr L Jour 235 197 Ind Cas 669 (FB) *Dawa Singh v Emperor* (Consequently it is open to the High Court in an appeal from a conviction by a convict who had been charged, say for example under S 302 Penal Code but convicted under S 304 Part 1 Penal Code to alter the conviction from one under S 304 Part 1 to one under S 302 Penal Code and then in the exercise of the powers conferred by S 439 (1) to enhance the sentence to one of death)
- (35) 22 A I R 1935 P C 35 (36) 36 Cr L Jour 482 57 All 156 62 Ind App 86 (P C) *Chunbidja v Emperor*
- (14) 1 AIR 1914 Mad 258 (260) 37 Mad II 9 15 Cr L Jour 180 *Dals Reddy v Emperor*
- (04) 1 Cr L Jour 942 (943) 1901 Pun Re No 12 Cr, *Bhola v. Emperor*
- (84) 6 All 622 (622) 1884 All W N 252 (T B) *Queen Empress v Ram Kuria*
- (31) 18 AIR 1931 Cal 450 (451) 32 Cr L Jour 890 *Kutabdi v Emperor*

- 3 (35) 22 AIR 1935 P C 89 (92) 36 Cr L Jour 838 62 Ind App 129 62 Cal 983 (P C) *Emperor v Dahu Raut*
- 4 (35) 22 AIR 1935 P C 89 (91) 36 Cr L Jour 838 62 Ind App 129 62 Cal 983 (P C) *Emperor v Dahu Raut*
- 5 (32) 19 AIR 1932 Cal 793 (726) 60 Cal 179 31 Cr L Jour 177, *Hanuman Sarma v Emperor*
- 6 Reformatory Schools Act S 16
- (94) 20 All 159 (160) 1897 All W N 230 *Queen Empress v Gobiinda* (Cannot interfere in appeal or revision with an order for detention in reformatory school passed in substitution for an order of transportation or imprisonment)
- (07) 6 Cr L Jour 129 (130) 1907 Pun Re No 18 Cr p 59 (59) 1908 Pun L R No 55 *Ram Singh v Emperor (Do)*
- (03 1900) 1893 1900 Low Bur Rul 411 (149) *Queen Empress v Nga Nyan Wan (Do)*
- (12) 13 Cr L Jour 44 (14) 5 S and L R 173 13 Ind Cas 281 *Imperator v Pajabali (Do)*

in another point

- (01) 24 Cal 423 (124) 5 Cal W N 211 *Reasut v Courtney* (Section 16 does not take away jurisdiction of High Court to alter or set aside sentence in substitution of which order for detention is made)

2 "Shall then send for the record" — Where the appeal is not dismissed summarily under S 421, the appellate Court is bound to send for the record, if such record is not already in Court¹ Where the entire record was lost, the High Court set aside the conviction and ordered a fresh trial² In *Kamakshamma v Emperor*³ it was held by the High Court of Madras that in the absence of any appeal by the person convicted, the conviction cannot in revision, be quashed merely on the ground that some of the material records were lost at the time of the lower Court's judgment

3. "After perusing the record."—An appeal cannot be dismissed for default of appearance The words 'after perusing the record' if it considers that there is no sufficient ground for interfering" shows that it is the duty of the appellate Court to go through the record and dispose of the appeal on the merits¹ This duty is irrespective of

(31) 18 AIR 1931 Nag 179 (179) 27 Nag L R 242 32 Cri L Jour 1268 *Muhammad Azimuddin v Emperor* (Sessions Judge has power to alter sentence of imprisonment though order of detention falls to the ground thereby)

[See however (01) 1 Low Bur Rul 68 (18) *Crown v Dawood Sahib* (Can interfere when order is against rules framed by Local Government under the Act)]

(93) 21 All 391 (401, 404) 1899 All W N 133 (FB) *Queen Empress v Hars* (Can interfere where the order is without jurisdiction)]

Cantonments Act (3 [III] of 1880), Section 28

(84) 1894 Pun Re No 40 Cr, p 77 (84, 87) *Charde v Empress* (In a case tried under S 28 of the Cantonments Act no appeal lies from any decision thereon)

Act 37 [XXXVII] of 1855 section 4

(72) 17 South W R Cr II (11) *Queen v Doronath Mulerji* (Under S 4, cl (1) of Act 37 [XXXVII] of 1855 all sentences passed in criminal cases are final and no appeal lies to the High Court)

Frontier Crimes Regulation (3 [III] of 1901), Ss 48 and 49

1 (35) 22 AIR 1935 P C 89 (92) 36 Cri L Jour 838 62 Ind App 199 62 Cal 983 (PC) *Emperor v Dattu Raut* (Court should also comply with provisions of S 421)

Also see S 421 Note 1

Cas 60, *Setugaperumal v Emperor*.

3. (15) 2 AIR 1915 Mad 1039 (1039) 38 Mad 498 14 Cri L Jour 497

Note 3

- 1 (11) 12 Cri L Jour 491 (481) 12 Ind Cas 89 (All) *Sheoji v Emperor*
 (09) 9 Cri L Jour 533 (554, 555) 5 Nag L R 76 2 Ind Cas 247, *Ratanchand v Emperor*
 (29) 16 AIR 1929 Lah 849 (849) 30 Cri L Jour 902 *Nihal v Emperor*
 (30) 17 AIR 1930 Lah 659 (659) 11 Lah 242 31 Cri L Jour 979, *Roora v Emperor*
 (19) 6 AIR 1919 Oudh 323 (324) 20 Cri L Jour 744 *Balkaran Singh v Emperor*
 (30) 17 AIR 1930 Oudh 334 (334) 31 Cri L Jour 939 *Taen v Emperor*
 (27) 14 AIR 1927 Pat 176 (176) 6 Pat 16 28 Cri L Jour 351, *Kuldip Singh v Emperor*
 (34) 21 AIR 1934 Pe h 21 (21) 35 Cri L Jour 963 *Din Mohammad v Emperor*
 (35) 1895 Pun Re No 21 Cr, p 59 (59), *Kotara v Empress*
 (05) 2 Cri L Jour 66 (66) 1905 Pun Re No 11 Cr, *Nihal Singh v King Emperor*
 (24) 11 AIR 1924 Pat 378 (376) 24 Cri L Jour 475 *Baldeo Bubev v Emperor*
 (23) 10 AIR 1923 All 175 (176) 24 Cri L Jour 65 *Ramchandrar v Emperor*
 (26) 13 AIR 1926 Bom 548 (548) 50 Bom 673 27 Cri L Jour 1167, *Trimbak v Emperor*
Mardha v Brojjeskar

the question whether the appellant appears or does not appear, if he appears he is bound to be heard, if not, the record should be perused and the appeal disposed of on the merits.³

The whole record must be perused, it is not enough to merely go through the judgment.⁴ But documents and evidence not forming part of the record of the proceedings of the lower Court cannot be referred to or considered in appeal.⁴

An appeal cannot be dismissed on the ground that the sentence of the lower Court is without jurisdiction. Where a Magistrate first passed a non appealable sentence and then illegally corrected it into an appealable sentence, it was held that an appeal lay against the latter and could not be dismissed on the ground that the original sentence was non appealable.⁵

4 Dismissal of appeal for default, if can be set aside — See Notes on Section 430

5 Refusal to entertain appeal on ground that conviction ought to have been under non-appealable section — Where a conviction is given under an appealable section the appeal cannot be refused to be entertained because the conviction in the appellate Court's opinion, ought to have been under a non appealable section.¹

6. Admission of appeal does not preclude objection as to its admissibility — The mere fact that an appeal was admitted in the absence of the respondent does not preclude the appellate Court from entertaining and giving effect, at the hearing, to an objection as to the maintainability of the appeal. Thus, the appellate Court can entertain an objection that there was no sufficient cause under S 5 of the Limitation Act for excusing the delay in filing the appeal,¹ or an objection that no appeal lies against the particular sentence.² See also Section 421 Note 1

7. Appeal cannot be admitted merely for reviewing sentence. — An appeal cannot be admitted merely for the purpose of reviewing the sentence only. If the appeal is admitted the appellant is entitled to be heard on the merits of the whole case. Where this is not done the High Court will order a re hearing of the appeal.¹ See also Section 421, Note 1

[See also (41) 28 AIR 1941 Mad 604 (605) 42 Cri L Jour 551 - 194 Ind Cas 256 *In re Ponnusami Reddier* (Where a criminal appeal is presented and the advocate for the appellant requests for time to obtain the necessary records it should not be disposed of on the same day of presentation)]

Also see S 421 Note 2

2 (45) 32 AIR 1945 Oudh 52 (53) 46 Cri L Jour 684 220 Ind Cas 430 *Mahomed Mustaqim v Sukhray*

(19) 6 AIR 1919 Pat 54 (56) 20 Cri L Jour 271 *Sham Behari Singh v Emperor* (An appellant must be given a notice of the adjourned hearing)

(27) 14 AIR 1927 Pat 176 (176) 6 Pat 16 28 Cri L Jour 351 *Kuldip Singh v Emperor*

3 (13) 14 Cri L Jour 182 (183) 19 Ind Cas 182 (Cal), *Abbash Ali v Emperor*

[See (23) 10 AIR 1923 Pat 368 (368) 24 Cri L Jour 453 *Nawa Lal Rai v Emperor* (Appeal cannot be disposed of summarily without considering whole evidence and writing out judgment)]

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Also see S 413 Note 5

Note 5

1 (88) 1888 Rat 363 (364) *In re Karunaram*

Note 6

1. (14) 1 AIR 1914 Bom 111 (111) 38 Bom 613 *Raoji Keshav v Krishnarao Anand Rao*

2 (13) 14 Cri L Jour 254 (254) 40 Cal 631 19 Ind Cas 510 *Asie Sheikh v Emperor*

Note 7

1 (39) 26 AIR 1939 Lah 295 (296) 1 L R (1939) Lah 148 40 Cri L Jour 760 *Harnam Singh v Emperor*

(95) 1895 Rat 826 (827) *Queen Empress v Dagdu Gangaram*

(31) 18 AIR 1931 Pat 351 (351) 32 Cri L Jour 1017 *Sheikh Righu v Emperor*

The Chief Court of Oudh¹⁷ has on the other hand, held that the appellant's pleader has no right of reply but that it is a *privilege* which should not ordinarily be refused by the Court

10 Notice of appeal — See Notes on Section 422

11. Connected appeals — Hearing of — An appellate Court should not hear two appeals together each appeal must be kept absolutely separate and dealt with on the merits¹ Further it is irregular for the Court while dealing with connected criminal appeals to make cross references to the evidence and judgments in the several cases² Where two parties were charged for their attacks against each other in the same occurrence, and the High Court though trying the two charges separately, gave a single judgment it was held by the Privy Council that although technically it would have been better to have kept the evidence entirely distinct and to have given two separate judgments, the irregularity was one which in the absence of prejudice would not affect the validity of the convictions³ Where the Sessions Court reversed the finding of the lower Court on a question of fact without discussing the evidence in the case but referring to his finding in the appeal in a counter case it was held that the procedure though convenient for the Sessions Judge raised difficulties when the case came before the High Court in revision for want of material for High Court and hence the case should be remanded⁴

12 Appointment of assessors in appeal — The appointment of assessors in appeal is not authorized by law¹

13 New plea — A plea of self defence can be raised for the first time in appeal and the appellate Court should examine the plea so raised¹ if the facts on the record justify such plea² Similarly a question of law such as that the prosecution is barred by limitation³ or that the trial is vitiated by an illegality⁴ (e.g. a misjoinder of charges⁵ or the constitution of the Court being illegal or irregular⁶) may be raised for the first time in appeal As a general rule however an objection as to the admissibility of evidence will

17 (25) 12 AIR 1925 Oudh 65 (66) 25 Cri L Jour 1169 *Prag v King Emperor*
(25) 12 AIR 1925 Oudh 50 (50) 25 Cri L Jour 1173 *Dakra v Emperor* (Privilege should never be refused)

Note 11

1 (26) 15 AIR 1928 Cal 230 (230 231) 29 Cri L Jour 512 *Doal Ali v Emperor*
2 (16) 3 AIR 1916 Cal 912 (913) 17 Cri L Jour 439 *Superintendent and Remembrancer of Legal Affairs Bengal v Mon Mohan Roy*
(16) 3 AIR 1916 Mad 1021 (1022) 16 Cri L Jour 542 *Indra Talator v Narasimha Rao*
3 (27) 14 AIR 1927 P C 26 (26 27) 8 Lah 193 28 Cri L Jour 254 (P C) *Madat Khan v Emperor*
4 (35) 22 AIR 1935 Pat 494 (494) 36 Cri L Jour 1349 *Heta Singh v Emperor*
Also see S 353 Note 4 and S 537 Note 30

Note 12

1 (69) 1886 Pun Re No 17 Cr p 42 (42) *Crown v Syud Ahmad*
Also see S 234 Note 8

Note 13

1 (2) 12 AIR 1925 All 664 (666) 26 Cri L Jour 997 *Ajudhia Prasad v Emperor*
(26) 13 AIR 1926 Nag 202 (202) 26 Cri L Jour 152 *Rahmanshah v Emperor*
2 (32) 19 AIR 1932 Lah 606 (607) 34 Cri L Jour 462 *Nur Dad v Emperor*
(34) 21 AIR 1934 Oudh 251 (254) 35 Cri L Jour 943 *Md Habi Khan v Emperor*
3 (33) 7 Cal W N 883 (888) *Dijoyendra Lall v Emperor*
4 (39) 26 AIR 1939 Bom 457 (459) 41 Cri L Jour 176 I L R (1939) Bom 648 *Emperor v Jhina Soma* (Prosecution is not debarred from taking ground in appeal that Sessions Judge omitted to explain law to jury)
(31) 18 AIR 1931 Oudh 113 (113) 32 Cri L Jour 91 6 Luck 336 *Ram Lalan v Emperor* (Approver on turning against prosecutor on trial jointly with other accused and his confession relied on as basis for conviction of all accused)
5 (07) 26 Mad 125 (126 127) 2 We r 293 *Krishnasami Pillai v Emperor*
6 (29) 16 AIR 1929 Cal 92 (93) 30 Cri L Jour 494 *Intor Mandal v Emperor*
(But see (30) 17 AIR 1930 Cal 221 (221 226) 57 Cal 106 *Superintendent and Remembrancer of Legal Affairs Bengal v Phagoo Majhi* (Not entertained as there was no prejudice))

not be entertained for the first time in appeal⁷ Similarly, an objection that the trial ought to have been with the aid of assessors and not by jury will not be entertained for the first time in appeal⁸

An alternative case cannot be raised by the prosecution for the first time in appeal from an acquittal⁹

14 Appreciation of evidence by the appellate Court — The appellate Court should exercise its own independent judgment in reviewing the evidence¹ and must form its own conclusions on the evidence² A general agreement with the lower Court is not enough³

A trial Court may give a finding of fact in two ways

(a) by drawing *inferences* from proved and admitted facts or

(b) by relying on the *credibility of the evidence*

This credibility may again depend upon the demeanour of the witnesses or upon other factors In case (a), the appellate Court is in as good a position as the first Court Even in case (b), where the credibility of the evidence depends upon factors other than the demeanour of witnesses the appellate Court is free to come to its own conclusions as to the

7 (36) 23 AIR 1936 Cal 101 (103) 37 Cri L Jour 445 *Narain Chandra v Emperor*

(33) 20 AIR 1933 Cal 190 (192) 34 Cri L Jour 430 *Eusuf Ali v Emperor*

8 (30) 1930 Mad W N 770 (776) *Karuppa Thevar v Emperor*

9 (43) 30 AIR 1943 Sind 130 (181) 1 L R (1943) Kar 3 44 Cri L Jour 607 207 Ind Cas 416 (DB), *Emperor v Chimandas Dhanomal*

Note 14

1 (38) 25 AIR 1938 Rang 45 (47) 39 Cri L Jour 249 *Nga Kyaw Hla v The King* (Appellate Court must independently scrutinize evidence and be convinced that no reasonable men can come to any other conclusion than that the accused was guilty)

(90) 1690 All W N 143 (149) *Queen Empress v Bishan*

(72 92) 1672 92 Low Bur Rul 516 (516 517) *Kyan Zan v Queen Empress*

2 (45) 32 AIR 1945 Nag 116 (116) ILR (1945) Nag 441 46 Cri L Jour 590 219 Ind Cas 320 *Mahomed Hussain v King Emperor*

(66) 1868 Pun Re No 8 Cr p 17 (23) *Sher Ali v Crown*

(96) 23 Cal 647 (349) *Milan Khan v Sagai Bepari*

(33) 20 AIR 1933 Pat 100 (107) 11 Pat 807 34 Cri L Jour 497 *Mosaddi Rai v Emperor* (Admission of counsel does not relieve the appellate Court of this duty)

(13) 14 Cri L Jour 419 (420) 40 Cal 876 20 Ind Cas 403 *Fidoi Hossein v Emperor* (The fact that counsel did not refer to evidence does not absolve the Court from looking into it)

appeal
ending

(21) 20 Cri L Jour 414 (414) 61 Ind Cas 654 (Cal) *Nogendra Nath v Emperor* (Conviction under S 304 Penal Code — Appellate Court is bound to come to definite finding of its own as to how, where and by whom injuries were caused to complainant)

(24) 11 AIR 1924 Cal 618 (619) 25 Cri Jour 1044 *Inatulla Sirkar v Emperor* (Appellate Court is bound to give explicit opinion on question of fact involved in the case)

(34) 21 AIR 1934 All 842 (843) 35 Cri L Jour 1229 *Emperor v Noor Ahmed* (It must review the entire evidence)

(76) 1876 Pun Re No 5 Cr p 6 (7) *Turn v Crown* (The law of appeal constitutes the appellate Court a Judge of the facts as completely as the Court of first instance and the former Court should give the benefit of the doubt to the accused if it feels any doubt about the guilt of the accused)

3 (11) 12 Cri L Jour 43 (43) 9 Ind Cas 261 (Cal) *Jatra Mohan v Akhil Chandra*
See the following cases

(21) 8 AIR 1921 Pat 496 (497) 22 Cri L Jour 480 *Mayadhar Mahanti v Danardan Kund* (Where a prosecution case is disbelieved in essential particulars it is not safe to convict the accused on the residue of the evidence that may be acceptable)

(27) 14 AIR 1927 Mad 410 (411) 28 Cri L Jour 238 *In re Ve Kataswami* (Rejecting part of prosecution story — Conviction can be based on rest of evidence)

(19) 6 AIR 1919 Pat 534 (536) 20 Cri L Jour 375 4 Pat L Jour 289 *Ram Prasad Mahton v Emperor* (Appellate Court finding part of evidence to be untrue — He should examine residue with care and scrutinize same with caution)

credibility of the evidence⁴ Similarly when the trial Court convicts and the appellate Court acquits the accused the High Court on appeal by the Government against the acquittal, is not in any worse position than the first appellate Court in the matter of weighing the evidence⁵ Where however a finding of fact is based upon the credibility of evidence involving the appreciation of the demeanour of witnesses the view of the trial Court which has seen and heard the witnesses is entitled to great weight and should not be lightly discarded⁶ In such cases the appellate Court will not interfere unless the indications of mistake are obvious or the evidence too strong to be rejected especially where the lower Court's finding is in favour of the accused's innocence⁷ Except in this respect there is no difference in the manner of appreciating evidence, between an appellate Court and the

- 4 (36) 23 AIR 1936 Cal 13 (40) 37 Cr L Jour 394 63 Cal 929, *Benoyendra Chandra v Emperor* (Decision of case turning upon question as to what inference is to be drawn from well established facts, about which there is no doubt — High Court is entitled to draw necessary inference)
- (26) 13 AIR 1926 Oudh 120 (121) 27 Cr L Jour 529, *Sula Baksh v Emperor*
- 5 (30) 17 AIR 1930 Lah 403 (104) 32 Cr L Jour 349 *Emperor v Mohammad Khan*
- 6 (45) 32 AIR 1915 Sind 42 (46) 1 L R (1914) Har 444 46 Cr L Jour 614 219 Ind Cas 419 (DB), *Mahamdu v Emperor*
- (44) 31 AIR 1914 Sind 94 (97) 1 L R (1913) Har 294 45 Cr L Jour 526 212 Ind Cas 109 (DB) *Kassim Haji Khan v Emperor* (But the appellate Court will not accept the appreciation of the evidence by the trial Court when it has failed to notice certain important aspects in the case regarding the evidence and has failed to properly appreciate them)
- (40) 27 AIR 1910 Lah 329 (331) *Bharpara v Dewan Chand*.
- (34) 25 AIR 1938 Pat 49 (51) 39 Cr L Jour 231 16 Pat 116, *Emperor v Baharuddin*
- (38) 25 AIR 1935 Rang 45 (47) 39 Cr L Jour 248 *Ngn Kyaw Hla v The King*
- (15) 2 AIR 1915 P C 1 (2) 39 Bom 396 43 Ind App 110 (P C) *Bombay Cotton Manufacturing Company v Motilal Shet al*
- (74) 21 Suth W R Cr 13 (14) *Queen v Madhub Chunder Giri*
- (25) 12 AIR 1926 Oudh 715 (717) 26 Cr L Jour 1317, *Sheo Narain Singh v King Emperor* (The High Court must be guided as regards the credibility of oral evidence mainly by the Court that heard it.)
- (35) 22 AIR 1935 Pat 95 (97) 36 Cr L Jour 348, *Ibrahim v Emperor* (Lower Court's opinion should be treated as almost conclusive)
- (39) 33 Cr L Jour 529 (930) 139 Ind Cas 756 (Oudh) *Emperor v Faragi* (The appellate Court must be slow to differ from the opinion of the trial Judge as regards the value of the testimony of witnesses unless there are good grounds)
- (29) 16 AIR 1929 Mad 846 (847) 31 Cr L Jour 449 *Public Prosecutor v Pakiriswami* (It is only in very exceptional circumstances that a Court dealing with an appeal against an acquittal should reverse that finding by accepting oral evidence which the trial Court after enjoying the advantage of hearing the witnesses has disbelieved)
- (31) 18 AIR 1931 Rang 66 (87) 8 Rang 671 32 Cr L Jour 929 *Emperor v Maung Tun Nyan*
- (33) 20 AIR 1933 Oudh 372 (373) 35 Cr L Jour 66, *Emperor v Parameshwar Din* (Judge trying case with marked care and intelligence — His opinion as to credibility of witnesses should ordinarily be accepted)
- (26) 13 AIR 1926 Oudh 245 (246) 27 Cr L Jour 57, *Dhulan v Emperor* (Question of credibility of

in most cases to rely upon the evidence which has been definitely disbelieved by the trial Judge for good reasons and to try to support the conviction of an accused person on such evidence)

- (82) 11 Cal L Rep 25 (29 30), *Pratap Chunder Mukherjee v Emperor* (The sound rule to apply in trying a criminal appeal where questions of facts are in issue is to consider whether the conviction is right and in this respect a criminal appeal differs from a civil one)
- (74) 20 Suth W R Cr 13 (13) 11 Beng L R 33 *Queen v Aherny Mullah*

7 (DB).
.. .. . evidence
.. .. . evidence
by trial Court)

trial Court⁸ Where the evidence has been properly appreciated by the lower Court and its view cannot be said to be wrong the appellate Court cannot interfere⁹

There is a difference of opinion as to whether the appellant is bound to show that the decision of the lower Court is wrong On the one hand, it has been held that there is no such burden on the appellant It is for the appellate Court as for the first Court to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the accused has been established beyond all reasonable doubt¹⁰ According to this view the presumption of innocence with which the accused starts continues right through until he is held guilty by the final Court of Appeal, this presumption is not strengthened by an acquittal or weakened by a conviction in the trial Court the onus of proof is neither increased nor lightened by an order of conviction or acquittal¹¹

On the other hand it has been held in the undermentioned case¹² that the presumption is that the lower Court's decision is correct According to this view an appellant is not in the same position before an appellate Court as he is before the Court trying him, but must satisfy the appellate Court that there is sufficient ground for interfering¹³ It is submitted that the former view is to be preferred to the latter

Where the whole of the prosecution evidence is disbelieved, a conviction by the lower Court in respect of two offences cannot be set aside as regards one offence and

(37) 24 AIR 1937 Sind 22 (25) 38 Cr L Jour 350 90 Sind L R 406 *Jalal v Emperor* (Judicial Commission on a Court will interfere if strong grounds exist)

(04) 1 Cr L Jour 791 (789) 1904 Pan Re No 7 Cr King *Emperor v Chaltar Singh*

(14) 1 AIR 1914 Lah 427 (431) 15 Cr L Jour 203, *Emperor v Bishen Singh*

(20) 7 AIR 1920 Lah 244 (245) 22 Cr L Jour 172 *Emperor v Samand*

(19) 5 AIR 1918 Lah 54 (55) 19 Cr L Jour 275 *Emperor v Mt Jaijai*

(18) 5 AIR 1918 Lah 105 (107) 19 Cr L Jour 723 1918 Pan Re No 20 Cr *Emperor v Muhammad Shafi*

(18) 5 AIR 1918 Lah 299 (286) 19 Cr L Jour 710 *Emperor v Lachmandas* (Culpability of accused must be very clear and indubitable before appellate Court would interfere)

(19) 9 AIR 1919 Lah 806 (359) 20 Cr L Jour 188, *Pallia v Emperor*

(19) 6 AIR 1919 Lah 440 (442) 19 Cr L Jour 187, *Emperor v Jagat Ram*

(34) 21 AIR 1934 Lah 710 (715) 38 Cr L Jour 419 *Emperor v Muhammad Khan*

(83) 20 AIR 1933 Lah 871 (874) 85 Cr L Jour 137, *Emperor v Rai Singh*

(33) 20 AIR 1933 Lah 888 (390) 34 Cr L Jour 598 *Emperor v Sher Singh*

(83) 20 AIR 1933 Lah 298 (298) 35 Cr L Jour 626 *Muzaffar v Emperor*

(27) 14 AIR 1927 Lah 549 (554) 28 Cr L Jour 558 *Emperor v Bakhtawar Lal*

[See (32) 19 AIR 1932 Sind 143 (143) 33 Cr L Jour 900 *Udharam v Emperor* (Courts are always reluctant to interfere with the findings of a trial Court unless strong grounds are made out for so doing)]

(33) 20 AIR 1933 Oudh 204 (255) 34 Cr L Jour 859 *Emperor v Hub Lal* (Judgment of acquittal will not be interfered with in absence of strong and cogent grounds)]

8 (72) 17 Suth W R Cr 59 (59) *In re Goomanec* (Appellate Court is bound precisely in the same way as trial Court to test evidence extrinsically as well as intrinsically)

9 (39) 26 AIR 1939 All 457 (458 461) 40 Cr L Jour 772 *Emperor v Sheo Sewak Singh*

(33) 20 AIR 1933 Oudh 62 (63) 34 Cr L Jour 377 *Rameshwar Tewari v Emperor* (Conclusion of trial Court supported by probabilities of case should be upheld)

(33) 20 AIR 1933 Oudh 269 (271 272) 35 Cr L Jour 58 *Chhotte Lal v Emperor*

[See (31) 18 AIR 1931 Oudh 83 (84 85) 6 Luck 582 32 Cr L Jour 630 *Emperor v Narain*]

10 (45) 32 AIR 1945 Nag 116 (117) 1 L R (1945) Nag 441 46 Cr L Jour 590 1919 Ind Cas 370

Mahomed Hussain v King Emperor

(43) 30 AIR 1943 Cal 465 (467) 1 L R (1943) 1 Cal 423 45 Cr L Jour 71 209 Ind Cas 100 (DB)

Ibrahim Bandukchi v Emperor

(38) 20 AIR 1938 Rang 45 (47) 39 Cr L Jour 248 *Nga Kyaw Hla v The King*

(96) 23 Cal 247 (349) *Ulan Khan v Sagai Depara*

(15) 2 AIR 1915 Cal 187 (187) 15 Cr L Jour 686 42 Cal 374 *Kanchan Mallik v Emperor*

11 (34) 11 AIR 1934 All 842 (843) 85 Cr L Jour 1279, *Emperor v Nur Ahmad*

12 (72) 18 Suth W R Cr 15 (16), *Queen v Ramlochan Singh*

13 (83) 5 All 386 (387) 1883 All W N 72 *Empress v Saywan Lal*

(94) 20 All 459 (461) 1899 All W N 117 *Queen Empress v Prag Dut*

confirmed as regards the other, the whole of the conviction should be set aside¹⁴ Where improper evidence is admitted the appellate Court should see whether, excluding it, there still remains sufficient evidence to sustain the conviction of the lower Court and, if so, it should not interfere¹⁵ See also Section 167 of the Evidence Act

15. Appeal from acquittal — Clause (a) — Section 407 of the Code of 1861 specifically provided, that 'there shall be no appeal from a judgment of acquittal passed in any criminal Court' This was in accordance with the old established principle of English law that a man once tried and acquitted for an offence is *ipso facto* protected from any subsequent proceeding for that offence, whether the subsequent proceeding is by the appellate or revisional Court

On grounds of public policy,¹ however, a right of appeal against an acquittal, subject to certain limitations, was for the first time recognised in this country by the Code of 1872.² An appellate Court will, however, hesitate and feel great reluctance in interfering with the finding of the Court below and coming to a different conclusion³ Where two views are possible on the evidence, an appellate Court will not interfere merely because it would sitting as a trial Court, have taken the other view⁴ unless it is shown that there has been some irregularity in procedure or some other serious defect which necessitates the re-examination of the entire evidence and a fresh conclusion⁵ Again, where the

24 (18) 5 AIR 1918 All 355 (355) 19 Cri L Jour 37, *Sheobans Singh v Emperor*

[See also (02) 6 Cal W N 380 (392) *Motsjan Bibi v Crown*]

15 (74) 11 Bom H C R 90 (98) *Reg v Parbhudas*

Note 15

1 (34) 21 AIR 1934 All 27 (31) 56 All 354 35 Cri L Jour 361 (FB) *Emperor v Sheo Janak Pande*

2 (31) 18 AIR 1931 All 439 (441) *Emperor v Ram Adhin Singh*

[See (81) 4 All 149 (149) 1891 All W N 159 *Empress of India v Gayadin*

(74) 7 Mad H O R 339 (341) 2 War 476 *In re Government Pleader*]

Also see S 417 Note 1

3 (37) 24 AIR 1937 Cal 156 (157) 38 Cri L Jour 638 *Superintendent and Remembrancer of Legal Affairs Bengal v Jatindra Mohan* (Appeals by the Crown against acquittals purely on questions of fact are not often encouraged by appellate Courts)

(37) 39 Pun L R 776 (777) *Emperor v Sardara Singh* (The High Court will not interfere unless, in view of all the circumstances the view taken by the Sessions Judge is clearly erroneous)

(34) 21 AIR 1934 All 27 (35) 56 All 354 35 Cri L Jour 364 (FB) *Emperor v Sheo Janak Pande*

(25) 12 AIR 1925 Sind 290 (295) 19 Sind L R 111 26 Cri L Jour 1028 *Emperor v Sundardas*

(23) 10 AIR 1923 Oudh 217 (224) 24 Cri L Jour 770, *Emperor v Natoram*

(16) 3 AIR 1916 Oudh 112 (114) 17 Cri L Jour 540 *Emperor v Durga Prasad* (Lower Courts decision should not be lightly set aside)

[See also (43) 30 AIR 1943 Sind 130 (131) 1 L R (1913) Kar 3 44 Cri L Jour 607 207 Ind Cas 446 (DB) *Emperor v Chimandas Dhanomal* (Appeals from acquittals are allowed only in exceptional circumstances)]

J
Singh
Sheo Janak Pande

(16) 3 AIR 1916 Lah 340 (392) 17 Cri L Jour 97 *Bachinta v Emperor* (High Court will not interfere where appeal is based on doubtful weighing of facts)

(14) 1 AIR 1914 Lah 427 (431) 15 Cri L Jour 203 *Emperor v Bishen Singh*

(03) 1903 Pun Re No 11 Cr p 31 (32) 1903 Pun L R No 142 *Emperor v Mangat*

(34) 21 AIR 1934 Lah 212 (215) 35 Cri L Jour 349, *Emperor v Natha Singh*

(34) 21 AIR 1934 Lah 573 (524) 36 Cri L Jour 635 *Emperor v Kura*

(16) 3 AIR 1916 Oudh 112 (114) 17 Cri L Jour 540 *Emperor v Durga Prasad*

(94) 16 All 212 (214) 1894 All W N 49 *Queen Empress v Robinson*

(81) 4 All 148 (149) 1891 All W N 153 *Empress of India v Gayadin*

(82) 1802 All W N 64 (64) *Empress v Wala Mohammad* (Following, 4 All 140)

(31) 1931 Mad W N 729 (730) *Public Prosecutor v Ramudu*

5 (34) 21 AIR 1934 All 27 (35) 56 All 354 35 Cri L Jour 361 (FB), *Emperor v Sheo Janak Pande*,

evidence against the accused is too scanty or insufficient,⁶ or where it is not established beyond all reasonable doubt that the respondent is guilty of the offence charged⁷ the appellate Court will not interfere with the acquittal. Nor will the finding of the trial Court be displaced merely because the Government's view of the case does not coincide with that of the trial Court⁸

Except in regard to the points stated above, there is no distinction drawn so far as the sections of the Code themselves are concerned, between appeals from convictions and appeals from acquittals in regard to the rules and limitations applicable to them. It was, however, held in several decisions, that a distinction must be drawn as regards the powers of the appellate Court in dealing with an appeal from an acquittal and an appeal from a conviction⁹. Thus, it was held that the appellate Court had no jurisdiction to reverse an order of acquittal on a matter of fact except in cases in which the lower Court had obstinately blundered¹⁰ or had through incompetence stupidity or perversity reached distorted conclusions as to produce a positive miscarriage of justice¹¹ or had in some other way, so conducted itself as to produce a miscarriage of justice¹² or had obviously blundered,¹³ or its judgment was wrong and perverse¹⁴ or was

6 (31) 18 AIR 1931 All 433 (44), *Emperor v Ram Adhin Singh*

(31) 18 AIR 1931 All 712 (715) 32 Cr L Jour 1073 *Emperor v Baldeo Kori*

[See also (77) 1 Bom 610 (623) *Peg v Hanwanta* (To reverse judgment of acquittal evidence stronger than statement of accomplice and of witness who L entirely disbelieved by lower Court must be shown)]

7 (43) 30 AIR 1913 Mad 370 (371) 44 Cr L Jour 785 203 Ind Cas 440 *Public Prosec. v Punnuswami Mudaliar*

(38) 20 AIR 1933 Sind 60 (31) 39 Cr L Jour 504 37 Snd LP 609 *Emperor v Gulab Shah*

(31) 18 AIR 1931 Rang 86 (87) 8 Rang 671 32 Cr L Jour 879 *Emperor v Maung Tun Aye*

8 (61) 4 All 149 (150) 1891 All W N 159 *Empress of India v Gayadin*

(94) 16 All 712 (714) 1894 All W N 49 *Queen-Empress v Robinson*

9 (31) 18 AIR 1931 Lah 460 (466) 37 Cr L Jour 1079 *Emperor v Musaffar*

10 (81) 4 All 149 (150) 1891 All W N 159 *Empress of India v Gayadin*

(94) 16 All 710 (714) 1894 All W N 49 *Queen-Empress v Robinson*

(93) 10 AIR 1918 Pat 119 (121) 23 Cr L Jour 410 *Emperor v Kunja Dasadh*

11 (29) 16 AIR 1909 Pat 491 (496) 8 Pat 496 31 Cr L Jour 143 *Emperor v Deboo Singh*

(81) 4 All 149 (149 150) 1891 All W N 159 *Empress of India v Gayadin*

(94) 16 All 712 (714) 1894 All W N 49 *Queen-Empress v Robinson*

[See (33) 20 AIR 1933 Rang 387 (388) 30 Cr L Jour 786 *Emperor v Aga Po Yin*

(29) 16 AIR 1909 Pat 503 (508) 30 Cr L Jour 1116 *Emperor v Ram Prasad* (In order to interfere, the judgment must be such as no body of sensible men could arrive at)]

12 (33) 20 AIR 1933 Pesh 77 (78) 34 Cr L Jour 354 *Emperor v Chaitar Singh*

(97) 1897 Pan Re No. 10 Cr p 70 (76) *Queen-Empress v Gulam Muhammad*

(16) 3 AIR 1916 Lah 143 (144) 17 Cr L Jour 194 1916 Pan Re No 15 Cr *Emperor v Naladh*

(34) 21 AIR 1934 Lah 573 (574) 35 Cr L Jour 635 *Emperor v Kura*

(34) 21 AIR 1934 Lah 217 (215) 35 Cr L Jour 349 *Emperor v Natha Singh*

(34) 21 AIR 1934 Rang 44 (47) 35 Cr L Jour 800 *Emperor v U Ba U*

(24) 11 AIR 1904 Cal 611 (614) 25 Cr L Jour 71 *Superintendent and Remembrancer of Legal Affairs, Bengal v Purna Chandra Ghose*

(11) 17 Cr L Jour 364 (370) 11 Ind Cas 132 1911 Pan Re No 10 Cr (FB) *Emperor v Kura* (Not

his section should be

* manifestly wrong)

* al from an acquittal

(22) 14 AIR 1927 Lah 178 (179) 23 Cr L Jour 55 *Emperor v Abdul Latif* (Unless manifestly wrong or perverse appellate Court cannot weigh evidence)

(31) 18 AIR 1931 Oudh 116 (119) 6 Luck 539 37 Cr L Jour 694 *Gafoor Khan v Emperor* (Judgment must be manifestly wrong — 4 All 149 dissented from.)

(33) 20 AIR 1933 Oudh 372 (373) 35 Cr L Jour 66 *Emperor v Parmeswar Din* (Do.)

14 (15) 2 AIR 1915 Cal 237 (238) 15 Cr L Jour 160 *Deputy Superintendent and Remembrancer of Legal Affairs Bengal v Amulya Charan Awan*

unreasonable¹⁵ A contrary view was also expressed in other decisions namely, that there was no distinction as regards the powers of the appellate Court between an appeal from an acquittal and an appeal from a conviction and that the only question in each case was whether the conclusions upon the evidence were proper and correct¹⁶

The question has now been settled by the Privy Council in *Sheo Swarup v King Emperor*¹⁷ Lord Russell of Killowen in delivering the judgment of the Board upholding the latter view observed as follows

- (16) 3 AIR 1916 Mad 711 (712) 16 Cr L Jour 599 *Public Prosecutor v Narayana Naidu*
 (30) 17 AIR 1930 Mad 704 (704 705) 31 Cr L Jour 897 *Public Prosecutor v Lakshminarra*
 (87) 1937 Rtt 314 (317) *Queen Empress v Sayed Surfuddin* (Decision of assessors)
 (33) 20 AIR 1933 Oudh 8, (85) 34 Cr L Jour 545 *Emperor v Sangaram*
 (25) 19 AIR 1925 Lah 600 (602) 26 Cr L Jour 1141 *Emperor v Ram Karan*
 (13) 14 Cr L Jour 525 (526) 90 Ind Cas 100a (Lah) *Emperor v Mt Bakhtawar*
 15 (37) 33 Cr L Jour 937 (933) 139 Ind Cas 740 (Oudh) *Emperor v Bharat Singh*
 (34) 21 AIR 1934 Rang 44 (45) 35 Cr L Jour 855 *Emperor v U Ba U*
 (04) 1 Cr L Jour 781 (789) 1904 Pun Re No 7 Cr *King Emperor v Chhattar Singh*
 (14) 1 AIR 1914 Lah 427 (431) 15 Cr L Jour 203, *Emperor v Bishen Singh*
 (20) 7 AIR 1930 Lah 21 (23) 31 Cr L Jour 319 *Emperor v Turezi*
 16 (34) 21 AIR 1934 All 27 (35) 56 All 354 35 Cr L J 364 (F.D) *Emperor v Sheo Janak Pande*
 (24) 11 AIR 1924 Bom 335 (337) 25 Cr L Jour 786 *Emperor v Moti Kloda*
 (94) 19 Bom 51 (09) *Queen Empress v Kars Gorda* (17 Cal 495 followed)
 (04) 1 Cr L Jour 781 (789) 1904 Pun Re No 7 Cr *King Emperor v Chhattar Singh* (Wrong and unreasonable finding can be reversed whether or not the unreasonableness amounts to perversity, stupidity or incompetence or whether the Court below can or cannot be said to have obstinately blundered)

— "un Nyan

Orissa v

— difference in appeal from acquittal)
 r v Nur Ahmad

here is no distinction made in the Code as to mode of procedure which governs the two sorts of appeals or as to principles upon which they are to be decided)

- (20) 7 AIR 1930 Bom 217 (219) 21 Cr L Jour 17 *Emperor v Salaram Manaji*
 (32) 19 AIR 1932 Lah 12 (13) 32 Cr L Jour 1130 *Emperor v Razisan*
 (31) 18 AIR 1931 Lah 18 (23) 32 Cr L Jour 485 *Blas Khan v Emperor* (There is no difference

- (90) 2 Weir 469 (462 463) *Government Pleader v Lakshmi Narasimham* (4 All 144 dissented from)
 (09) 11 Cr L Jour 66 (66) 4 Ind Cas 664 1909 Pun Re No 15 Cr *Emperor v Harnama* (But when

acquittal and one from conviction)

- (34) 21 AIR 1934 S od 84 (88) 35 Cr L Jour 1149 *Emperor v Mt Bhuro*
 (98) 20 All 459 (464) 1898 All W N 117 *Queen Empress v Prag Dat*
 (93 1900) 1893 1900 Low Bur Rul 49 (46) *Queen Empress v Maung Daw*
 (27) 14 AIR 1927 S od 99 (94) 27 Cr L Jour 1347 91 Sind L R 141 *Emperor v Suleman*
 (04) 1 Cr L Jour 1072 (1025) 2 Low Bur Rul 303 *Emperor v Po Saing Aung Pe*
 [See (35) 12 AIR 19 5 All 31a (315) 47 All 306 26 Cr L Jour 676 *Emperor v Aular* (Appeal by Government must be considered on its merits just as any other appeal always must be)
 (34) 21 AIR 1934 Oudh 229 (231) 35 Cr L Jour 843, *Emperor v Sital*]
 [See also (33) 20 AIR 1933 All 574 (578) 34 Cr L Jour 1239 *Emperor v Basant Das* (Perversity not necessary)]

- 17 (34) 21 AIR 1934 P C 227 (229, 230) 56 All 645 61 Ind App 398 36 Cr L Jour 7 6 (PC)

There is in their opinion no foundation for the view apparently supported by the judgments of some Courts in India that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact except in cases in which the lower Court has obstinately blundered or has through incompetence stupidity or perversity reached such distorted conclusions as to produce a positive in scarriage of justice or has in some other way so conducted itself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result. Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed.¹⁸ No limitation should be placed upon that power unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses (2) the presumption of innocence in favour of the accused a presumption certainly not weakened by the fact that he has been acquitted at his trial¹⁹ (3) the right of the accused to the benefit of any

[See also (45) 32 AIR 1945 P C 151 (152) 47 Cr L Jour 1 201 Ind Cas 56 *Nur Mahomed v* 786 followed—Trial Court not placing reliance on the ground for invoking the

- 1 (DB) *Supt & Legal Remembrancer v Golok* (As the case was eminently one which ought to be decided by a jury on a proper trial and with proper directions from the Judge the High Court did not propose to examine the evidence against each accused in detail but ordered a retrial.)
- (42) 29 AIR 1942 Mad 531 (531) 43 Cr L Jour 665 201 Ind Cas 440 *Public Prosecutor v Chinna lathumana Naidu* (Though appellate Court can go into facts it will not convict if facts were at all uncertain especially when lower Court's finding on evidence is not unreasonable.)
- (42) 29 AIR 1942 Pat 190 (193) 20 Pat 881 43 Cr L Jour 493 199 Ind Cas 475 (DB) *Emperor v Barka Jetha Majhi* (Trial Court acquitting accused on an erroneous view of law—Acquittal can be set aside.)
- (42) 29 AIR 1942 Snd 83 (86) 1 L R (1941) Kar 532 43 Cr L Jour 458 199 Ind Cas 78 (DB) *Emperor v Pindladhoshah Ibrahimshah* (In an appeal from an order of acquittal based on facts the High Court will interfere where the acquittal has resulted from a total misunderstanding and misappreciation on the part of the Magistrate of the evidence on record relating to the charge.)
- 19 (40) 27 AIR 1940 All 291 (293) 41 Cr L Jour 647 *Emperor v Aftab Mahomed*
- (39) 26 AIR 1939 All 457 (458, 461) 40 Cr L Jour 772 *Emperor v Sileo Sewah Singh*
- (38) 25 AIR 1938 Snd 80 (81) 39 Cr L Jour 504 3rd Snd L R 639 *Emperor v Gulab Shah*
- (36) 23 AIR 1936 Pat 350 (353) 15 Pat 108 37 Cr L Jour 877 *Emperor v Chaturbhuj*
- (36) 23 AIR 1936 Rang 90 (94) 38 Cr L Jour 971 *Emperor v Nga Mya Maung*
- (25) 12 AIR 1905 All 315 (315, 316) 47 All 806 26 Cr L Jour 676 *Emperor v Autar* (Onus on the Crown of establishing judgment to be erroneous.)
- (31) 18 AIR 1931 All 712 (715) 32 Cr L Jour 1073 *Emperor v Baldeo Koori* (Do)
- (33) 20 AIR 1933 Oudh 340 (342) 34 Cr L Jour 538 *Emperor v Ram Dat* (Crown must show that guilt of accused is proved beyond any reasonable doubt.)
- (30) 17 AIR 1930 All 490 (493) 31 Cr L Jour 954 5th All 806 *Emperor v Padam Singh* (In an appeal against an acquittal although the accused was not acquitted on the merits it is for the Crown to establish and to establish beyond reasonable doubt that the conviction of accused on the merits ought to have been sustained.)
- (28) 15 AIR 1908 Pat 146 (150) 6 Pat 768 29 Cr L Jour 301 *Emperor v Gulam Nabi* (Crown must show conclusively that inference of guilt is irresistible.)
- (33) 20 AIR 1933 Pat 500 (503) *Emperor v Wajid Sheikh* (The Crown coming in appeal ought to show that the view taken by the first Court as to the reliability of the approvers is erroneous.)

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(33) 20 AIR 1933 Pesh 27 (28) 34 Cr L Jour 384 *Emperor v Chaitar Singh*

doubt,²⁰ and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.²¹ To state this, however, is only to say that the High Court, in its conduct of the appeal should, and will, act in accordance with the rules and principles well known and recognised in the administration of justice."

Where the lower Court, thinking whole trial illegal because of wrong joinder of charges, acquitted the accused, it was held that the order of acquittal should be set aside, the reason being that if the whole trial be illegal, there can be neither conviction nor acquittal.²²

In exercising its jurisdiction in the matter of appeals against acquittals, the High Court should confine its exercise to the particular acquittal complained of by the Government.²³

Where an accused is charged with a major offence but is convicted of a minor offence, he should be held to be acquitted of the major offence.²⁴ In such a case, if the Government appeal against the acquittal in respect of the major offence, it is open to the accused to ask the Court to consider all the evidence before it and to urge all possible grounds against conviction, and if the Court comes to the conclusion that the conviction even for the lesser offence is wrong, it can *suo motu* acquit the accused of that offence in the exercise of its powers under Section 439²⁵.

16. Appeal from acquittal—Order for further inquiry.—It is only in an appeal from an acquittal that the appellate Court can direct a further inquiry.¹ There is no power to order further inquiry in an appeal from a conviction² or from any other

(34) 21 AIR 1934 All 27 (35) 56 All 354 35 Cr L Jour 364 (FD), *Emperor v Sheo Janak Pande*

(31) 18 AIR 1931 All 439 (411), *Emperor v Ram Adhin Singh*

(17) 4 AIR 1917 Cal 637 (637) 17 Cr L Jour 9 *Deputy Legal Remembrancer, Bihar & Orissa v Mutukdhari Singh*

20 See also (36) 25 AIR 1938 Sind 67 (68) 39 Cr L Jour 462 32 Sind L R 694 *Emperor v Ghulamali Bahawal*

(36) 23 AIR 1936 Pat 350 (353) 15 Pat 108 37 Cr L Jour 877, *Emperor v Chaturbhuj*,

(36) 23 AIR 1936 Rang 90 (94) 38 Cr L Jour 927 *Emperor v Nga Mya Maung*

v Rub Lal

Mt Bhuro

an v Emperor

v Bharat Singh

53 220 Ind Cas 452 (DB) *Emperor*

v W S Priestley

22 (37) 24 AIR 1937 Bom 152 (152) 38 Cr L Jour 571, *Emperor v Yemanya*

(38) 25 AIR 1938 Sind 108 (113) 39 Cr L Jour 630 I L R (1939) Kar 41 *Emperor v Pursomal Germal*

(94) 10 Bom 51 (68), *Queen Empress v Kari Gorda*

24 (28) 15 AIR 1923 PC 254 (257, 50 All 722 55 Ind App 390 29 Cr L Jour 828 (PC), *Kishan Singh v Emperor*

25 (38) 25 AIR 1938 Mad 723 (723) 39 Cr L Jour 871 *Public Prosecutor v Panchakshram*

Note 16

1. (1900) 27 Cal 126 (129) 3 Cal W N 601 *Charoobala Dabee v Darendra Nath*

2 (21) 8 AIR 1921 All 158 (162) 23 Cr L Jour 402, *Mohammad Ata v Emperor* (But further evidence may be taken)



order³ The appellate Court may, if necessary, take additional evidence under Section 423⁴

17. Appeal against acquittal—Power to order re-trial. — The power to order a re trial, whether in an appeal from a conviction or from an acquittal, is a *discretionary* one¹ A re trial should be ordered only where the trial is incurably defective so that even the taking of additional evidence under S 423 will not put the appellate Court in a position to dispose of the case satisfactorily² Thus, where the lower Court had acquitted the accused on a misconception of the law and did not examine the defence witnesses, a re trial was ordered on setting aside the acquittal³ Where the evidence disclosed some other offence than that of which the accused was acquitted, it was held that a re trial might be ordered⁴ See also the undermentioned case⁵

The discretion to order a re trial will not be exercised, where the case is not of sufficient consequence,⁶ or where there is no evidence on the record sufficient for conviction,⁷ or where no action was taken against the accused for a long time after the offence and the ordering of a re trial would result in the accused labouring under great difficulties in the conduct of his case,⁸ or where there has already been full inquiry into the facts and no further evidence is likely to be forthcoming⁹

The fact that evidence had been discovered subsequent to the acquittal is not a ground for setting aside the acquittal or for ordering a re trial¹⁰

An order for re trial can be passed even subsequent to the order setting aside the conviction and sentence¹¹

Where, in an appeal against an order of acquittal, the High Court sets aside the order of acquittal but declines to order re trial, the prosecution still has power to prosecute the accused for the same offence¹²

3 (87) 24 AIR 1937 All 305 (318) 38 Cr L Jour 581 ILR (1937) All 517 (FB), *Mann Lal v Emperor* (No power of remand under S 476B)

See Notes on Clause (2)

4 (87) 24 AIR 1937 Nag 295 (286) 38 Cr L Jour 1059 ILR (1937) Nag 541, *Shoo Ram v Emperor*

Note 17

1 (37) 24 AIR 1937 Bom 152 (152) 38 Cr L Jour 571, *Emperor v Yemanya Kalappa* (Defect in trial entirely due to fault of prosecution in joining charges improperly — Re-trial not ordered)

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a proper manner — Re trial ordered)

6 (71 74) 7 Mad H O R Cr 339 (341) 2 West 476, *In re Government Pleader*

[C. A. 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000]

7 5 Remembrancer of Legal Affairs,

8 *Jaswant Rai & Co*
(FB), *Public Prosecutor v.*

9 *Nue*

10 *not travel*

[See however (23) 10 AIR 1923 Rang 65 (65) 24 Cr L.J. 744, *Mrs May Boudville v King Emperor* (Re-trial not ordered as there was no reason to suppose that fresh evidence would be forthcoming)]

11 (81) 3 Mad 48 (51) *In re Rame Reddi*

Lal Puri v Emperor.

ya Kalappa

18 *Re trial of appeals* — An appeal is to all intents and purposes a trial¹ and consequently the word 're tried' will include the re trial of an appeal also. Where a person is acquitted in appeal by the Sessions Judge, the High Court on an appeal therefrom by the Provincial Government, can after reversing the acquittal order the appeal to be re tried².

19 "Find him guilty and pass sentence" — The appellate Court setting aside an order of acquittal may find the accused guilty of the offence charged, and pass sentence on him according to law¹. The words find him guilty are however, not limited to the offences of which the accused was accused in the lower Court the appellate Court may find him guilty of all offences of which the trial Court could have found him guilty under the provisions of Ss 237 and 238 of the Code provided of course the accused is not prejudiced by the course adopted². The fact that the trial was with the aid of assessors will not affect the power of the appellate Court to convict the accused for another offence under Ss 237 and 238 even though the opinion of assessors could not be taken in respect of such offence³.

Where the accused has had no legal trial he cannot be convicted and sentenced by the appellate Court. The only course open in such a case is to order a re trial⁴.

Where the accused is convicted in appeal the appellate Court may pass sentence according to law. Where the trial Court convicted the accused and awarded him one year's imprisonment and on appeal the accused was acquitted it was held in an appeal against such acquittal that the High Court if it set aside the acquittal had power to pass a severer sentence than that awarded by the trial Court though it must be within the powers of the trying Magistrate⁵.

Ordinarily in an appeal against an acquittal the appellate Court convicting the accused refrains from passing a capital sentence⁶.

20 Appeal from conviction—General — In an appeal from a conviction the

Note 18

- 1 (70) 1970 Pun Re No 31 Cr p 48 (49) *Fuyl v Crown*
- 2 (89) 13 Bom 506 (515) *Queen-Empress v Ganesh Khanderao*
- 3 (14) 1 AIR 1914 Mad 50 (51) 15 Cr L Jour 409 *Public Prosecutor v Pater Unnithiri* (*Quare* — Can do so under S 439 read with clis (a) (c) and (d) of S 423)

[But see (36) 23 AIR 1936 Rang 369 (370) 37 Cr L Jour 1008 *Emperor v U Ador* (the words that the accused be re-tried in S 493 (1) (a) do not apply to a case where the order of acquittal is passed on appeal)]

Note 19

- 1 See (23) 10 AIR 1923 All 91 (109) 45 All 296 25 Cr L Jour 497 *Emperor v Har Prasad*
[See also (14) 12 AIR 1923 All 165 (171) 47 All 203 26 Cr L Jour 599 *Emperor v Raghunath Venaski*]
- 2 (28) 15 AIR 1928 Bom 130 (132) 52 Bom 345 29 Cr L Jour 403 *Emperor v Ismail Khadirszab*
(20) 17 AIR 1928 Snd 105 (107) 19 Snd L R 183 25 Cr L Jour 1017 *Fazlullah v Emperor* (In absence of prejudice to accused appellate Court can alter conviction into one of graver offence than that charged and found but falling within S 437)
- 3 (28) 15 AIR 1928 Bom 130 (133) 52 Bom 335 29 Cr L Jour 403 *Emperor v Ismail Khadirszab*
(AIR 1924 Bom 246 held no longer good law)
- 4 (16) 3 AIR 1916 Mad 110 (113 115) 39 Mad 527 16 Cr L Jour 593 (FB) *Public Prosecutor v Mahajakkhal Kadiri Koppa Haji*
[See (37) 21 AIR 1937 Bom 152 (152) 33 Cr L Jour 571 *Emperor v Yemanya Kalappa* (Trial illegal — Acquittal merely set aside — Re trial not ordered)]
- 5 (35) 22 AIR 1935 Na 139 (143 141) 31 Nag L R 312 36 Cr L Jour 867 *Emperor v Abbasulla Yusufalli*
- 6 (30) 17 AIR 1930 Lab 409 (414) 37 Cr L Jour 51 *Asamat Khan v Emperor* (Where conduct of accused has been high handed and cruel and opposite party is not proved to have given any provocation capital sentence may be passed)

appellate Court may adopt one of three courses according to the facts and circumstances of the case

- (1) It may reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court of competent jurisdiction subordinate to such appellate Court, or committed for trial.
- (2) It may alter the finding, maintaining the sentence, or with or without altering the finding reduce the sentence.
- (3) It may alter the nature of the sentence, but, subject to the provisions of s 106, sub s (3), not so as to enhance the same

It cannot simply remand the case directing that the lower Court should examine certain witnesses afresh and re-submit the record to the appellate Court for decision of the appeal¹ Nor can it direct a further inquiry to be made²

Clause (b) cannot be taken to imply that, unless accompanied by a sentence a conviction, such as that under S 562 of the Code, is not open to appeal it is unnecessary to regard the section as an exhaustive statement of the powers of an appellate Court³

21 "Reverse the finding and sentence" — Where an appellate Court reverses the finding and sentence of the lower Court, it must adopt one of the three courses —

- (1) acquit or discharge the accused, or
- (2) order his re-trial by a Court of competent jurisdiction, or
- (3) order his commitment for trial

A mere reversal of the conviction without adopting any of these courses amounts to an acquittal of the offence of which the accused was convicted in the trial Court¹

Before any of these courses is adopted, it is necessary that the finding of the lower Court should be reversed. This reversal, however, does not amount to an acquittal within the meaning of section 403²

It was held in the undermentioned case³ that where the accused had been convicted of offence X and the appellate Court considered him guilty not only of that offence but also of offence Y it should confirm the conviction in respect of offence X and direct him to be tried for the other offence also by a Court of competent jurisdiction.

22 "Acquit or discharge the accused" — As has been seen already, an appellate Court reversing the conviction of the accused can acquit or discharge the accused¹

Where A and B are convicted by the trial Court and B appeals and is acquitted on the merits, it does not follow that A will necessarily have the benefit of the finding of the appellate Court² Where, however, the grounds of acquittal of B are common to A also,

Note 20

- 1 (25) 12 AIR 1925 Cal 172 (172) 26 Cr L Jour 313 *Abdus Samad v Emperor*
[See also (36) 23 AIR 1936 Pat 439 (439) 37 Cr L Jour 906 *Sri Krishna Prasad v Emperor*
(Appellate Court setting aside conviction and sending case back for further evidence but not for complete re-trial — Proceeding is illegal)]

2 See Note 16

- 3 (35) 22 AIR 1935 Mad 157 (157) 58 Mad 517 36 Cr L Jour 589, *Mayandi Nadar v Pala Kudumban*

Note 21

- 1 (33) 1933 Mad W N 224 (224) *Chinna Simlan v Peria Simlan*
2 (35) 36 Cr L Jour 1333 (1334) 158 Ind Cas 200 (All) *Emperor v Bahraich*, (In appeal conviction set aside with a direction that accused be committed for trial)

Also see S. 403, Note 8

- 3 (98) 2 Weir 482 (483) *In re Kannachampet Parangodan*

Note 22

- 1 See (66) 15 Suth W R Cr 56 (56) *In re Panchanan Biswas*
(81) 6 Bom 34 (38) *Imperatrix v Pandharinath*
2 (18) 5 AIR 1918 Mad 918 (919) 40 Mad 591 18 Cr L Jour 454 *In re Venkatakrishnayya*

the position is different. In such cases, it has been held that the High Court as a *Court of revision* is entitled to set aside the conviction of A also, although he had not appealed from his conviction³. The *appellate Court* as such has not got this power⁴ but the High Court as the *Court of revision* has⁵.

Where A is acquitted and B is convicted by the trial Court and B appeals from his conviction, the appellate Court cannot interfere so as to affect the acquittal of A when there is no appeal against such acquittal⁶.

23 "Order him to be re tried"—Under the Code of 1872 where the trial Court was not one competent to try the case, the appellate Court was bound to order a re trial¹. Under the present section, where the appellate Court reverses the conviction of the accused, it may order him to be re tried by a Court of competent jurisdiction². The question, whether there should be a re trial is thus a matter of *judicial discretion* of the Court³. As a general rule⁴ an order for re trial would be proper where the trial in the lower Court has been *illegal, irregular or otherwise defective*⁵. In all serious cases where the first trial

3 (44) 31 AIR 1944 Pat 232 (233, 234) 23 Pat 103 45 Cri L Jour 725 214 Ind Cas 95 (D B) *In re Alhar Singh*

(66) 1866 Pun Re No 71 Cr p 76 (77) *Lal Khan v Kureem Khan*

(67) 1867 Pun Re No 6 Cr p 11 (12) *Craun v Achhur Singh*

(34) 21 AIR 1934 Lah 346 (343) 35 Cri L Jour 1016 *Manjaj Singh v Emperor*

(1900) 5 Cal W N 330 (331) *Broja Rahat v Empress*

(31) 18 AIR 1931 Cal 618 (619) 58 Cal 902 32 Cri L Jour 1003 *Rajani Kanta v Emperor* (Even without issuing notice on prosecution)

(20) 7 AIR 19 0 Cal 617 (610) 21 Cri L Jour 554 *Mir Moutez Ali v Emperor*

(16) 8 AIR 1916 Lah 350 (344) 17 Cri L Jour 97 *Bachanta v Emperor*

(11) 12 Cri L Jour 250 (251) 10 Ind Cas 793 (Low Bur) *T R S Chari v Emperor*

(10) 11 Cri L Jour 99 (100) 4 Ind Cas 980 (Lah) *Emperor v Sada* (High Court can when dealing with case in appeal acquit an innocent person though he has failed to exercise his right of appeal)

(73) 19 Buth W R Cr 57 (60) *Queen v Jaffrals*

(28) 15 AIR 1928 Pat 376 (335) 29 Cri L Jour 325 *Mt Champa Pasin v Emperor* (High Court in appeal is not precluded from interfering with the conviction of an accused when the case comes up before High Court otherwise than at his instance)

(34) 21 AIR 1934 Oudh 151 (155) 9 Luck 516 35 Cri L Jour 915 *Bhagwan Din v Emperor* (Illegality of sentence of non appealing accused patent on record—High Court in appeal can exercise powers of revision and set aside conviction and sentence of such accused)

(20) 7 AIR 1920 Pat 471 (481 482) 21 Cri L Jour 705 5 Pat L Jour 430 *Raghu Bhumsij v Emperor*

4 (10) 11 Cri L Jour 99 (105) 4 Ind Cas 930 (Lah) *Emperor v Sada*

(75) 2 Weir 570 (570) (An appellate Court cannot on the appeal of one prisoner alter the sentence of another prisoner in the same case who has not appealed. When an appellate Court is of opinion revised the record must be

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Cri L Jour 705 *Raghu Bhumsij*

Also see § 439 Note 23

6 (11) 12 Cri L Jour 575 (576) 12 Ind Cas 639 (All) *Darbara Mal v Emperor*

Note 23

1 (79) 1879 Pun Re No 1 Cr p 1 (1) *Kislan Singh v Khazan Singh*

2 (85) 1888 Pat 367 (367) *Queen Empress v Kasturibhai* (It can specify Court by which accused is to be re-tried)

3 (08) 8 Cri L Jour 101 (123) 8 Cal L Jour 59 *Durga Charan Sanjal v Emperor*

[See also 12] 13 Cri L Jour 437 (436) 40 Cal 163 15 Ind Cas 611 *Nazimuddin v Emperor*

(83) 1883 All W N 99 (99) *Empress v Bhagwan*

4 (41) 28 AIR 1941 Cal 707 (713) ILR (1941) 2 Cal 319 43 Cri L Jour 309 193 Ind Cas 499 (DB) *Hugh Francis Billiard v Emperor* (Where on an appeal from a conviction at a trial by jury the High Court holds that there has been misjoinder of charges and as such there has not been a legal trial, it is not entitled to order that there shall not be a fresh trial unless it is prepared to quash the conviction under S 215 Cr 1 C)

(39) 26 AIR 1939 Sind 209 (216 217) 41 Cri L Jour 29 ILR (1940) Har 749 *Shekaram v Emperor*

(37) 24 AIR 1937 Pesh 71 (71) 28 Cri L Jour 741, *Najaf Gul Mid v Emperor*

owing to a defect of jurisdiction or other similar cause is rendered abortive a new trial should be ordered unless it is quite clear that on the materials before the Court there is no chance of conviction.⁵

It is not however in every case where there has been a defect in the trial that the appellate Court will order a re trial. A re trial will not be ordered —

- (1) where the sentence is a small one the offence not being a serious one and the accused has sufficiently suffered in pocket⁶
- (2) where the evidence is unsatisfactory⁷ and cannot in any proper view of the case support a conviction⁸
- (3) where there is no probability of a conviction even if a re trial is ordered⁹ and the accused has already been subjected to persecution for a long time¹⁰
- (4) where the accused has already undergone a considerable portion of the sentence¹¹

- (36) 23 AIR 1936 All 758 (759) 33 Cr L Jour 71 *Moliram v Emperor*
 (11) 12 Cr L Jour 555 (390) 12 Ind Cas 961 36 Mad 457 *Jeremiah v Vas* (Power to direct re-trial is not confined to cases where trial was held by Court having no jurisdiction)
 [See (93) 10 AIR 1923 Mad 32 (34) 46 Mad 117 23 Cr L Jour 743 *In re Umar Hayee* (Trial de novo—Witnesses not examined de novo—Depositions at previous trial filed—Procedure held illegal and re-trial ordered)]
- 5 (03) 8 Cr L Jour 121 (124 126) 8 Cal L Jour 59 *Durga Charan v Emperor*
 6 (90) 12 AIR 1920 All 301-303 28 Cr L Jour 731 *Tufail Ahmad v Emperor*
 (64) 21 AIR 1934 Lah 649 (645) 66 Cr L Jour 463 *Kundan Lal v Emperor* (Technical offence)
 7 (43) 60 AIR 1943 Cal 571 (572) 1 LR (1943) 1 Cal 543 45 Cr L Jour 99 209 Ind Cas 206 (DB) *Emperor v Lal Mita*
 (63) 25 AIR 1933 Cal 787 (783) 40 Cr L Jour 56 *Suresh Chandra v Emperor* (Case failing for want of sufficient evidence)
 (27) 23 Cr L Jour 19 (22) 99 Ind Cas 51 (Cal) *Mamat Ali v Emperor*
 (10) 11 Cr L Jour 209 (260 261) 5 Ind Cas 847 33 Mad 507 *Choragudi Venkataswami v Emperor* (Evidence not justifying conviction)
 (26) 13 AIR 1916 Nag 23 (54 55) 26 Cr L Jour 1090 *Ram Prasad v Emperor* (Do)
 (16) 3 AIR 1916 Mad 1103 (1108) 17 Cr L Jour 193 *In re Jogambara Pattan* (Order of re-trial is irregular in absence of assurance that evidence will be forthcoming)
 (3) 19 AIR 1937 Oudh 23 (25) 33 Cr L Jour 167 7 Luck 390 *Sita Ram v Emperor* (Evidence not sufficient to support conviction)
 [See also (13) 14 Cr L Jour 673 (674) 21 Ind Cas 671 (Mad) *In re Subba Thevan*]
 8 (33) 25 AIR 1933 Cal 51 (59) 11 R (1933) 1 Cal 290 39 Cr L Jour 161 *Goloke Behari v Emperor*
 (33) 25 AIR 1933 Cal 361 (362) 39 Cr L Jour 604 *Trisparani Bhattacharya v Emperor*
 (93) 20 Cal 711 (716) 20 Cal W N 369 *Taju Pramanik v Queen-Empress* (No evidence to warrant conviction)
 (90) 14 Bom 115 (147) *Queen Empress v Maganlal*
 (13) 14 Cr L Jour 219 (223) 19 Ind Cas 310 (Cal) *Promothanath Roy v Emperor*
 (8) 6 Bom 34 (37) *Imperatrix v Phandharisnath*
 (66) 5 Suth W R Cr 60 (89) Beng L R Sup Vol 429 (FB) *Queen v Elal Buz*
 9 (37) 24 AIR 1937 Bom 15 (15) 33 Cr L Jour 571 *Emperor v Yemanya Kallappa* (Case of appeal against acquittal)
 (21) 8 AIR 1921 Mad 687 (688) 23 Cr L Jour 700 *Pamaswami Thevan v Emperor*
 (26) 13 AIR 1916 Mad 633 (641) 50 Mad 274 27 Cr L Jour 394 *In re Sojamuthu Padayachi*
 (27) 14 AIR 1917 Mad 447 (443) 23 Cr L Jour 290 *Venkata Sanyal v Emperor*
 10 (40) 27 AIR 1940 All 19 (21) 41 Cr L Jour 231 *Municipal Board Ghazabad v Harsaran* (Prosecution with bad motive and not to vindicate law in public interest—Accused sufficiently punished for offence by having to undergo trial—Re trial not necessary)
 (33) 25 AIR 1933 Cal 51 (59) 39 Cr L Jour 161 ILR (1933) 1 Cal 290 *Goloke Behari v Emperor*
 (34) 21 AIR 1934 Bom 303 (300) 35 Cr L Jour 1477 *Emperor v Khim Chand* (AIR 1934 Bom 43 35 Cr L Jour 644 followed)
 [See also (43) 80 AIR 1943 Cal 571 (572 573) ILR (1943) 1 Cal 543 45 Cr L Jour 99 209 Ind Cas 206 *Emperor v Lal Mita* (But the fact that the accused has already been re-tried twice is no reason for refusing to order a third trial in a proper case)]
 11 (99) 3 Cal W N 33 (333) *Abdul Buzas v Ekhtar Mandal*
 (11) 12 Cr L Jour 82 (8) 9 Ind Cas 4 5 (Cal) *Kanta Nayya v Emperor* (Conviction under S 203, Penal Code.)
 (30) 17 AIR 1930 Nag 205 (20) 31 Cr L Jour 05 *Girdhari v Emperor*

- (5) where the defect consists in the admission of irrelevant evidence, but there is other evidence on the record sufficient to enable the Judge to decide the case¹²
 (6) where the only defect is that certain evidence has not been brought on the record which ought to have been, the appellate Court may, in such a case, itself take evidence under S 428 and decide the case¹³

Where there is no defect in the trial or irregularity in procedure, the mere fact that the appellate Court is unable to form an opinion as to whether the accused is to be convicted or acquitted,¹⁴ or that there is a chance that the prosecution may be able to produce better evidence,¹⁵ or that the appellate Court disagrees with the finding of the lower Court,¹⁶ is not a ground for ordering a re trial

Where the appellate Court ordered a new trial on the ground that although the accused were shown by the evidence to have committed some offence it was clear they had been convicted under a wrong section, and all the facts on which a conviction for any offence could be sustained had been put in issue before the trying Magistrate, it was held that before quashing the sentence and ordering a re trial, the appellate Court should have come to a certain conclusion as to the offence which the accused were shown by the evidence to have committed, and that it should have considered, whether if the evidence showed that the accused should properly have been convicted of another offence than that charged, they would be prejudiced by amending the conviction¹⁷

See also the undermentioned cases¹⁸ where a re trial was ordered and the cases

- (27) 14 AIR 1927 Lah 671 (672) 8 Lah 496 29 Cri L Jour 8 *Sai v Emperor*
 (20) 7 AIR 1920 Pat 590 (591) 21 Cri L Jour 496 *Raghu Singh v Emperor*
 (18) 6 AIR 1918 Pat 542 (593) 19 Cri L Jour 77 *Bhaso Singh v Emperor*
 (31) 18 AIR 1931 Lah 767 (767) 33 Cri L Jour 145 *Nur Hussain v Emperor*
 (11) 12 Cri L Jour 19 (19) 8 Ind Cas 1101 (Mad) *M Muthappa Nadar v M Kula Sankara Nadar* (Accused having undergone punishment for more serious offence re trial in respect of minor offence was not ordered)
 (See however (37) 24 AIR 1937 All 240 (243) 38 Cri L Jour 521 *Sarda Prasad v Emperor* (That the accused has undergone a part of the sentence is not in itself a sufficient ground for not ordering a re-trial))
 12 (23) 10 AIR 1923 Rang 65 (65) 24 Cri L Jour 744 *Mrs May Boudville v Emperor*.
 (See also (40) 27 AIR 1940 Mad 685 (686) 41 Cri L Jour 897, *Ramaswami Ayyar v Chittoor Municipality* (The marking of an irrelevant document in evidence is not a ground for ordering a re trial by an appellate Court))
 13 (18) 5 AIR 1918 All 133 (134) 19 Cri L Jour 48 *Ishwar Prasad v Emperor*
 (83) 2 Weir 480 (480) *In re Iyachikone*
 (See however (84) 1894 Pun Re No 29 Cr p 48 (50) *Gohar v Empress* (Where the appellate Court does not want to act under S 428 and the conviction cannot be sustained owing to the defect the Court should order a re trial and not dismiss the appeal))
 14 (90) 1890 Rat 530 (531) *Queen Empress v Magunlal*
 15 (38) 25 AIR 1934 Cal 361 (362) 39 Cri L Jour 601 *Tripurari Bhattacharjee v Emperor*
 (39) 25 AIR 1934 Pat 39 (40) 39 Cri L Jour 278 *Socharam v Emperor*
 (31) 1931 Mad W N 517 (520) *Subramanyam v Emperor* (A Judge who takes this action constitutes himself as a sort of Public Prosecutor)
 (31) 18 AIR 1931 Mad 227 (227 228) 32 Cri L Jour 749 *Lakshmi Narasimham v Satyanarayana* (It is rather for supplying formal defects that appellate Court orders re trial)
 (30) 17 AIR 1930 Mad 189 (190) 31 Cri L Jour 422 *Ratnavelu Mudaliar v Emperor* (Do)
 16 (36) 23 AIR 1936 All 754 (759) 33 Cri L Jour 71 *Motiram v Emperor* (Appellate Court not entitled to order a re trial merely because it disagrees with the finding of lower Court that accused had not committed the more serious offence but a lesser offence)
 (36) 23 AIR 1936 Pesh 172 (175) 37 Cri L Jour 1039 *Biswar Shah v Emperor*
 17 (83) 2 Weir 460 (480 481) *In re Iyachikone*
 18 (41) 28 AIR 1941 Cal 707 (713) 43 Cri L Jour 389 1 LR (1941) 2 Cal 319 194 Ind Cas 493 (DB), *Hugh Francis Bellgard v Emperor* (Misdemeanor of charges)
 (41) 28 AIR 1941 Mad 679 (680) 43 Cri L Jour 58 196 Ind Cas 553 *In re Pattabi Rama Iyer* (Accused admitting offence under misapprehension — Prayer for re trial must be granted)
 (37) 24 AIR 1937 Rang 139 (141) 34 Cri L Jour 1040 *Aga Khan Chai v Emperor* (Evidence of persons who might be able to tell what happened at time of offence not admitted by prosecution)

cited below¹⁹ where it was not ordered

The words in clause (b) authorizing the appellate Court to order a re trial are wide enough to authorize a re trial from the point at which the error in the trial has been committed provided that the accused was not otherwise prejudiced²⁰

There is nothing preventing the appellate Court from directing a re trial on a fresh charge framed on the evidence already recorded²¹ However, the appellate Court cannot direct that the evidence already on the record should be treated as evidence in the case as it savours of an order for further inquiry which cannot be passed in appeals from convictions²² An order for re trial, again, cannot restrict the evidence to be taken to that

- It is not safe to convict accused without taking such evidence — Acquittal not possible on evidence as it stands—Re-trial should be ordered)
- (24) 11 AIR 1924 Cal 257 (283) 25 Cri L Jour 817 (FB) *Emperor v Barendra Kumar Ghose* (Perfunctory cross examination of prosecution witness is a good ground)
- (22) 9 AIR 1922 Pat 40 (42) 23 Cri L Jour 218 *Lachmi Lal v Emperor* (Perfunctory trial and several irregularities.)
- (23) 10 AIR 1923 Pat 62 (64) 1 Pat 758 24 Cri L Jour 69 *Jagdeo Singh v Emperor* (Where there is evidence but the Court is unable to test it and the case is unsatisfactorily conducted)
- (28) 15 AIR 1928 Pat 50 (51) 28 Cri L Jour 893 *Sheoparson Singh v Emperor* (Serious mistakes in charge — Failure to consider important evidence—Order for re trial from framing of charge proper)
- (96) 1 Cal W N 85 (36) *Bishnu Banwar v Empress* (Where two accused were wrongly tried jointly)
- (10) 11 Cri L Jour 684 (685) 8 Ind Cas 594 (Low Bar), *Hamdu Meah v Emperor* (Re-trial not ordered to fill up the deficiencies and reconcile the discrepancies in the evidence of prosecution)
- (03) 30 Cal 822 (830) 7 Cal W N 639 *Barendra Lal v Emperor* (Misjoinder of charges—Charge to the jury defective)
- (07) 11 Cal W N c (c) *Dars Roy v Empress* (Re trial for a graver offence may be ordered)
- (88) 5 Suth W R Cr 80 (93) Beng L R Sup Vol 459 (FB) *In re Elahes Buksh* (Erroneous direction to jury)
- (86) 4 Bom H O R Cr 3 (3) *Reg v Ganu* (Conviction under S 403, Penal Code set aside — Re-trial on charge under S 408 ordered)
- (82) 1882 All W N 112 (112) *Empress v Ram Prasad*
- (29) 18 AIR 1929 All 710 (719) 31 Cri L Jour 230 *Azam Ali v Emperor* (Section 403 forbids re trial only where a person is convicted or acquitted and conviction or acquittal is in force)
- (33) 20 AIR 1933 Cal 364 (366) 60 Cal 814 34 Cri L Jour 320 *Amar Chandra v Emperor* (Special procedure — Omission of Judge to follow)
- (97) 1897 Rat 938 (939) *Queen Empress v Sadashiv Balakrishna* (Material evidence excluded)
- 19 (40) 27 AIR 1940 Pat 295 (303) 41 Cri L Jour 267 *Feroze Kazi v Emperor* (It would be dangerous to order a re hearing in a case in which there is enmity between the parties and the Court is doubtful as to the value of any evidence that may be adduced upon a re hearing)
- (37) 24 AIR 1937 Cal 269 (272) 38 Cri L Jour 1918 *Sanyash Gawn v Emperor* (Likelihood of witnesses confusing what they saw at time of occurrence of murder before two years—Re trial not ordered)
- (28) 15 AIR 1928 Pat 293 (294) 29 Cri L Jour 258 *P K Sen v Emperor* (Where the prosecution came into Court with an incomplete case which so far as it went confirmed the defence — Held that they were not entitled to a re trial)
- (27) 14 AIR 1927 Mad 177 (178) 50 Mad 735 27 Cr L J 1381, *Samsullah v Emperor* (Petty matter)
- (34) 21 AIR 1934 Lab 415 (415) 35 Cri L Jour 1447, *Amur v Emperor* (Do)
- (08) 7 Cri L Jour 215 (216) 2 Mad L Tim 495 *Narayana v Tahsildar of Conjeetaram* (Interests of justice not requiring a re trial)
- 20 (41) 28 AIR 1941 Sind 144 (145) 1 L R (1941) Kar 167 42 Cri L Jour 837 196 Ind Cas 276 (DB) *Virumal Seemal v Emperor* (A Sessions Judge hearing an appeal from a conviction and ordering a re trial on the ground that the Magistrate failed to question the accused on the evidence of the prosecution witnesses can order a re-trial from the stage at which the illegality crept in i.e. from the stage at which the examination of the accused is taken)
- 21 (13) 14 Cri L Jour 230 (231) 19 Ind Cas 326 9 Nag L R 42 *Manna v Emperor* (Court may at the same time direct that new trial should commence with the framing of a proper charge)
- [But see (30) 1932 Mad W N 114 (116) *Naganna v Emperor* (Appellate Court cannot direct that a particular charge be framed or that trial be resumed from a particular point)]

partial re trial cannot be directed by the appellate Court — It can either direct a complete re-trial or call for further evidence to be placed before itself)

mentioned in the order the order should be for re trial in view of the instructions contained in the order the accused is entitled to let in such additional evidence as he may desire²³

Where a re trial is ordered it is open to the prosecution either to proceed or not to proceed as it may be advised²⁴

Where the circumstances of the case warrant an order for re trial the appellate Court should not simply dismiss the appeal or report the case to the High Court²⁵

Where a Magistrate tries a case which is exclusively triable by a Court of Session the trial is void there being in such cases no trial the appellate Court cannot order a re trial²⁶

24 "By a Court of competent jurisdiction" — The words order him to be re tried by a Court of competent jurisdiction do not imply that it is necessary before ordering a re trial that the original Court should have had *no jurisdiction* to try the case¹ The re trial may be ordered to be held by the original Court itself if it was competent to try the case² or by *another* Court of competent jurisdiction even where the original Court was itself a Court of competent jurisdiction³

The Court convicting the accused may be competent to try the case but not competent to *adequately* punish the accused for the offence In such a case the appellate Court reversing the conviction may order a re trial to be held by a Court which can adequately punish the accused⁴

There is nothing preventing the appellate Court from specifying the subordinate Court which should hold the re trial⁵

Can a re trial be ordered before the appellate Court itself? There is a difference of opinion on the point It was held by the High Court of Bombay in the undermentioned case⁶ that the re trial if ordered must be by a Court of competent jurisdiction *subordinate* to the appellate Court and that the appellate Court could not order the re trial to proceed before itself According to the High Court of Madras the words Court of competent jurisdiction subordinate to such appellate Court are not words of limitation and do not

(16) 8 AIR 1916 Pat 219 (221) 17 Cr L Jour 332 1 Pat L Jour 99 *Gajanand Thakur v Emperor*

2^o

24 (21) 8 AIR 1921 Cal 257 (259) 22 Cr L Jour 475 *Tenara & Mo dal v Emperor*

25 (93) 1900) 1893 1900 Low Bar Rul 129 (129) *Empress v Nga San Hla Bao*

(0^o) 2 We r 484 (484 485) *In re Channa Mottayyan* (In this case the matter was referred by the appellate Court to the District Magistrate)

26 (0^o) 29 Cal 412 (414) *Abdul Ghani v Emperor*

Note 24

25 (93) 1900) 1893 1900 Low Bar Rul 129 (129) *Empress v Nga San Hla Bao*

ess (8 All 14) dissented from 16 Bom 520

(1900) 27 Cal 172 174) 4 Cal W N 166 *Satish Chandra Das v Queen-Empress*

[See also (0) 29 Cal 412 (414) *Abdul Ghani v Emperor* (If lower Court not competent to try, appellate Court cannot order re-trial)]

2 See (91) 2 We r 491 (492) *In re Pera Naicken*

(1900) 27 Cal 172 (174) 4 Cal W N 166 *Satish Chandra Das v Queen-Empress*

3 (93) 1900) 1893 1900 Low Bar Rul 129 (129) *Queen-Empress v Shakh Ali* (Dissenting from 8 All 14)

4 (95) 1895 1896 Re No 16 Cr p 50 (51) *Das v Queen-Empress*

(04) 1 Cr L Jour 751 (754 755) 17 C P L R 97 *Emperor v Sherif Ali*

5 (84) 18 9 Rat 367 (367) *Queen-Empress v Karkhur Das*

(35) 2 AIR 1935 1 C 1^o (1^o 1^o) 6^o 1^o App 174 53 Bom 496 36 Cr L Jour 9^o 3 (PC) *Hari v Emperor*

6 (93) 1893 Rat 322 (322) *Queen-Empress v Fakra*

exclude the appellate Court if the offence is one within its jurisdiction⁷

Where in a case tried by jury in Court X the appellate Court reversed the conviction and sentence and ordered a re trial by Court Y which was competent to try the case with the aid of assessors it was held by the Privy Council that there was no legal objection to the order made but that the order was one which ought not to be made unless justified by exceptional circumstances inasmuch as it was likely to have very serious effects upon the rights of the accused and that his privilege which he had enjoyed of a trial by a jury, he ought in general to retain⁸

On the same principle it has been held by the Calcutta High Court that where a conviction by a jury is set aside on the ground of defective charge to the jury but there is evidence on record the sufficiency of which must be considered by the jury the proper course is to order a re trial by jury⁹ In the undermentioned case¹⁰ the Judicial Commissioner's Court of Sind in an appeal against an acquittal in a case tried by jury held that the High Court had jurisdiction to decide the case itself instead of ordering a new trial

25 Discharge and re trial — If both can be ordered — Where the appellate Court discharges an accused person on the ground for example of misjoinder of parties it has power to add a direction that the accused should be re tried It is not obligatory on it to leave to the discretion of the Magistrate the course which should be taken in such matter¹ It was however held in the cases noted below² that it is not ordinarily the duty of the appellate Court to order the re trial of a person whose conviction is set aside and that the prosecution may be left to take such proceedings against the accused as they may be advised to take

26 Effect of re trial on offences of which accused had been acquitted in trial Court. — Suppose A is charged with having committed offences X and Y but is convicted of offence X only and on appeal the conviction is reversed and a re trial ordered Is the whole case re opened and is A to be re tried on both charges X and Y? Yes if the facts of the case are such that the offences X and Y fall within s 236 of the Code¹ Where the accused is charged at one trial with distinct offences constituted by distinct acts and he is acquitted of one of such offences and convicted of the other an order for re trial in an appeal against the conviction will not re open the whole case²

7 (07) 5 Cri L Jour 104 (105) 30 Mad 298 16 Mad L Jour 546 2 Mad L T m 46 *Public Prosecutor v Mansikka Gramani*

(90) 2 We r 481 (481) *In re Vedakadeth Kasaran*

8 (25) 12 AIR 1925 F C 122 (124) (PC) *Tilakdhari Singh v Kesho Prasad*

9 (08) 4 Cri L Jour 419 (414) 11 Cal W N 51 *Sheikh Fakir v Emperor*

(12) 13 Cr L Jour 715 (716) 16 Ind Cas 593 (Cal) *Jamaruddi v Emperor* (Whole case should go to jury for re trial)

(10) 11 Cri L Jour 96 (97) 5 Ind Cas 315 (Cal) *Hasir Ali v Emperor*

(08) 7 Cri L Jour 315 (317) 7 Cal L Jour 246 *Kala Singh v Emperor* (Practices of the Court is to order re-trial)

10 (27) 14 AIR 1927 Sind 104 (108) 21 Sind L R 356 28 Cri L Jour 68 *Emperor v Saram*

Note 25

1 (01) 28 Cal 104 (107 108) *Kumudini Kanta v Queen Empress*

2 (08) 8 Cri L Jour 11 (17) 4 Nag L R 71 *Emperor v Balwant Singh*

(08) 7 Cri L Jour 103 (105) 7 Cal L Jour 70 *Leakut Hossein Khan v Emperor*

Note 26

1 (38) 1 L R (1933) 1 Cal 98 (117 119) *Kamala Kanta v Emperor* (Section 403 (1) Cr P C has no application inasmuch as the re trial will not be a second trial but only a continuation of the first trial)

(95) 22 Cal 377 (381 382) *Krishna Dhan v Queen Empress*

(19) 13 Cri L Jour 497 (498) 15 Ind Cas 641 40 Cal 163 *Nasumuddi v Emperor*

2 (36) 63 Cal 1112 (1114 1115) *Nasimuddin Biswas v Emperor*

(95) 22 Cal 377 (382 383) *Krishna Dhan v Queen Empress*

(27) 14 AIR 1927 Pat 13 (15) 6 Pat 208 27 Cri L Jour 1100 *Abdul Hamid v Emperor*

punished with imprisonment for two years, the High Court considered that the case was one which ought to have been committed, though the offence was not one exclusively triable by a Court of Session.⁹

Where a conviction was set aside on the ground that the case was one exclusively triable by a Court of Session and had been tried by the Magistrate without jurisdiction, the High Court refused to make an order for commitment in view, *inter alia*, of the considerable expense which the accused had been put to in the conduct of the case.¹⁰

The Appellate Court will not, while quashing the proceedings and committing the case to the Sessions Court, order that no proceedings should be taken against one of the accused merely because he has already suffered a part of the sentence, where this cannot be done without prejudicing the whole trial.¹¹

31. "Alter the finding" — The appellate Court may, under clause (b) of the section, alter the finding of the lower Court without ordering a re trial. This power, however, must be taken to be limited by the general principle that the appellate Court cannot come to any finding which the lower Court could not have legally come to, the meaning of the section must be taken to be that the appellate Court is given the power to correct any mistakes of finding which the first Court may have committed.¹ Thus, an appellate Court cannot, in a case not falling within S 237 of the Code, convict the accused of a *graver* offence than that charged.²

9. ('92) 16 Bom 580 (583, 584) 1892 Rat 577, *Queen-Empress v Abdul Rahman*. (Dissenting from 8 All 14)

10. ('32) 19 AIR 1932 Cal 390 (394). 59 Cal 1233 33 Cri L Jour 685, *Superintendent and Remembrancer of Legal Affairs, Bengal v Daulatram*

11. ('41) 28 AIR 1941 Sind 86 (38) 193 10d Cas 454 42 Cri L Jour 460, *Mansharam Gianchand v. Emperor* (Magistrate convicting accused for offence falling under S 220, Penal Code, and his confederate under S 384 read with S 114, Penal Code — High Court cannot while quashing proceedings and committing case to Sessions Court order that proceedings against confederate be dropped merely because he has served part of sentence.—Both accused and confederate should be tried together for offences arising out of same transaction)

Note 31

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ate

(Dissenting from 25 All 534)

('85) 7 All 414 (420, 424) 1885 All W N 105 (FD), *Queen Empress v Pershad*

('06) 4 Cri L Jour 490 (491) 3 Low Bar Bul 232, *Emperor v Po Yin*.

('23) 10 AIR 1923 Lah 260 (261) 3 Lah 440 23 Cri L Jour 709 *Arjan Mal v Emperor* (Appellate Court cannot convict accused of offence requiring sanction)

[See however ('03) 25 All 534 (536) 1903 All W N 100 *Emperor v Gur Narain Prasad*. (Appellate Court can alter conviction to one for any of the offences mentioned in S 193 notwithstanding the absence of any complaint as required by it)]

Where A is charged in the lower Court with having committed offences X and Y and is acquitted of offence X, the appellate Court may, in an appeal against the conviction for offence Y, alter the conviction to one for offence X of which A had been acquitted in the lower Court.³ The same principle will apply with greater force, where A had not been expressly acquitted or convicted of offence X, but had simply been convicted of offence Y.⁴ But it has been held in the undermentioned decisions⁵ that it is not open to the appellate Court under this clause to alter the finding to one of conviction for an offence of which the accused has been acquitted. These decisions purport to follow the decision of the Privy Council in *Kishan Singh v. Emperor*.⁶ But it is submitted that the Privy Council decision is purely concerned with the powers of the High Court under s 439 and does not touch the question of the powers of an appellate Court under this clause. Where A was charged with having committed offence X only, but the lower Court could, under the provisions of s 237 or s 238, have convicted the accused without a charge of offence Y also, the appellate Court can, in an appeal against the conviction for offence X, alter the conviction to one for offence Y.⁷ But can an appellate Court alter the finding in such a

3. ('44) 31 AIR 1944 All 137 (146, 148, 167) : 1 L R (1944) All 403 : 46 Cri L Jour 38 : 215 Ind Cas 213 (FB), *Zamir Qasim v. Emperor* (An appellate Court is, subject to the other provisions contained in the Criminal Procedure Code, empowered under S 423 (1) (b) (2) to alter a finding of acquittal into one of conviction even though no appeal has been preferred by the Provincial Government—AIR 1937 All 240 38 Cri L Jour 521, overruled—*Held* by majority of Full Bench, Mulla and Hamilton JJ, dissenting)

('11) 12 Cri L Jour 572 (572) : 12 Ind Cas 836 : 34 All 115, *Sardara v. Emperor*.

('28) 18 AIR 1928 All 700 (701) : 27 Cri L Jour 901, *Janki Prasad v. Emperor*.

('18) 5 AIR 1918 All 65 (86) : 20 Cri L Jour 22, *Dulla v. Emperor*

('84) 21 AIR 1934 Oudh 200 (205, 206) : 9 Luck 607 : 85 Cri L Jour 973, *Lakhan Singh v. Emperor*.

('98) 28 Cal 975 (977, 979), *Queen-Empress v. Jabanullah*

('82) 19 AIR 1932 Cal 723 (726) : 60 Cal 179 : 34 Cri L Jour 177, *Hanuman Sarma v. Emperor*

('17) 4 AIR 1917 Pat 625 (626) : 18 Cri L Jour 982, *Dhanpat Singh v. Emperor*.

('18) 5 AIR 1918 Pat 257 (259) : 18 Cri L Jour 785 : 3 Pat L Jour 565, *Mahangu Singh v. Emperor*.

('10) 11 Cri L Jour 534 (535) : 7 Ind Cas 861 : 34 Mad 547, *Appanna v. Pethani Mahalakshmi*

('14) 1 AIR 1914 Cal 458 (459) : 41 Cal 350 : 15 Cri L Jour 385, *Romesh Chandra v. Emperor*

('04) 1 Cri L Jour 942 (943) : 1904 Pun L R 110 : 1904 Pun Re No 12 Cr, *Bhola v. Emperor*

('11) 10 Ind Cas 372 (373) : 35 Mad 243 : 12 Cri L Jour 269, *Hanumappa v. Emperor*

('24) 11 AIR 1924 Rang 98 (97) : 1 Rang 436 : 25 Cri L Jour 247, *On Shive v. Emperor*

Also see S 439, Notes 12 and 13

4. ('41) 28 AIR 1941 Rang 840 (841) : 1941 Rang L R 582 : 43 Cri L Jour 426 : 193 Ind Cas 766, *The King v. Nga Fo Nyem* (Accused charged alternatively under S 379 and S 215 Penal Code, (Act 45 [XIV] of 1860)—Conviction under S 215 only—Appellate Court holding evidence establishing offence under S 379 and not under S 215 and acquitting accused altogether—Appellate Court held should have altered conviction to one under S 379 and maintained the sentence)

('37) 24 AIR 1937 All 853 (358) : 38 Cri L Jour 621, *Emperor v. Jagannath* (Accused charged alternatively under S 366A, or S 498, Penal Code—No finding by lower Court in respect of S 498—Conviction under S 366A—Acquittal under S 498 not implied—High Court can alter conviction from S 366A to S 498)

('33) 20 AIR 1933 All 565 (567, 568) : 55 All 834 : 34 Cri L Jour 1064, *Raghunath v. Emperor*

('31) 18 AIR 1931 Sind 9 (12) : 25 S

('12) 13 Cri L Jour 457 (459) : 15 In

5 ('42) 29 AIR 1942 Pesh 51 (53) :

(Conviction under S. 304, Penal Code—Appellate Court cannot convict accused under S 302 as conviction under S. 304 is tantamount to an acquittal of the offence under S 304)

('38) 25 AIR 1938 Sind 202 (206) : 40 Cri L Jour 93 : 1 L R (1939) Kar 75, *Jado Rahim v. Emperor*

('29) 16 AIR 1929 Nag 325 (327) : 30 Cri L Jour 944, *Kisan Das v. Emperor*

(See also ('35) 22 AIR 1935 Rang 512 (514) : 37 Cri L Jour 246, *Paw Tha U v. Emperor*. (Accused charged under Ss 302, 392 read with S 114, Penal Code—Sessions Judge not convicting accused under S. 392 amounts to acquittal under it—High Court cannot alter conviction from S 302 to S 379, Penal Code))

6. ('28) 15 AIR 1928 P C 254 (257) : 50 All 722 : 55 Ind App 390 : 29 Cri L Jour 828 (FC)

7. ('42) 29 AIR 1942 Pat 271 (275) : 43 Cri L Jour 296 : 198 Ind Cas 78 (DB), *Ram Dyal Kahar v. Emperor*. (Accused participating in concealing evidence—Whether he took part in murder not certain—Appellate Court can alter conviction from S 302 to S 201)

way that the altered offence was neither charged in the trial Court nor was one for which the accused could have been convicted under the provisions of ss 237 and 238? The general trend of opinion is that it cannot do so,⁸ and this is in accord with the principle

(41) 28 AIR 1941 Lah 465 (468) 1 L R (1942) Lah 129 43 Cri L Jour 235 197 Ind Cas 689 (FB) *Baua Singh Sawan Singh v Emperor* (Charge under S 302 but conviction under S 301 Part I Penal Code—Appeal by convict—Appellate Court can alter conviction to one under S 302)

(41) 28 AIR 1941 Rang 29a (296) 1941 Rang L R 39a 43 Cri L Jour 57 196 Ind Cas 714 *Emperor v Maung Hla Pe*

(38) 25 AIR 1933 Rang 281 (282) 39 Cri L Jour 731 1938 Rang L R 139 *Maung Ba v The King* (Trial Magistrate convicting accused under S 353 Penal Code — Appellate Court can alter conviction to one under S 302)

(36) 23 AIR 1936 Nag 132 (133 134) 34 Cri L Jour 390 1 L R (1936) Nag 99 *Diwan Singh v Emperor*

(Accused acquitted
307 Penal Code)
Code altered into

Emperor (A person

Ikudhar Kabiraj

There a person has

been charged and tried for an offence under S 380 Penal Code he can be legally convicted under S 403 of the Code if he has not been taken by surprise by such a procedure]]

[But see (26) 13 AIR 1926 All 33 (34) 26 Cri L Jour 1494, *Mula v Emperor* (Accused convicted under S 457 Penal Code cannot be convicted under S 411 in appeal)

sentence is not legal)

(35) 22 AIR 1935 Cal 561 (570) 62 Cal 433 36 Cr L J 127a (SB) *Emperor v Bhawan Prasad*

(11) 12 Cri L Jour 269 (271) 10 Ind Cas 372 35 Mad 243 *Golla Hanumappa v Emperor*

(26) 13 AIR 1926 Cal 431 (432) 26 Cri L Jour 1018 *Rakhai Chandra v Jamin Kanta* (Conviction under S 147 Penal Code cannot be altered to one under S 373 Penal Code)

(03) 30 Cal 288 (290) *Yakub v Lallu* (Trial for offence of rioting — Appellate Court cannot convict under ss 448 and 323)

(25) 12 AIR 1925 Mad 708 (706) 26 Cri L Jour 1036 *In re Kadalatha Pillai* (Conviction under S 159 Madras Local Boards Act — Appellate Court cannot convict under S 163 (1) of that Act)

(1900) 27 Cal 990 (991) 5 Cal W N 31 *Rahmudda v Asgar Ali* (Conviction for rioting with common object of theft — Finding by appellate Court of different common object—Conviction on such finding is not legal)

(24) 11 AIR 1924 All 766 (767) 25 Cri L Jour 1292 *Clada Singh v Emperor* (In appeal charge can not be altered to another one for which evidence is ample)

(18) 5 AIR 1918 Mad 496 (496 497) 18 Cri L Jour 860 *In re Mongalu Aroddhono Hathi* (Appellate Court acquitting persons charged with rioting but convicting under ss 448 and 323 Penal Code)

(24) 11 AIR 1924 Mad 375 (376) 47 Mad 61 25 Cri L Jour 554 *In re Shreeramulu* (Alteration of charge under ss 147 and 373 Penal Code into one under S 160)

(27) 14 AIR 1927 Rang 32 (32) 4 Rang 335 27 Cri L Jour 1360 *Nga Shue Zon v Emperor* (Charge under S 457 Penal Code—Appellate Court convicting under Arms Act)

(10) 11 Cri L Jour 340 (340) 5 Ind Cas 974 (Mad) *In re Bomma Peddaj* (Conviction by the appellate Court under s 379 Penal Code by altering the conviction of the original Court under ss 447 and 357)

Appellate Court conviction,

first Court under ss 147
) and 323)

Emperor (Charge and

convict on under S 458 Penal Code by trial Court—Change of conviction under S 471 in appeal is not proper)

above stated, that an appellate Court cannot come to any finding which the trial Court could not have come to. If the appellate Court considers that the accused is guilty of another offence than that charged, it should direct a re-trial with directions to alter the charge.⁹ It is conceived that it may also frame a fresh charge itself on the analogy of s 227, and proceed, after notice to the accused, to dispose of the case. This, however, should not be done if it is likely to prejudice the accused.¹⁰

In some cases, however, it has been held that the appellate Court can, where the facts are the same, alter the conviction from one under a wrong section to one under the proper section, if it does not prejudice the accused.¹¹ It has also been held in the cases

(21) 8 A I R 1921 Pat 496 (497) • 22 Cri L Jour 485, *Mayadhar Mahanti v Danardan Kund* (No charge for the offence in the trial Court—Conviction by appellate Court)

(20) 7 AIR 1920 Pat 590 (591) • 21 Cri L Jour 496, *Raghu Singh v Emperor* (Conviction under S 457, Penal Code, altered into one under S 456)

(99) 3 Cal W N 367 (368), *Monoranjn Chowdhary v. Queen Empress* (Alteration of findings under Ss 109 and 211, Penal Code, to one under S 193)

(23) 10 AIR 1923 Lah 260 (261) • 3 Lah 410 • 23 Cri L Jour 709, *Arjan Mal v Emperor* (Conviction under S 169, Penal Code, altered into one under Ss 176 and 109)

(34) 21 A I R 1934 Lah 178 (179) • 35 Cri L Jour 519, *Mange v Emperor* (Conviction under S. 376, Penal Code—Alteration into one under S 323)

(89) 1900) 5 Cal W N 298 (297), *Rameshwar v Jogi Sahoo* (Cannot convict of any offence which did not form the subject matter of the complaint)

(24) 11 AIR 1924 Cal 532 (533) • 24 Cri L Jour 312, *Patil Ghose v Emperor* (Alteration of the conviction of the petitioners from S 325, Penal Code, to S 323)

(15) 2 AIR 1915 Cal 219 (219) • 15 Cri L Jour 704, *Genu Manjhi v. Emperor* (Alteration from S. 147, Penal Code, to S 323)

(15) 2 AIR 1915 Cal 181 (182) • 16 Cri L Jour 42, *Har Narain v Emperor* (Alteration from S 147, Penal Code, to S 353)

(06) 3 Cri L Jour 240 (242) • 8 Bom L R 120, *Emperor v Sakharan Ganu* (Alteration of conviction

Code — Accused

ingh v Emperor

(Conviction under S 323, Penal Code—Alteration into one under S 323/114)

(45) 32 AIR 1945 Pat 376 (378), *Byjo Gope v Emperor* (Conviction under S 385, Penal Code, cannot be altered by appellate Court to one under Ss 147/148, Penal Code)

(15) 2 AIR 1915 All 357 (358) • 18 Cri L Jour 599, *Debi Singh v Emperor* (The powers conferred by the Code of Criminal Procedure upon a Court of Appeal are not intended to be used in such a way as to spring up a new case on the accused without giving him any notice of the charge which he has to meet)

(89) 1888 Bat 368 (368), *Queen Empress v Krishna* (Conviction for an offence under S 411, Penal Code — Alteration of conviction into one either under S 379 or S 411 — Held that such alternative

*Singh]
an v Emperor*

*thiryan
eror* (Conviction for

appellate Court is
with S 149, Penal
h the latter is not

mentioned in the charge)

(44) 31 A I R 1944 Cal 92 (105 106) • 1 L R (1943) 1 Cal 493 • 45 Cri L Jour 431 • 211 Ind Cas 574 (DB), *Sailendra Nath v Emperor* (Charge under S 381, Penal Code—Appellate Court can convict accused under S 408)

(44) 31 AIR 1944 Pat 67 (74) • 22 Pat 681 • 45 Cri L Jour 624 • 212 Ind Cas 293 (DB) *Satyanarayana v Emperor*

if (Conviction under
injustice is not caused

mperror

cited below,¹² that the only restriction on the appellate Court's power is that the accused is not prejudiced by the alteration of the charge and that the appellate Court could alter the finding, even though the case does not fall within S 237 or S 238. It is submitted that this view cannot be supported on principle. Section 233 of the Code provides that every distinct offence must be separately charged, though where a trial does take place without a charge, it is a curable irregularity under S 335. This principle applies equally to the appellate Court as well as to the trial Court,¹³ and there is nothing to show that the appellate Court can disregard the rule any more than the trial Court. Though the words "may alter the finding" in the section are general, they must be construed in harmony with other provisions of the Code and not as overriding them.¹⁴

The word "finding" is not limited to a finding upon a point of law as distinct from a finding upon a point of fact.¹⁵

Where X was charged under S 143 and also under S 379 of the Penal Code, but

(13) 14 Cri L Jour 239 (239) 19 Ind Cas 335 (Mad), *Kunhambu v Emperor* (Conviction under S 353, Penal Code altered into one under S 183)

(22) 9 AIR 1922 All 143 (143) 23 Cri L Jour 198 *Hanuman v Emperor*

(32) 19 A I R 1932 Cal 865 (866) 33 Cri L Jour 828, *Raghubir Kahar v Emperor* (Finding of guilt under Ss 420/75 altered into one under Ss 379/75)

(28) 15 AIR 1929 Pat 359 (362) 29 Cri L Jour 374, *Ulfa Khan v Emperor* (Accused charged under S 147 can be convicted under S 323, Penal Code, in appeal)

(29) 16 A I R 1929 Pat 11 (15) 7 Pat 758 30 Cri L Jour 205 *Bhundu Das v Emperor* (Magistrate convicting for offence under S 326 read with S 149, Penal Code—Appeal—Conviction altered to one under Ss 326 and 34 Penal Code)

(33) 20 AIR 1933 Pat 26 (27) 34 Cri L Jour 419, *Jagannath Misra v Emperor*

(03) 1 Upp Bur Rul Penal Code 9 (13) *Ko Set Shewin v King Emperor*

(87) 1837 Pun Re No 59 Cr, p 156 (157) *Buta v Empress* (Finding under S 411 altered to one under S 403 Penal Code)

(03) 2 Weir 465 (486) *In re Veera Reddi*

(99) 26 Cal 863 (867, 968) 9 Cal W N 658, *Lala Ojha v Queen Empress*

(04) 1 Cri L Jour 694 (696) 1 All L Jour 245, *Mohammad Yassin v Emperor*

(1900) 13 C P L R 125 (126), *Empress v Ram Din* (Conviction under S 459, Penal Code altered to one under Ss 326 and 511)

(75) 12 Bom H C R Cr I (7), *Reg v Ramajirao*

[See (06) 3 Cri L Jour 348 (349) 3 Low Bur Rul 112, *Emperor v Kyaw Hla Aung* (Appellate Court can alter finding to legalize sentence)]

[See also (36) 23 A I R 1936 Nag 263 (264) 38 Cri L Jour 455 I L R (1937) Nag 102 *Nathusingh v Emperor* (Prosecution under S 181, Penal Code—Appellate Court can change it to S 193 of the Code)]

(36) 23 AIR 1936 Nag 275 (276) 38 Cri L Jour 380 I L R (1937) Nag 145, *Vithal v Emperor*]

Also see S 236, Note 1.

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1) (b) lays down that is not in any way

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, *Lala Ojha v Queen Empress*,

A W N 100, *Emperor v Gur Narain Prasad* (The power under S 423 Cr P C is not limited by any

preliminaries imposed upon the first Court before it takes cognizance of the offence involved in the altered finding)]

13 (05) 2 Cri L Jour 694 (695) 1905 Pun Re No 39 Cr, *Sahib Singh v Emperor*

Also see S 233, Note 2.

[See however (15) 2 AIR 1915 Mad 302 (303) 15 Cri L Jour 630, *In re Surya Narayana Rao* (Where two persons are tried together and convicted of one offence, the appellate Court has power to convict one of two persons tried for a certain offence and the other of another offence found on the facts)]

14 (10) 11 Cri L Jour 40 (49) 33 Mad 264 5 Ind Cas 145 *Palmanala Paya Kanniah v Emperor*

15 (18) 5 AIR 1919 Pat 257 (254) 19 Cri L Jour 735 3 Pat L Jour 505 *Mahalingu Singh v Emperor* (D stungu shing AIR 1917 Pat 625 18 Cri L Jour 992 and AIR 1914 Cal 456 . 41 Cal 350 : 15 Cri L Jour 385)

was convicted only under S 143 and acquitted of the offence under S 379 of the Penal Code, and the appellate Court confirmed the conviction under S 143 but set aside the acquittal under S 379, it was held that the appellate Court had no jurisdiction to do so inasmuch as it was not a case of any *alteration of conviction*.¹⁶

Charge for substantive offence—Conviction by appellate Court for abetment—As has been seen before, a conviction for offence X can be altered to one for offence Y if, on the facts of the case, the accused could have been convicted of offence Y without a charge by the lower Court under the provisions of Ss 237 and 238. The abetment of an offence is not a minor offence and cannot come under S 238.¹⁷ But it may come under S. 237, if there is no element in it which is not included in the charge for the substantive offence. In such a case, the accused may be convicted in appeal for abetment of the offence.¹⁸ See also S 236, Note 3.

32. Reduction of sentence.—Where the appellate Court rejects the appeal summarily under S 421, it cannot reduce the sentence.¹ Nor can it, while affirming the conviction, reverse the sentence absolutely inasmuch as every conviction must be followed by a sentence. If it thinks the sentence severe it must pass at least a nominal sentence.²

An appellate Court has power to reduce the sentence,³ but not to *remit* any sentence—a function which belongs to the Government.⁴

Where A and B are co accused and A alone appeals, the appellate Court can, in the ends of justice, reduce the sentence passed on B.⁵

33 "Alter the nature of the sentence, but, . . . not so as to enhance the same."—Under the Code of 1861, the appellate Court had no power to enhance the sentence passed by the lower Court.¹ Under the Code of 1872, S 280, as amended by Act 11 [XI] of 1874, the appellate Court could enhance such sentence.² Under the Code of 1893

16 (23) 10 AIR 1923 Cal 658 (658) 24 Cri L Jour 938, *Prasanna Chandra v Upendra Nath*
17. (27) 14 AIR 1927 All 35 (36) 49 All 120 27 Cri L Jour 1118, *Mahabir Prasad v Emperor*
(27) 14 AIR 1927 Cal 63 (64) 28 Cri L Jour 2, *Hulas Chand v Emperor*
(35) 22 AIR 1935 Pesh 67 (68) 36 Cri L Jour 1438, *Suraj Bhan v Emperor*
Also see S 238, Note 2

18 (26) 13 AIR 1926 Rang 207 (207, 208) 27 Cri L Jour 1285 *Nga Po v Emperor* (Charge under dacoity—Conviction under abetment of robbery is not improper)
(27) 14 AIR 1927 All 85 (36) 49 All 120 27 Cri L Jour 1118, *Mahabir Prasad v Emperor*
(31) 18 AIR 1931 Oudh 274 (278, 277) 7 Luck 102 32 Cri L Jour 905, *Khuman v Emperor*
(35) 22 AIR 1935 Pesh 67 (68) 36 Cri L Jour 1438, *Suraj Bhan v Emperor*

Note 32

1 (86) 1886 Rat 304 (305), *Queen Empress v Govinda Rao*
2 (91) 1891 Rat 545 (546) *Queen Empress v Lakshmidas*
3 (37) 24 AIR 1937 Mad 231 (232) 59 Mad 995 37 Cri L Jour 1150 *In re Abdul Gani*
[See (66) 1866 Pun Re No 1 Cr, p 1 (2), *Achar Putwara v Crown*
(1865) 3 Suth W R Cr 16 (17), *Queen v Keesa Singh* (Illegal sentence of ten years' transportation reduced to transportation for seven years)
(67) 7 Suth W R Cr 39 (39), *Queen v Bhamaur Doosadh* (Illegal sentence of fourteen years reduced to legal sentence of ten years)
(05) 2 Cri L Jour 206 (207) (Lab), *Inam Din v Emperor* (Sentence of transportation for life reduced to one for seven years)]
[See also (43) 30 AIR 1913 Bom 301 (305) 44 Cri L Jour 786 208 Ind Cas 455 (DB) *Emperor v Kamal Dattatraya* (Appellate Court should not interfere with sentence unless trial Court has proceeded on wrong basis)]

4 (69) 1869 Pun Re No 11 Cr p 20 (21) *Crown v Loodun*
5 (32) 19 AIR 1932 Lah 615 (615) 34 Cri L Jour 458, *Jalal v Emperor*

Note 33

1 (1865) 3 Suth W R Cr 16 (17), *Queen v Keesa Singh*

and the present Code such power does not exist³

There is a great difference of opinion as to whether particular sentences passed by the appellate Court are enhancements of the sentences passed by the first Court. Thus, the following views have been expressed :

- (1) A sentence of fine and in default X months' imprisonment is a lighter sentence than a sentence merely of X months' imprisonment⁴. A contrary view has been held in the undermentioned cases,⁵ namely that it is really an enhancement inasmuch as even if the X months' imprisonment is fully served out, the fine nevertheless continues to be leviable in other ways from the accused.
- (2) A sentence of six months' imprisonment and a fine of Rs 1000 and in default three months' imprisonment, in substitution of a sentence of nine months' imprisonment is not an enhancement⁶. The case will be different if the imprisonment in default added to the substantive sentence of imprisonment exceeds the original imprisonment awarded⁷.

- (3) When the sentence is altered to one of simple theft by the Courts are at liberty to alter the sentence as they think fit.

In the latter case, the alteration of the conviction to one of theft and maintaining the sentence is not an enhancement of the sentence. In other words, the alteration of an offence to a less grave offence, but maintaining the sentence, is not an enhancement when the *act committed* is held to be the same, but the alteration is due to a different interpretation of the law⁸.

3. ('36) 23 AIR 1936 Lah 729 (730) : 37 Cri L Jour 930, *Abdul Rahman v Emperor*. (Appellate Court cannot pass sentence of fine for aggregate amount beyond the maximum allowed to the lower Court.)

4. ('37) 24 AIR 1937 Pat 563 (564) : 38 Cri L Jour 1186, *Bhola Singh v Emperor*. (Sentence of fine in place of sentence of imprisonment is not an enhancement if the fine is not more than period of original imprisonment.)

5. ('42) 29 AIR 1942 Oudh 399 (399) : 18 Luck 252 : 43 Cri L Jour 719 : 200 Ind Cas 809, *Ganga v Emperor*. (Do)

6. ('37) 24 AIR 1937 Pat 563 (564) : 38 Cri L Jour 1186, *Bhola Singh v Emperor*. (See also ('37) 24 AIR 1937 Oudh 462 (463) : 38 Cri L Jour 935, *Shankar Singh v Emperor*. (Imposition of substantial fine in place of sentence of imprisonment and maintaining same sentence of imprisonment is not an enhancement.)

7. ('07) 6 Cri L Jour 100 (101) : 3 Nag L R 90, *Shamlay v Emperor*.

8. ('24) 11 AIR 1924 Pat 563 (564) : 3 Pat 639 : 25 Cri L Jour 1186, *Bhola Singh v Emperor*.

(See also ('37) 24 AIR 1937 Oudh 462 (463) : 38 Cri L Jour 935, *Shankar Singh v Emperor*. (Imposition of substantial fine in place of sentence of imprisonment and maintaining same sentence of imprisonment is not an enhancement.)

9. ('31) 18 AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217, *Md. Hussain v Emperor*.

10. ('27) 14 AIR 1927 Mad 789 (789, 790) : 2 Jour 621, *Ranganayami v Emperor*.

11. ('31) 18 AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217, *Md. Hussain v Emperor*.

12. ('31) 18 AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217, *Md. Hussain v Emperor*.

13. ('31) 18 AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217, *Md. Hussain v Emperor*.

14. ('31) 18 AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217, *Md. Hussain v Emperor*.

15. ('31) 18 AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217, *Md. Hussain v Emperor*.

16. ('31) 18 AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217, *Md. Hussain v Emperor*.

17. ('31) 18 AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217, *Md. Hussain v Emperor*.

18. ('31) 18 AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217, *Md. Hussain v Emperor*.

19. ('31) 18 AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217, *Md. Hussain v Emperor*.

20. ('31) 18 AIR 1931 Lah 159 (160) : 12 Lah 449 : 32 Cri L Jour 1217, *Md. Hussain v Emperor*.

- (4) Where the appellate Court passes a sentence which the lower Court has no power to pass, there is an enhancement of the sentence⁹
- (5) Where the accused, convicted of two offences, is acquitted as regards one of such offences, the maintenance of the whole punishment, awarded for the two offences, amounts to an enhancement¹⁰ The reason alleged for this view is that when a single sentence is awarded for two offences, part of it must be deemed to be for one offence and part for the other, so that the maintaining of the whole sentence for one only of the offences is an enhancement¹¹ A contrary view has been expressed in the cases below.¹²
- (6) Where a person is guilty of acts constituting a single offence, but they are split up into two or more offences and the accused is sentenced separately or given one combined sentence for the two or more supposed offences, the appellate Court is competent to alter the conviction to the proper one for the single offence and maintain the aggregate of the two sentences or the whole of the combined sentence, there is no enhancement in such a case¹³
- (7) Where a charge has several counts, the appellate Court setting aside the conviction on some of the counts, but maintaining the entire sentence, does not give any enhanced sentence¹⁴
- (8) A fine in lieu of simple imprisonment is not an enhancement.¹⁵

9. (24) 11 AIR 1924 All 130 (130) : 45 All 594 : 25 Cri L Jour 312, *Id. Yakub Ali v Emperor*. (Appellate Court's power to vary sentence is measured by trial Court's power)
 (11) 12 Cri L Jour 444 (445, 446) : 7 Nag L R 109 11 Ind Cas 788, *Sitaram v Emperor* (Do)
 (80) 17 AIR 1930 Lah 318 (318) : 81 Cri L Jour 166, *Fusaf v Municipal Committee, Murreet* (Alteration of sentence of fine into one of whipping which lower Court could not pass)
 10 (33) 20 AIR 1933 Lah 933 (933) : 35 Cri L Jour 103, *Kehar Singh v Emperor*
 (07) 5 Cri L Jour 89 (89) : 30 Mad 48 : 1 Mad L T 403, *Pramanta Pillai v Emperor* (In such cases, some reduction of sentence by the appellate Court must be made unless the Court thinks that the sentence ought not to be reduced, in which case it should refer the matter to the High Court for
 27

(10) 11 Cri L Jour 483 (483) : 7 Ind Cas 415 (Mad), *Emperor v Varadhan*
 (92) 1892 Rat 618 (618), *Queen Empress v. Natha*
 (17) 4 AIR 1917 Lah 858 (360) : 1916 Pan Re No 31 Cr. : 18 Cri L Jour 372, *Mangal Singh v Emperor*
 (10) 11 Cri L Jour 727 (727) : 8 Ind Cas 830 (Mad), *In re Kesreddi Panasa Ramudu*
 (27) 14 AIR 1927 All 375 (376) : 49 All 494 : 28 Cri L Jour 495, *F. M. Thorpey v Emperor*
 (87) 1887 Pan Be No. 45 Cr. p. 110 (113), *Asim Khan v. Empress*
 (97) 24 Cal 816 (317), *Pamasa Kunja v Ramkhalawan*
 (28) 15 AIR 1928 Bom 348 (347) : 29 Cri L Jour 1082, *Ramachandra v Emperor*
 (96) 22 Bom 760 (761) *Queen Empress v Hanma*
 (05) 2 Weir 487 (487), *In re Ramanujam Pillai*
 [See (16) 3 AIR 1916 Mad 789 (788) : 16 Cri L Jour 446, *In re Chotlano Ranto* (When conviction on some charges is set aside, sentence must be reduced)
 (97) 24 Cal 817n (318n), *Arpin Sheikh v Arobbi Datta*]
 11 (27) 14 AIR 1927 Mad 789 (789) : 28 Cri L Jour 824, *Rangasmams Kanda Pillai v Emperor*
 he true sentence

circumstances of the particular case whether a retention of the sentence awarded by the trial Court constitutes an enhancement of sentence — It does not follow that if the conviction on one of several charges in a trial is set aside while one or more others are affirmed, there must necessarily be a reduction of sentence]

13 (07) 6 Cri L Jour 43 (45) : 3 Nag L R 67, *Balbhadr Bani v Tribhuban Nath*
 14 (28) 15 AIR 1928 Mad 651 (652) : 29 Cri L Jour 847, *Kaliappa Goundan v Emperor*
 15 (11) 12 Cri L Jour 444 (446) : 11 Ind Cas 788 : 7 Nag L R 109, *Sita Ram v Emperor*

- (9) Rigorous imprisonment in lieu of simple imprisonment for the same term is enhancement¹⁶
- (10) Solitary confinement, even if the imprisonment awarded is reduced, is enhancement.¹⁷
- (11) A sentence of imprisonment in lieu of fine is an enhancement¹⁸
- (12) An increase of fine¹⁹ or a sentence of whipping²⁰ in lieu of decrease in imprisonment is an enhancement

See also the undermentioned cases²¹

The real solution of the conflict lies in recognising the fact that the question whether a sentence has been enhanced is a question of fact to be determined in each particular case with reference to the facts of that case.²² The proper test is whether the accused considers the substituted sentence heavier than that awarded.²³ Thus, a substitutu-

16. ('24) 11 AIR 1924 All 130 (130) : 45 All 594 : 25 Cri L Jour 312, *Mohd Yakub Ali v Emperor*

17. ('90) 1890 All W N 170 (170), *Empress v Peman*

18. ('93) 18 Bom 751 (751), *Queen-Empress v. Dansung Dada*

('93-1900) 1893-1900 Low Bar Rul 423 (425), *Kyaw Kaing v. Queen-Empress*

('96) 18 All 301 (302) . 1896 All W N 68, *Queen-Empress v Lakshmi Kant*

fine]]

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('97) 2 Weir 487 (487), *In re Appu*

[See also ('40) 27 AIR 1940 Rang 81 (82) : 41 Cri L Jour 455 : 1939 Rang L R 744, *The King v. Kyaw Aye*. (Order of detention in Borstal School cannot be altered into sentence of whipping, as it would amount to enhancement of sentence)]

[But see ('84) 1884 Pun Re No 3 Cr, p 4 (4), *Jucan v Empress*. (Rigorous imprisonment for four years substituted by whipping in case of juvenile offender)]

21 ('42) 29 AIR 1942 Sind 162 (163) : 1LR (1942) Kar 288 : 44 Cri L Jour 127 : 203 Ind Cas 646, *Kundan Tilmul v. Emperor*. (Where the offender is ordered to be whipped, the Appellate Court cannot be said to enhance the sentence where it gives the offender an opportunity to escape whipping by payment of fine and orders whipping only in default of fine)

('38) 25 AIR 1938 Oudh 233 (233) . 39 Cri L Jour 689, *Shital Prasad v. Emperor* (Accused convicted of offence punishable with fine only but bound over under S 562 — Imposition of fine in appeal — Held, imposition of fine, though in the circumstances of the case could hardly be called enhancement of sentence, it still entailed a greater burden on the accused)

('36) 23 AIR 1936 Rang 227 (228) : 37 Cri L Jour 790 : 14 Rang 119, *Emperor v Ah Hwee* (Order for detention in Borstal School for any period permitted by Act does not amount to enhancement of sentence)

('87) 1887 All W N 100 (101), *Empress v Mada* (The Deputy Magistrate sentenced the accused to 15 days' rigorous imprisonment and a fine of Rupees 10, or, in default, to a further term of one

Bacho (Substitu-
Proper course is

('71) 15 Suth W R Cr 7 (3, 9) : 6 Beng L R App 95, *Queen v Banda Ali* (Substitution of legal sentence in lieu of illegal sentence of whipping is enhancement of sentence)

(1900) 1900 Pun L R Cr No 32 (33) . 1901 Pun Re No 29 Cr, *Hasana v Empress* (Order for joint fine — Two persons who have been sentenced to a fine of Rs. 75 each were jointly fined Rs. 150 — On appeal by appellate Court, held this amounted to an enhancement in each case)

22 ('42) 29 AIR 1942 Oudh 399 (399) . 18 Luck 252 : 43 Cri L Jour 719 : 200 Ind Cas 803, *Gangs v. Emperor*

('01) 23 All 497 (499) . 1901 All W N 176 *King-Empress v Sagua*

(1900) 27 Cal 175 (177) *Rakkat Raja v Khirode Pershad* (Alteration of a sentence of three months' imprisonment to one months' imprisonment with a fine of Rs. 20, or in default of payment to 15 days' rigorous imprisonment does not amount to enhancement.)

tion of three days' rigorous imprisonment and Rs 100 fine and in default one month's rigorous imprisonment may not be an enhancement if the convict does not consider the fine of Rs 100 too heavy to pay"¹

Where the accused were convicted by the Magistrate under ss 363 and 498, Penal Code, but were sentenced under s 363 only and subsequently in appeal were found guilty under s 498 only, it was held that the appellate Court could pass appropriate sentence under s 498 provided such sentence did not exceed that passed by the trial Court²⁵

As a practical guide to the subordinate Courts in Burma, the High Court of Rangoon has laid down certain principles on which a whipping may be substituted for imprisonment. See the undermentioned cases²⁶

An additional order for security passed under s 106, sub-s (3), is not an enhancement of the sentence²⁷ As to whether an order for costs under s 31 of the Court fees Act is an enhancement of sentence, see s 546A, Note 3

The provision against enhancement of sentence in this clause applies only to a convicted person. It does not, therefore, preclude the award of rigorous instead of simple imprisonment to a person who has been bound over under Chapter VIII but who has failed to give the required security²⁸

34 "Appeal from any other order" — Clause (c) — Clause (c) applies to an appeal from any other order, i.e., any other order than an order of acquittal or of conviction¹ Thus appeals from orders under s 514² or s 185³ can be dealt with under this clause In an appeal under sub s (3) of s 250 the appellate Court can under this clause, set aside the order for compensation though it cannot set aside the acquittal⁴

The only orders that can be passed in appeals from orders not being acquittals or convictions are those specified in this clause, namely, *alteration* or *reversal* of the order of the lower Court and those specified in clause (d), namely, *amendment* or *consequential*

(14) 1 AIR 1914 Lah 539 (539) 1915 Pun Re No 7 Cr 16 Cri L Jour 603 *Kripa Ram v Emperor* (Altering a sentence of three months imprisonment to one of one month's imprisonment and a fine and in default one month's further imprisonment is not enhancement)

(26) 18 AIR 1928 Lah 543 (543) 27 Cri L Jour 812 *Kanshi Ram v Emperor* (Where the accused is insolvent and unable to pay the fine an alteration of a sentence of two months imprisonment and Rs 50 fine or in default one month's further imprisonment to six weeks imprisonment and Rs 200 fine or in default further imprisonment of six weeks is enhancement of sentence)

[See also (16) 3 AIR 1916 Lah 130 (130) 17 Cri L Jour 212, *Manchand v Emperor* (If on appeal from a sentence of one week's rigorous imprisonment (part of which had already been undergone) the sentence is altered into one of fine of Rs 50 or in default one week's rigorous imprisonment the sentence amounts to an enhancement)]

24 (14) 1 AIR 1914 All 530 (531) 36 All 495 15 Cri L Jour 519 *Emperor v Mahar Chand*
25 (38) 25 AIR 1938 Cal 439 (440) 39 Cri L Jour 684 *Superintendent and Remembrancer of Legal Affairs, Bengal v Hossein Ali*

26 (29) 16 AIR 1929 Rang 177 (179) 7 Rang 319 30 Cri L Jour 986 (FB) *Emperor v Chit Pon* (Substitution of 30 stripes for three months rigorous imprisonment is enhancement)

(32) 19 AIR 1937 Rang 150 (151 152) 10 Rang 317 33 Cri L Jour 758 *Emperor v Nga Aung Myat* (Period of imprisonment already undergone should be considered by appellate Court in inflicting sentence of whipping)

27 (18) 5 AIR 1918 Nag 64 (65) 20 Cri L Jour 760 *Maharaj Singh v Emperor*

(19) 6 AIR 1919 All 375 (376) 20 Cri L Jour 302 *Zafar Hussain v Emperor*

28 (36) 23 AIR 1936 Sind 189 (189) 30 Sind L R 322 33 Cri L Jour 169 *Emperor v Manu Chabalo*

Note 34

1 (98) 21 Mad 124 (126) 2 Weir 503 (FB) *Queen-Empress v Srinivasulu Naidu*

2 (43) 30 AIR 1943 Pesh 6 (8) 44 Cri L Jour 381 203 Ind Cas 325 *Gul Zaman v Emperor*

(03) 2 Cri L Jour 131 (137) 1905 Pun L R 99 1005 Pun Re No 15 Cr *Masta v Emperor*

(12) 13 Cri L Jour 31 (31) 5 Sind L R 170 13 Ind Cas 223 *Karam Bahadur v Emperor*

3 (85) 1885 Pun Re No 42 Cr, p 89 (89) *Ram Kala v Ganga* (Case in revision—Revisional Court can under s 439 exercise same powers as those of an appellate Court under s 423, cl. (c))

4 (32) 19 AIR 1932 Cal 120 (121) 58 Cal 1436 33 Cri L Jour 269 *Surendra Nath v Basanta Chandra*

or incidental orders. There is a difference of opinion on the question whether in an appeal from an order under s 118, an order for further inquiry or re trial can be ordered, one view being that such further inquiry or re trial cannot be ordered⁵ and the other view being that an order for further inquiry or re trial is an "incidental order" within the meaning of cl (d) and can be passed in such cases⁶

The word "alter" in clause (c), though literally may include an alteration increasing the severity of the penalty, cannot be so construed, the whole tenor of the section shows that the Court has no power, by alteration, to increase the severity of the penalty imposed by the trial Court.⁷

35. Subsequent events — Power to take notice of. — An appellate Court has to look to the offence as charged, and the conviction should not be disturbed because it thinks that, owing to subsequent events, the parties may have committed another offence¹ Thus, facts which happened subsequent to the conviction or verdict cannot be utilised for the purpose of altering the verdict or of reducing the sentence²

But where, after the verdict of the jury, it was discovered that the foreman of the jury had taken bribe, the verdict was set aside³

36 Power to direct sentences to run concurrently — The High Court can, under this section, and s 561A of the Code, act under s 397 and direct separate sentences in separate trials to run concurrently⁴

37. Appellate Court cannot canvass previous convictions — An appellate Court cannot go into the legality of previous convictions or of orders passed against the accused¹

38. Appellate Court, when to report to the High Court. — Where the appellate Court comes to the conclusion that the sentences in respect of the convicted persons ought to be enhanced, and therefore wishes to report to the High Court, it should do so in separate proceedings and not keep the appeal undisposed of till the report is made and orders passed thereon¹ An appellate Court should not refer the matter of the appeal

5 (42) 29 AIR 1942 Oudh 416 (416) 43 Cr L Jour 729 201 Ind Cas 60 *Abdullah Sheshk v Emperor* (AIR 1926 All 403 49 All 501 27 Cr L Jour 915 doubted)

(66) 3 Cr L Jour 243 (243) 33 Cal 8, *Dayanath v Emperor*

(34) 21 AIR 1934 Mad 202 (202) 34 Cr L Jour 947, *In re Narappu Reddy*

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forfeited The Appellate Court can raise the amount of the security forfeited)

Note 35

1 (68) 9 Suth W R Cr 65 (65 66), *Ramjee Doss v Meerajan Sheshk*

2 (29) 16 AIR 1929 Cal 92 (93) 30 Cr L Jour 484, *Intas Mandal v Emperor*

3 (33) 20 AIR 1933 Cal 639 (640) 60 Cal 751 34 Cr L Jour 1072 *Hafes Molla v Emperor*

Note 36

1 (31) 18 AIR 1931 Bom 529 (529) 33 Cr L Jour 77, *Nagappa Vyankappa v Emperor*

[See (29) 16 AIR 1929 All 585 (545) 51 All 899 30 Cr L Jour 901 *Sis Ram v Emperor*]

Also see s 397, Note 11

Note 37

1. (24) 11 AIR 1924 Rang 295 (297) 25 Cr L Jour 1303, *On Pe v Emperor*

Note 38

1 (84) 18-4 All W N 130 (130) *Empress v Durga Prasad*

tion of three days' rigorous imprisonment and Rs 100 fine and in default one month's rigorous imprisonment may not be an enhancement if the convict does not consider the fine of Rs 100 too heavy to pay²¹

Where the accused were convicted by the Magistrate under Ss. 363 and 493, Penal Code but were sentenced under S 363 only and subsequently in appeal were found guilty under S 493 only, it was held that the appellate Court could pass appropriate sentence under S 498 provided such sentence did not exceed that passed by the trial Court²²

As a practical guide to the subordinate Courts in Burma, the High Court of Rangoon has laid down certain principles on which a whipping may be substituted for imprisonment. See the undermentioned cases²³

An additional order for security passed under S 106, sub-s (3), is not an enhancement of the sentence²⁷ As to whether an order for costs under S 31 of the Court-fees Act is an enhancement of sentence, see S 516A, Note 3

The provision against enhancement of sentence in this clause applies only to a convicted person. It does not therefore preclude the award of rigorous instead of simple imprisonment to a person who has been bound over under Chapter VIII but who has failed to give the required security²⁸

34 "Appeal from any other order" — Clause (c) — Clause (c) applies to an appeal from any other order, i.e., any other order than an order of acquittal or of conviction¹ Thus appeals from orders under S 514² or S 195³ can be dealt with under this clause. In an appeal under sub-s (3) of S 250, the appellate Court can, under this clause, set aside the order for compensation though it cannot set aside the acquittal⁴

The only orders that can be passed in appeals from orders not being acquittals or convictions are those specified in this clause namely, *alteration* or *reversal* of the order of the lower Court and those specified in clause (d), namely, *amendment* or *consequential*

(14) 1 AIR 1914 Lah 539 (539) 1915 Pan Ra No 7 Cr 16 Cri L Jour 603 *Kripa Ram v Emperor* (Altering a sentence of three months imprisonment to one of one month's imprisonment and a fine and in default one month's further imprisonment is not enhancement)

(26) 13 AIR 1926 Lah 543 (543) 27 Cri L Jour 812 *Kanshi Ram v Emperor* (Where the accused is insolvent and unable to pay the fine an alteration of a sentence of two months imprisonment and Rs 50 fine or in default one month's further imprisonment to six week's imprisonment and Rs 200 fine or in default further imprisonment of six weeks is enhancement of sentence)

[See also (16) 3 AIR 1916 Lah 130 (130) 17 Cri L Jour 212, *Manchand v Emperor* (If on appeal from a sentence of one week's rigorous imprisonment (part of which had already been undergone) the sentence is altered into one of fine of Rs 50 or in default one week's rigorous imprisonment the sentence amounts to an enhancement)]

24 (14) 1 AIR 1914 All 530 (531) 36 All 485 15 Cri L Jour 519 *Emperor v Mehar Chand*
25 (38) 25 AIR 1938 Cal 439 (440) 39 Cri L Jour 694 *Superintendent and Remembrancer of Legal Affairs Bengal v Hossein Ali*

26 (29) 16 AIR 1929 Rang 177 (179) 7 Rang 319 30 Cri L Jour 986 (FB) *Emperor v Chit Lon* (Substitution of 30 stripes for three months rigorous imprisonment is enhancement)

(32) 19 AIR 1932 Rang 150 (151 152) 10 Rang 317 33 Cri L Jour 758 *Emperor v Nga Aung Myat* (Period of imprisonment already undergone should be considered by appellate Court in inflicting sentence of whipping)

27 (18) 5 AIR 1918 Nag 64 (65) 20 Cri L Jour 760 *Malharaj Singh v Emperor*

(19) 6 AIR 1919 All 375 (378) 20 Cri L Jour 302, *Zafar Hussain v Emperor*

28 (36) 23 AIR 1936 Sind 188 (189) 30 Sind L R 329 38 Cri L Jour 163 *Emperor v Manu Chabiso*

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Masla v Emperor

(12) 13 Cri L Jour 31 (31) 5 Sind L R 179 13 Ind Cas 223 *Karam Bahadin v Emperor*

3 (85) 1885 Pun Re No 42 Cr, p 89 (89) *Ram Kala v Ganga* (Case in revision—Revisional Court can under S 439 exercise same powers as those of an appellate Court under S 423 cl. (a))

4 (32) 19 AIR 1932 Cal 190 (121) 53 Cal 1436 33 Cri L Jour 969 *Surendra Nath v Basania Chandra*

or incidental orders. There is a difference of opinion on the question whether in an appeal from an order under S 118, an order for further inquiry or re trial can be ordered, one view being that such further inquiry or re trial cannot be ordered⁵ and the other view being that an order for further inquiry or re trial is an "incidental order" within the meaning of cl (d) and can be passed in such cases.⁶

The word "alter" in clause (e), though literally may include an alteration increasing the severity of the penalty, cannot be so construed, the whole tenor of the section shows that the Court has no power, by alteration, to increase the severity of the penalty imposed by the trial Court.⁷

35. Subsequent events — Power to take notice of. — An appellate Court has to look to the offence as charged, and the conviction should not be disturbed because it thinks that, owing to subsequent events, the parties may have committed another offence.¹ Thus, facts which happened subsequent to the conviction or verdict cannot be utilised for the purpose of altering the verdict or of reducing the sentence.²

But where, after the verdict of the jury, it was discovered that the foreman of the jury had taken bribe, the verdict was set aside.³

36. Power to direct sentences to run concurrently. — The High Court can, under this section, and S. 561A of the Code, act under S. 397 and direct separate sentences in separate trials to run concurrently.⁴

37. Appellate Court cannot canvass previous convictions. — An appellate Court cannot go into the legality of previous convictions or of orders passed against the accused.¹

38. Appellate Court, when to report to the High Court. — Where the appellate Court comes to the conclusion that the sentences in respect of the convicted persons ought to be enhanced, and therefore wishes to report to the High Court, it should do so in separate proceedings and not keep the appeal undisposed of till the report is made and orders passed thereon.¹ An appellate Court should not refer the matter of the appeal

5. (42) 29 AIR 1942 Oudh 416 (416) 43 Cri L Jour 729 • 201 Ind Cas 60, *Abdullah Sheikh v. Emperor* (AIR 1926 All 403 • 48 All 501; 27 Cri L Jour 945 doubted)

(100) 3 Cri L Jour 243 (243) : 33 Cal 8, *Dayanath v. Emperor*.

(34) 21 AIR 1934 Mad 202 (202) : 34 Cri L Jour 947, *In re Narayana Reddy*

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forfeited.

(36) 23 All

(Person ordered to give security under Ch VIII failing to do so — Trial Magistrate ordering that he should be detained in simple imprisonment—High Court in revision can direct that the imprisonment should be rigorous.)

Note 35

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Note 36

1. (31) 18 AIR 1931 Bom 529 (529) : 33 Cri L Jour 77, *Nagappa Vyanappa v. Emperor*,
[See (29) 16 AIR 1929 All 585 (585) • 51 All 893 • 30 Cri L Jour 904, *Su Nam v. Emperor*]
Also see S. 397, Note 11.

Note 37

1. (24) 11 AIR 1924 Rang 295 (297) : 25 Cri L Jour 1303, *On Fe v. Emperor*.

Note 38

1. (84) 18-4 All W N 130 (130), *Empress v. Dur a Prasad*.

to the High Court it should decide the appeal itself²

39 "Any amendment or any consequential or incidental order" — Clause (d) — The appellate Court has under clause (d), power to make any amendment or any consequential or incidental orders that may be just and proper¹ The wide power of making amendment under the clause must however, be used with discretion so as not to prejudice the accused²

Clause (d) deals with orders to be passed *after the appeal has been heard* and cannot apply to matters that may arise *pending appeal* such as the release of the appellant on bail³ Nor can it apply to matters at the stage of *admission* of the appeal Thus an order cannot be passed under this clause excusing the delay in filing an appeal after limitation inasmuch as the application of this section is legitimate only after the preliminary stage indicated in ss. 421 and 422 has been passed, *i.e.*, after the appeal is validly admitted⁴ It has however been held in the case cited below⁵ that an order dispensing with security by a person convicted under s 107 of the Code can be passed *pending appeal* as an incidental order under clause (d) It is submitted that this is not correct Clause (d) should be construed along with the first portion of the section which makes it clear that an order under clause (d) can be passed only *after perusing the record and hearing the appeal*

An amendment of charge can properly be done under this clause⁶

Whether a particular order is consequential or incidental depends on the terms of the order under consideration in each particular case and the circumstances in which it is made⁷

In *Mah Singh v Mangni Khanda*⁸ a Full Bench of the High Court of Calcutta observed as follows

Consequential or incidental orders within the purview of the proviso must fall under one or other of the two heads

First there are orders which follow as a matter of course being the necessary complements to the main order passed without which the latter would be incomplete or ineffective Such are directions as to the refund of fines realized from acquitted appellants or, on the reversal of acquittals as to the restoration of compensation paid under section 250 and for them no separate authority is needed

Secondly there are orders which though ancillary in character require more than the support of a criminal Court's inherent jurisdiction and could not be passed without express authority

2 (15) 2 AIR 1915 All 185 (186) 16 Cr L Jour 433 *Emperor v Mohan Lal*

(68) 9 Suth W R Cr 5 (5) *Sreekissan v Jugal*

(69) 11 Suth W R Cr 24 (24) *Queen v Nussooruddeen*

(14) 1 AIR 1914 Low Bur 226 (226) 7 Low Bur Rul 251 15 Cr L Jour 667 *Emperor v Sulaiman*

Also see S 438 Note 4

Note 39

1 (43) 30 AIR 1943 P C 190 (195) 45 Cr L Jour 126 70 Ind App 196 23 Pat 88 1 L R (1941) Kar P C 1 209 Ind Cas 276 (P C) *Thakur Shah v Emperor* (Section 423 and in particular sub-s. (1))

(d) gives wide powers of amendment in a criminal appeal)

(36) 23 A 1 R 1936 Cal 509 (533 534) 37 Cr L Jour 1090 ILR (1937) 1 Cal 169 *Netai Chandra v Emperor*

2 (43) 30 A 1 R 1943 P C 190 (195) 1 L R (1944) Kar P O 1 70 Ind App 196 23 Pat 88 45 Cr L Jour 126 209 Ind Cas 276 (P C) *Thakur Shah v Emperor*

3 (34) 21 AIR 1934 All 845 (845) 36 Cr L Jour 177 *Darsu v Emperor*

4 (23) 10 AIR 1923 Mad 95 (96) 24 Cr L Jour 89 *In re Mittoor Mowdeen*

5 (30) 19 AIR 1932 All 680 (681) 54 All 661 33 Cr L Jour 731 *Katwaroo v Emperor*

6 (43) 30 AIR 1943 P C 190 (195) ILR (1944) Kar P G 1 23 Pat 88 70 Ind App 196 45 Cr L Jour 126 209 Ind Cas 276 (P C) *Thakur Shah v Emperor* (If however by amending charge there is any chance of injustice being done to the accused the Court should offer a new trial on the charge so amended)

7 (33) 20 A 1 R 1933 Rang 288 (290 291) 11 Rang 861 85 Cr L Jour 1 (F B) *Ma Mya Khan v Maung Po Hwa*

8 (11) 12 Cr L Jour 529 (531) 12 Ind Cas 297 39 Cal 157 (FB)

The principle in *Mehi Singh's case* was followed by the Allahabad High Court in the undermentioned case.⁹ The Rangoon High Court¹⁰ has however, dissented from it.

The following have all been held to be "consequential" or 'incidental' orders within the meaning of clause (d)

- (1) An order for costs under S 143, sub s (3) is incidental to an order for possession under section 145¹¹
- (2) An order under S 517 for restoration of property to the person entitled may be passed as a consequential or incidental order¹²
- (3) An order under s 520 See Notes on s 520
- (4) Where a member of a Bench of Magistrates has not signed the judgment, the appellate Court can, as an incidental order, send the case back to him for such signature¹³
- (5) An order under S 31 of the Court fees Act (now S 546A, Criminal Procedure Code) can be passed as an incidental order¹⁴
- (6) An order under S 471 of the Code is incidental to an order of acquittal on the ground of insanity¹⁵
- (7) An order sending a case back for re hearing can be passed under this clause¹⁶
- (8) An order directing refund of compensation on the setting aside of an order for compensation is a consequential or incidental order within clause (d)¹⁷

Before the present Code, there was no provision corresponding to clause (d) of this section and it was held on the language of S 250, that it was the *Magistrate by whom the case was heard* that could pass an order under that section and not an appellate Court¹⁸. The introduction of clause (d) would appear to make a difference. It has, however, been held that an order under S 250 is not 'consequential' or 'incidental' to an order of discharge or acquittal and cannot be passed by the appellate Court under this clause¹⁹. See also section 250, Note 6

sation under S 250 is not consequential on or incidental to order of acquittal.)

[See also (33) 20 A I R 1933 Rang 288 (291) 11 Rang 361 35 Cri L Jour 1 (FD), *Ma Mya Khin v. Maung Po Htwa*]

11 (33) 20 AIR 1933 Rang 288 (291) 11 Rang 361 35 Cri L Jour 1 (FD) *Ma Mya Khin v. Maung Po Htwa* (Such order may be passed by High Court in revision of order passed by Magistrate under Section 145)

Also see S 148 Note 6

12 (28) 15 AIR 1928 Lah 567 (567 568, 571) 10 Lah 187 29 Cri L Jour 810 *Thiraj v. Emperor* (06) 4 Cri L Jour 370 (371) 3 All L Jour 770 1906 All W N 256, *Emperor v. Gopi Nath* (Order as to property which it did not previously include.)

(14) 1 AIR 1914 Cal 658 (660) 15 Cri L Jour 184, *Hagu Dandas v. Manmatha Nath*

Also see S 520 Note 5

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King v. Kala Nyo

(22) 9 AIR 1922 Mad 54 (55) 23 Cri L Jour 71, *A B Mahammad v. Emperor*

(15) 2 A I R 1915 Low Bur 34 (35) : 8 Low Bur Rul 290 16 Cri L Jour 670, *Emperor v. Nga E Maung*

16 (14) 1 AIR 1914 Mad 50 (51) 15 Cri L Jour 402, *Public Prosecutor v. Raver Umthara*

17 (03) 25 All 315 (316) 1903 All W N 57, *In the matter of Safdar Hussain*.

18 (75) 8 Mad H O B vii (vii) 2 We r 314

19 (11) 12 Cri L Jour 529 (531 532) 32 Cal 157 12 Ind Cas 297 (FD), *Mehi Singh v. Mangal Khanda* (Overruling 11 Cri L Jour 46)

(40) 27 AIR 27 AIR 1940 Rang 278 (279) 1940 Rang L R 502, *King v. Mg Khin Maung*

(39) 26 A I R 1939 Sind 321 (322) 41 Cri L Jour L R (1940) Kar 119, *Emperor v. Md. Asim*

The following orders have been held not to be within clause (d) :

- (1) Order as to costs of the *appeal itself*²⁹ or of the adjournment of the appeal³¹
- (2) Order setting aside an order under S. 31 of the Court Fees Act³² (now S. 546A, Criminal Procedure Code)
- (3) Order reviewing the order of the predecessor.³³
- (4) Order staying criminal proceedings pending decision of civil Court.³⁴ But where an order under S. 476, sub s. (1), is set aside, proceedings under S. 476, sub s. (2), which had been begun may be stayed under clause (d).³⁵

As to whether the appellate Court can expunge the remarks occurring in the lower Court's judgment, see Section 561A, Note 7.

40. Verdict of jury — Sub-section (2). — Section 418 provides that an appeal in jury cases is limited to questions of law.¹ This sub-section provides that an appellate Court cannot alter or reverse the verdict of a jury unless such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding by the jury of the law as laid down by him.² This sub-section should not, however, be construed as controlling S. 419 and as laying down that no question of law can be taken in appeal unless there is a misdirection by the Judge or a misunderstanding by the jury of the law as laid down by him. Where the trial is illegal in fact, it may be set aside for *that* reason only and no question of misdirection by the Judge or misunderstanding by the jury of the law arises at all.³

(29) 13 AIR 1926 Lah 427 (427) : 7 Lah 152 : 27 Cri L Jour 570, *Notified Area, Eharar v Karti Eam.*

(31) 11 AIR 1924 All 224 (224) : 46 All 80 : 25 Cri L Jour 967, *Chad v. Ram Lal*

(32) 3 Cri L Jour 441 (442) : 28 All 625 : 3 All L Jour 382 : 1906 All W N 145, *Emperor v Chittan*

(33) 361 : 35 Cri L Jour 1 (FB), *Mia Mya Khin v.*

(25) 12 AIR 1925 Mad 438 (440) : 48 Mad 262 : 26 Cri L Jour 707 (FB), *Veerapa Naidu v Arudayarmal* (It does not necessarily follow from an order passed in revision)

[But see (14) 1 AIR 1914 Bom 128 (128) : 15 Cri L Jour 522, *Emperor v Ganpat Silaram*]

21. (02) 1902 All W N 59 (59, 60), *King Emperor v. Chhabray Singh*

22. (09) 9 Cri L Jour 83 (83, 84) : 31 Mad 547, *Emperor v Maddipalla Subbarayudu*

23. (29) 16 AIR 1929 Bom 609 (311) : 53 Bom 578 : 31 Cri L Jour 309, *Emperor v. Lakshman Ram Shet.*

24. (31) 18 AIR 1931 Pat 411 (413, 414) : 33 Cri L Jour 147, *Jagannath Acharya v Rajagopalachari.*

25. (12) 13 Cri L Jour 492 (492) : 6 Low Bur Rul 49 : 15 Ind Cas 492, *Nga San Tin v. Emperor*

Note 40

1. (42) 29 AIR 1942 Oudh 221 (222, 223) : 43 Cri L Jour 416 : 17 Luck 516 : 199 Ind Cas 714 *Jagannath v Emperor* (The question whether a witness is or is not an accomplice is one for jury to determine and it would amount to misdirection on the part of the Judge to say that a witness is not an accomplice. The Judge ought to point out whether there is corroborative evidence or not)

(34) 21 AIR 1934 Pat 309 (310) : 13 Pat 629 : 35 Cri L Jour 1104, *Nanhak Ahir v. Emperor*

Also see S. 418, Note 2

2. (35) 25 AIR 1938 Cal 51 (59) : 39 Cri L Jour 161 : ILR (1938) 1 Cal 290, *Goloke Behary v Emperor* (Misdirection—What amounts to—Failure to marshal evidence relating to each element of charge.)

(38) 25 AIR 1938 Cal 460 (463) : 39 Cri L Jour 674, *Ebad Khan v Emperor.*

(36) 23 AIR 1936 Mad 516 (519) : 37 Cri L Jour 909 : 59 Mad 904, *Balnasaabapathi Goundan v Public Prosecutor.*

(34) 21 AIR 1934 Cal 105 (111) : 61 Cal 6 : 35 Cri L Jour 554, *Khoda Buz Hay, v Emperor.* (Arguments on behalf of the convicted person must be limited to the matters referred to in sub-s. (2) of Section 423)

[See (39) 26 AIR 1939 Bom 4

Soma (No Court will inter

the evidence, or because it

lightly interfere with the verdict of a jury with which the Sessions Judge has agreed would be to reduce trial by jury to a farce)]

3. (43) 30 AIR 1943 Bom 74 (75) : 44 Cri L Jour 411 : 265 Ind Cas 411 (DB), *Malaprasad v Emperor.* (Verdict of jury contrary to binding rule of practice which has practically the force of law that the evidence of an accomplice ought not to be acted upon unless corroborated in material respects.)

Section 537 provides that no finding, sentence or order of a Court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity in any proceeding or on account of any misdirection in any charge to the jury unless such error, etc., has occasioned a *failure of justice*. Where there is an error of law or a misdirection by the Judge or a misunderstanding by the jury of the law as laid down by him and there has been a *consequent* erroneous verdict and failure of justice, the appellate Court is entitled to interfere with the verdict.⁴ Where there is no misdirection and the

(27) 14 AIR 1927 Cal 949 (950, 951) 23 Cri L Jour 449, *Kasem Ali v Emperor* (Only two persons charged for conspiracy between themselves and convicted—One of them subsequently acquitted—The conviction of the other also should be set aside)

(26) 18 AIR 1926 Lah 193 (194) 27 Cri L Jour 793 *Fitzmaurice v Emperor*

See also the following cases

(27) 28 Cri L Jour 108 (110) 99 Ind Cas 236 (Cal) *Basanta Kumar Gossain v Emperor* (No misdirection but verdict on mere speculation set aside)

(31) 18 AIR 1931 Bom 311 (312) 55 Bom 435 32 Cri L Jour 1077, *Emperor v Issuf Mohammad* (Improper letting of evidence—Effect on jury—Verdict may be set aside)

(23) 10 AIR 1923 Pat 142 (142) 23 Cri L Jour 141, *Maddadar Ram v Emperor* (Where during the trial before a jury the Public Prosecutor had read an alleged confession of the accused which not having been recorded according to law was ruled out as inadmissible, held that the irregularity of allowing it to be read might have influenced the minds of the jury, however carefully the Judge may have endeavoured to remove any impression caused thereby and that the accused was entitled to a re trial)

(67) 7 Suth W R Cr 6 (6) *Queen v Chand Bagdee* (A conviction on no evidence is wrong in point of law)

(17) 10 AIR 1920 Cal 1000 (1000) 20 Cri L Jour 1000

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4 See the following cases

(43) 30 AIR 1913 Bom 74 (74) 44 Cri L Jour 411 205 Ind Cas 411 (DB) *Mataprasad v Emperor* (Verdict of jury in disregard of the rule that uncorroborated evidence of accomplices should not be acted upon—Judge's failure to impress that rule upon jury amounts to misdirection)

(41) 28 AIR 1941 Oudh 567 (573) 17 Luck 128 42 Cri L Jour 728 195 Ind Cas 371, *Israr Husain v Emperor*

(37) 24 AIR 1937 Pat 440 (442) 38 Cri L Jour 919 16 Pat 413, *Rameshwar Singh v Emperor*

(08) 18 Mad L Jour 541 (541) 8 Cri L Jour 397 4 Mad L T 194, *In re Gangi Reddy, Buchanna*

(17) 10 AIR 1920 Cal 1000 (1000) 20 Cri L Jour 1000

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(17) 10 AIR 1920 Cal 1000 (1000) 20 Cri L Jour 1000

(10) 11 Crl L Jour 663 (663, 684) 8 Ind Cas 573 (Mad) *Public Prosecutor v Papalsha* (Telling jury to leave out of consideration evidence of witness and retracted confession of accused)

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(16) 3 AIR 1916 Mad 651 (854) 39 Mad 449 16 Crl L Jour 294 *Annava Muthuriam v Emperor* (Failure to warn jury against considering inadmissible evidence though consented to by the accused)

(03) 1 Weir 446 (447) *In re Mookkanda Manjagoran*

(03) 26 Mad 467 (468) 2 Weir 517, *Guzzala Hanuman v Emperor*

(06) 4 Crl L Jour 502 (503) 1 Mad L T 350, *Para Thandan v Emperor* (Omission to direct jury to give benefit of doubt was under the circumstances of the case, held to be misdirection)

(81) 10 Cal L Rep 4 (6) *Jugut Mohini Dassee v Madhu Sudhan Dutt*

(08) 8 Crl L Jour 6 (9) 35 Cal 531 7 Crl L Jour 599 12 Cal W N 774 *Natabar Ghose v Emperor* (Material ingredient of offence not stated to jury)

(21) 6 AIR 1921 Cal 64 (65) 23 Crl L Jour 344, *Annuddi Chowkudar v Emperor*

(07) 5 Crl L Jour 78 (80) 30 Mad 44 *Mari Valayan v Emperor* (Omission to lay down law by which jury are to be guided)

(08) 7 Crl L Jour 356 (358) 18 Mad L Jour 250 *In re Accalia Beors* (Telling jury that confessions to police if followed by production of stolen property are admissible is misdirection)

(08) 7 Crl L Jour 325 (327) 31 Mad 127 16 Mad L Jour 66 *In re Sankappa Rai* (Directing jury that statement of witness before investigating Magistrate is strong evidence against accused)

(18) 5 AIR 1918 Cal 314 (316) 19 Crl L Jour 81 *Asraf Ali v Emperor*

(26) 13 AIR 1926 Cal 1107 (1109) 27 Crl L Jour 1402 *Jahur Sheikh v Emperor*

(26) 13 AIR 1926 Cal 726 (730) 27 Crl L Jour 398 *Hari Charan v Emperor* (Omission to warn jury not to take into account conviction of co-accused vitiates verdict)

(26) 13 AIR 1926 Cal 235 (238) 53 Cal 181 26 Crl L Jour 1577, *Abdul v Emperor*

(26) 13 AIR 1926 Cal 226 (227) 26 Crl L Jour 1021, *Gadadhar Sarkar v Emperor* (Charge to jury should not tend to make the jury forget distinction between knowledge and mere suspicion on accused's part regarding offence)

(21) 8 AIR 1921 Cal 697 (698) 22 Crl L Jour 605 *Abdul Rahim Mir v Emperor*

(14) 1 AIR 1914 Cal 549 (550) 15 Crl L Jour 147, *Ofei Mollah v Emperor* (Judge's opinion expressed in dogmatic and unqualified terms held to be misdirection)

(20) 7 AIR 1920 Cal 90 (91) 21 Crl L Jour 183 *Emperor v Abdul Sheikh*

ror (Acquittal

(98) 25 Cal 561 (563 564) *Biru Mandal v Queen Empress* (Omission to explain law to jury)

(98) 25 Cal 416 (418 419) 2 Cal W N 347, *Nabi Baksh v Queen Empress*

(98) 25 Cal 230 (231 233) *Ali Fakir v Queen Empress*

(96) 23 Cal 252 (253) *Queen Empress v Imam Ali Khan* (Non-direction amounting to misdirection)

(05) 2 Crl L Jour 311 (313) 1 Cal L Jour 380 *Panchu Mandal v Emperor*

(1900) 4 Cal W N 576 (581) *Sadhu Sheikh v Empress*

(1900) 4 Cal W N 196 (200) *Rahmat Ali v Empress* (Omission to point out circumstances favourable to accused)

(1900) 4 Cal W N 193 (196) *Sri Prasad Misser v Empress* (Omission to explain law to jury)

(97) 1 Cal W N 301 (302 303) *Tomji Paramank v Empress* (Failure to put before jury all elements which constitute offence)

(99) 26 Cal 49 (50) *Basanta Kumar v Queen-Empress*

(08) 7 Crl L Jour 315 (317) 7 Cal L Jour 246 *Kali Singh v Emperor* (It is misdirection for Judge to say that he sees no reason to doubt a particular witness)

(07) 5 Crl L Jour 424 (426) 34 Cal 325 *Dasarath Mandal v Emperor*

(06) 3 Crl L Jour 144 (147 149) 10 Cal W N 153 *Sourendra Nath v Emperor* (Omission to warn jury that statement of one accused is not to be used against co-accused)

(09) 9 Crl L Jour 404 (405) 32 Mad 46 1 Ind Cas 867, *In re Giddigadu*

(03) 26 Mad 38 (40) 2 Weir 733 *Thandraya Mudaly v Emperor* (Failure to tell jury that confession caused by promise is irrelevant)

(98) 21 Mad 83 (90 91) 2 Weir 503 *Queen Empress v Raman*

(10) 11 Crl L Jour 557 (558) 8 Ind Cas 52 (Cal) *Asfar Sheikh v Emperor* (Asking jury to accept statement in the first information in preference to evidence in the case)

(10) 11 Crl L Jour 538 (539) 7 Ind Cas 915 (Cal) *Harendra Pal v Emperor*

verdict is a reasonable and honest one, the appellate Court cannot interfere⁶ Nor can it

- (10) 11 Cr L Jour 9 (10) 4 Ind Cas 543 (Cal), *Emperor v Nalul Kabiraj* (Failure to place evidence fairly before jury)
- (30) 17 AIR 1930 Cal 370 (378) 58 Cal 96 32 Cr L Jour 10 *Government of Bengal v Santiram Mondal*
- (29) 16 AIR 1929 Cal 726 (727) 57 Cal 649 31 Cr L Jour 909 *Ahoro Mondal v Emperor* (Direction to jury to consider question of voluntary nature of confession is misdirection)
- (30) 17 AIR 1930 Cal 276 (278) 57 Cal 1266 31 Cr L Jour 1207, *Panchanan Gogoi v Emperor*. (Omission to tell jury to reject evidence of hostile witness altogether)
- (26) 13 AIR 1926 Cal 594 (585) 27 Cr L Jour 125, *Superintendent and Remembrancer of Legal Affairs, Bengal v Sader Saik* (Witnesses for prosecution not present—Court holding that there is no evidence and directing to return verdict of not guilty—It is misdirection)
- (30) 17 AIR 1930 Cal 703 (703) 58 Cal 590 32 Cr L Jour 228, *Nawab Ali v Emperor* (Non direction amounting to misdirection)
- (33) 20 AIR 1933 Cal 509 (511) 34 Cr L Jour 841, *Chaitya Ranjan v Emperor* (Caution against approver's testimony being not sufficient in absence of independent corroboratory evidence not given—Convict on set aside)
- (31) 18 AIR 1931 Cal 617 (617) 33 Cr L Jour 40, *Bhupnath Mondal v Emperor* (Wrong explanation as to presumption under S 114 Evidence Act)
- (32) 19 AIR 1933 Oudh 28 (31) 33 Cr L Jour 275, *Emperor v Zamin*
- (34) 21 AIR 1934 Oudh 354 (359) 10 Luck 119 35 Cr L Jour 1086, *Lal Behari Singh v Emperor* (Point of law as to necessity of charge for conviction not brought in notice of jury)
- (25) 12 AIR 1925 Pat 797 (803 806) 4 Pat 626 27 Cr L Jour 49, *R pin Singh v Emperor*
- (80) 6 Cal 247 (249) 7 Cal L Rep 74, *Gogun Chunder Ghose v Empress* (Judgment in civil suit out of which criminal prosecut on arose referred to by Judge in his charge to jury)
- (26) 13 AIR 1926 Mad 370 (370) 27 Cr L Jour 176, *In re Ambalam* (Where the defence case was not adequately put before the jury and evidence was admitted which should have been excluded)
- (29) 16 AIR 1929 Cal 170 (171) 30 Cr L Jour 912 *Duarkadas v Emperor* (Non direction amounting to misdirection)
- S (46) 33 AIR 1946 Bom 36 (41) (FB), *Govt of Bombay v Abdul Wahab* (Unanimous verdict of jury—Appellate Court will not interfere unless it is satisfied that the verdict is perverse and that no reasonable body of men could have arrived at the verdict at which the jury arrived)
- (49) 29 AIR 1942 Nag 127 (132) 1 L R (1942) Nag 749 44 Cr L Jour 18 203 Ind Cas 214 (DB), *Govt. of P and Berar v Bhaguram Rodaji* (No fundamental or glaring error of law in Judge's charge to jury—High Court will not interfere)
- (41) 28 AIR 1941 Mad 708 (708) 42 Cr L Jour 824 196 Ind Cas 227 *In re Somanna*
- (41) 28 AIR 1941 Pat 362 (366) 195 Ind Cas 107, *Bakhori Gope v Abdul Halim* (Charge open to criticism in some respects but fair as a whole—No ground for reversal of unanimous verdict of jury)
- (27) 14 AIR 1927 All 109 (109) 27 Cr L Jour 1355, *Jai Lal v Emperor*.
- (11) 12 Cr L Jour 193 (195) 10 Ind Cas 684 (Cal) *Rashid Ismail v Emperor*
- (09) 9 Cr L Jour 567 (567) 32 Mad 179 2 Ind Cas 307, *Public Prosecutor v Bonigiri Pottigadu*
- (93) 2 Cal W N 702 (709 718) *Queen Empress v Dhasrab Chunder* (High Court cannot go into the merits of the verdict in such a case)
- (21) 11 AIR 1924 Mad 230 (230) 25 Cr L Jour 269 *Mulimayandi Thevan v Emperor*, (Where misdirection to the jury is not proved the verdict of the jury will be upheld in appeal.)
- (27) 14 AIR 1927 Oudh 549 (549) 28 Cr L Jour 937, *Babbar v Emperor*
- (34) 21 AIR 1934 All 1032 (1033) 36 Cr L Jour 322 *Banshi Dar v Emperor* (The High Court cannot go into questions of fact in such cases.)
- (27) 14 AIR 1927 Pat 370 (375) 7 Pat 15 29 Cr L Jour 692 *Ram Chariter Singh v Emperor* (Where the High Court is of opinion that the accused should have been acquitted and that the verdict is against the weight of the evidence the Court may direct a copy of the judgment to be sent to the Local Government for necessary action)
- (30) 17 AIR 1930 Cal 712 (713) 32 Cr L Jour 236, *Hafizah Haldar v Emperor* (It is for appellant to show affirmatively that there has been misdirection)
- (30) 17 AIR 1930 Cal 437 (439) 32 Cr L Jour 453 *Mohiuddin v Emperor*
- (93) 1893 Rat 644 (652) *Queen Empress v Yesu* (Non-direction is not misdirection—Verdict will not be interfered with unless non-direction amounts to misdirection)
- (20) 7 AIR 1900 Cal 271 (271) 46 Cal 635 21 Cr L Jour 8, *Mohans Mohan v Emperor* (Verdict on circumstantial evidence alone—No interference.)

interfere, even if there is a misdirection, unless it has resulted in the verdict being erroneous⁶ and has further occasioned a failure of justice⁷

(1865) 2 South W R Cr 5 (5), *Queen v. Gopaul Das* (Pleas that the prosecutor is at feud with the prisoner and that the prisoner's confession was given at the instance of the police are not grounds of appeal)

6 (40) 27 AIR 1940 Lah 87 (88) : 41 Cri L Jour 482, *A. M. Mathews v. Emperor*. ('Erroneous' explained)

(32) 19 AIR 1932 Cal 474 (478) : 50 Cal 1361 : 33 Cri L Jour 851, *Saroj Kumar v. Emperor*.

(29) 16 AIR 1929 All 364 (364) : 30 Cri L Jour 622, *Abdul Majid Khan v. Emperor*. (Court of revision also cannot do so)

(08) 8 Cri L Jour 35 (36) : 10 Bom L R 565, *In re Shambhulal Pandas*

(35) 22 AIR 1935 All 103 (105) : 36 Cri L Jour 612, *Asis Khan v. Emperor*.

(03) 27 Bom 626 (632) : 5 Bom L R 599, *Emperor v. Waman Shivram*.

(89) 1889 Rat 452 (454), *Queen-Empress v. Lalsing*.

(29) 16 AIR 1929 Pat 313 (316) : 8 Pat 344 : 30 Cri L Jour 721, *Ram Das v. Emperor*.

[...]

jury and having found affirmatively on that point postponing the case to another date in order to determine whether the misdirection had rendered the verdict of the jury erroneous.)

(09) 10 Cri L Jour 11 (12) : 3 Ind Cas 434 (Mad), *Tootipalli Rama Goundan v. Emperor*]

[See also (94) 21 AIR 1934 Cal 847 (849) : 62 Cal 337 : 30 Cri L Jour 858, *Ilu v. Emperor* (In an appeal from a trial by a jury, on a question as to misdirection as to evidence, the High Court has to see whether, on a proper direction and having all the circumstances before them, the jury, as reasonable men, would have found that the charge was proved.)]

7. (46) 48 Bom L R 163 (168) (DB), *Emperor v. Narhari Ganpati*.

(43) 30 AIR 1943 Pat 163 (184) : 21 Pat 865 44 Cri L Jour 507 206 Ind Cas 865 (DB), *Lokhono Saku v. Emperor* (However perverse and difficult to understand the verdict of the jury may be, the appellate Court has no power to interfere unless there has been a failure of justice due to any misdirection or non-direction to the jury)

(41) 28 AIR 1941 Nag 324 (326, 327) : 43 Cri L Jour 120 ILR (1942) Nag 510 197 Ind Cas 138, *In re Harakchand Ghumarinal*. (If a Court after considering the evidence finds that, even if the misdirection had not occurred, the jury could not reasonably have come to any other decision, it should not interfere)

(40) 27 AIR 1940 Lah 87 (89) : 41 Cri L Jour 482, *A. M. Mathews v. Emperor*.

(37) 24 AIR 1937 Pat 263 (271, 274) : 15 Pat 817 38 Cri L Jour 673, *Samarendra Kumar v. Emperor*.

(36) 23 AIR 1938 Pat 48 (47) : 37 Cri L Jour 320, *Hari Mahla v. Emperor*.

(09) 9 Cri L Jour 93 (93) : 4 Mad L Tim 483, *In re Kanyan*

(03) 5 Bom L R 207 (208), *Emperor v. Apunna Devappa*

(26) 13 AIR 1926 All 429 (431) : 27 Cri L Jour 785, *Dhiraaj v. Alasi*. (Misdirection must have affected jury's verdict)

(27) 14 AIR 1927 Cal 680 (682) : 54 Cal 539 : 23 Cri L Jour 689, *Ayub Mandal v. Emperor*.

(33) 1933 Mad W N 320 (323), *Arumugha Goundan v. Emperor*.

(9) 10 Cri L Jour 498 (499) : 4 Ind Cas 120 (Cal), *Keshab Pal v. Emperor*. (No failure of justice—No interference)

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ige has manifestly put

xor. (Misdirection not

(66) 5 South W R Cr 80 (87, 93) : Beng L R Sup Vol 459 (FB), *In re Elahes Buksh* (Improper advice given by a Judge to the jury upon a question of fact, or the omission of the Judge to give that advice which he, in the exercise of a sound judicial discretion ought to give the jury upon questions of fact, amounts to such an error in law as summing up as to justify the High Court, on appeal or revision, in setting aside a verdict of guilty)

(34) 21 AIR 1934 Pat 309 (310) : 13 Pat 529 : 35 Cri L Jour 1104, *Nankah Ahir v. Emperor* (Proper direction to jury—Jury acting on evidence of approver—High Court cannot interfere)

(28) 15 AIR 1938 Pat 326 (330, 333) : 29 Cri L Jour 325, *Mt. Champa Pasin v. Emperor*. (The considerations governing the appeal from the trial held with the aid of assessors differ greatly from those governing an appeal from the trial by a jury—In the latter case the appeal is restricted by the provisions of Ss 423 (2) and 537, whereas in the former case the whole case is before the appellate Court)

(37) 22 AIR 1935 All 103 (105) : 36 Cal L Jour 612, *Asis Khan v. Emperor*.

The admission of inadmissible evidence and the rejection of admissible evidence during the trial are questions of law. Where the Judge in his charge to the jury puts inadmissible evidence before the jury or fails to warn them against considering such evidence, there will be a misdirection which will, subject to the provisions of s 537, form a ground of interference in appeal.⁸ Where inadmissible evidence has been admitted during the trial but there has been no misdirection, it will nevertheless be an error of law and will subject to the provisions of s 537, be a ground of appeal.⁹

Where a verdict is set aside on the ground of misdirection or error of law, the appellate Court should ordinarily direct a re-trial¹⁰ though where the Court is satisfied that the evidence is wholly insufficient to support the conviction¹¹ or where the accused has been sufficiently harassed by repeated trials,¹² it may discharge or acquit the accused. But

[See also (14) 1 AIR 1914 P C 155 (164) 15 Cri L Jour 326 (PC) *Ibrahim v Emperor* (Objectionable evidence not affecting verdict of jury—No miscarriage of justice)]

(26) 13 AIR 1926 Cal 147 (148) 27 Cri L Jour 277 *Keramat Mandal v Emperor* (Contravention of law by the Judge on an unimportant matter and having a remote bearing on the question in issue does not justify reversal of verdict of jury)]

Also see S 297 Note 13

8 (44) 31 AIR 1914 Bom 338 (340 343) (DB), *Sarmita v Emperor*

[See (89) 12 Mad 196 (197), *Queen Empress v Arumugha* (A Sessions Judge should caution the jury not to accept an approver's evidence unless it is corroborated. It is a misdirection not to do so)]

(31) 18 AIR 1931 Cal 65 (66) 32 Cri L Jour 421, *Obedah Sheikh v Emperor* (Inadmissible evidence referred to in charge)

(98) 25 Cal 736 (742) 2 Cal W N 484 *Abbas Pradi v Queen Empress*

(03) 27 Bom 628 (632) 5 Bom L R 599 *Emperor v Waman Shitram*]]

9 See (26) 13 AIR 1926 Bom 238 (240) 27 Cri L Jour 481 *Kuthubuddin Khan v Emperor* (Misreception of evidence held on facts not to occasion failure of justice)

(81) 18 AIR 1931 Bom 311 (313) 35 Bom 435 32 Cri L Jour 1077 *Issuf Mohammad v Emperor* (Misreception of evidence which might have influenced the jury—Verdict set aside)

10 (45) 32 AIR 1945 Bom 265 (268) 48 Cri L Jour 714 420 Ind Cas 182 (FB) *Government of Bombay v Dashrath Ramnivas* (Although High Court has power to decide the appeal on facts after setting aside the verdict it is not desirable to do so when on account of misdirection the jury had no opportunity to appreciate the evidence in its true perspective)

(44) 31 AIR 1914 Cal 234 (239) 1 L R (1913) 1 Cal 181 46 Cri L Jour 31 215 Ind Cas 176 *Superintendent and Remembrancer of Legal Affairs Bengal v Golok Tikadar*

(26) 13 AIR 1926 All 429 (431 432) 27 Cri L Jour 785, *Dhiraj v Alasi* (It is only under special circumstances that Court should order sequential)

[See also (19) 6 AIR 1919 Cal 115 (116) 46 Cal 212a 20 Cri L Jour 225 *Dani Madhub Kundu v Emperor* (On appeal to the High Court the verdict of the jury was set aside with the remark that it would be open to the Crown to proceed further with the case if it be so advised and that the accused be enlarged on bail till a fresh trial if any. Held, the order of the High Court was an order for re-trial subject to the right of the Crown if it thought fit to withdraw the proceeding)]

11 (71) 15 Suth W R Cr 37 (39 40) - 6 Beng L R App 109, *Queen v Mahima Chandra*

(02) 20 Cal 782 (791) 6 Cal W N 553 *Jamsrudi Masalla v Emperor*

(09) 2 Weir 386 (388) *Aishakadath Unniram v Queen* (Evidence worthless—No re-trial was ordered)

(26) 13 AIR 1926 All 429 (431, 432) 27 Cri L Jour 785 *Dhiraj v Alasi*

(98) 25 Cal 711 (714, 716) 2 Cal W N 369 *Taji Paramanick v Queen Empress* (Nowhere does the law lay down that where the verdict of the jury is set aside the Court must necessarily direct a new trial.)

(20) 13 AIR 1926 Nag 53 (54 55) 26 Cri L Jour 1090, *Ram Prasad v Emperor*

(28) 15 AIR 1928 Pat 316 (335) 22 Cri L Jour 323, *Mt Champa v Emperor* (Whole case for prosecution found to be false—Re-trial not ordered)

(32) 19 AIR 1932 Oudh 23 (25) 33 Cri L Jour 167 7 Luck 390 *Sita Puri v Emperor*

(01) 55 Cal W N 60 (60) 2 Cal W N 484 20 Cri L Jour 225 *Dani Madhub Kundu*

207 Ind Cas 427 *Mt Dharjan's v Emperor* (Late Court chooses to reverse the verdict)

12 (26) 13 AIR 1926 All 429 (431 432) 27 Cri L Jour 785 *Dhiraj v Alasi*

[See also (31) 18 AIR 1931 Bom 311 (313) 35 Bom 435, 32 Cri L Jour 1077, *Issuf Muhammad v Emperor* (Accused young and been in prison for four months—Re-trial not ordered)]

can the Court go into the evidence and decide upon the facts whether, upon the merits, the decision is right and, if so, confirm the conviction notwithstanding a misdirection or an error of law?

To this question the Privy Council has, in the recent case of *Abdul Rahim v King-Emperor*¹³ given a clear answer in the affirmative, and held that a re trial need not be ordered in such cases. Previously, there was a conflict of decisions. In *Wafadar Khan v. Queen Empress*,¹⁴ it was held by the High Court of Calcutta that it was not open to the appellate Court to do so, the word "erroneous" according to that decision is not to be read as meaning "wrong on facts," but as meaning that the verdict had been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law. The appellate Court cannot determine for itself whether the verdict, as a conclusion of fact, is right or wrong, as, to hold otherwise would be to substitute the decision of the Court for the verdict of the jury. In *Romesh Chandra v Emperor*,¹⁵ where inadmissible evidence had been received but there was no misdirection, it was held that the misreception of evidence was likely to have adversely affected the appellant, that the verdict must be set aside on the ground of an error of law, and that a re trial only should be ordered. Referring to s 167 of the Evidence Act, which runs as follows

"The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised, that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision,"

it was observed that the section merely says that the improper admission of evidence is not a "ground of itself" for interference, that the fact that the trial is by a jury is another factor to be taken into account, that the appellate Court cannot say on the principle of *Wafadar Khan's case* that there is other evidence which would justify the decision, and cannot confirm the decision unless it is satisfied that the verdict of the jury would have been the same if no evidence had been wrongly received. The High Court of Allahabad has, in *Ikramuddin v Emperor*,¹⁶ followed the view of the Calcutta High Court as expressed in *Wafadar Khan's case*, and has held that an appellate Court has no power to look at the evidence and find the accused guilty of any offence with which he was not charged in the trial Court and which was not laid before the jury. The High Court of Bombay has, on the other hand, held that, where a verdict of the jury is vitiated by a misdirection or a misreception of evidence, the appellate Court has power to convict or acquit the accused as the evidence, according to its own view, is or is not sufficient for conviction or, where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing the witnesses, to order a new trial.¹⁷ A similar view has been taken by the High Courts of

13 (46) 33 AIR 1916 PC 82 (PC)

14 (94) 21 Cal 955 (976-977)

[See also (25) 12 AIR 1915 Cal 161 (163-164) • 26 Cri L Jour 307, *Harendra Nath v Emperor* (Two points to be considered —(a) whether jury were influenced and (b) whether independent of that evidence there is other evidence to justify verdict)]

(75) 24 Suth W R Cr 18 (20), *Queen v Lucky Narain*

(1900) 4 Cal W N 576 (581, 582), *Sadhu Sheikh v Empress* (Quere)]

[See however (30) 17 AIR 1930 Cal 199 (200) 31 Cri L Jour 737, *Emperor v Dinabandhu* (Appellate Court, where sentence of death is passed against accused, can deal with the case as a whole and consider whether verdict has been rightly arrived at)]

15 (19) 6 AIR 1919 Cal 514 (518); 46 Cal 895 20 Cr L J 321 (21 Cal 955 and 4 C W N 576 followed)

16 (17) 4 AIR 1917 All 173 (175-176) 39 All 348 18 Cri L Jour 491

17 nperor.

Madras¹⁹ and Lahore¹⁹ and the Judicial Commissioner's Courts of Nagpur²⁰ and Sind²¹ The Calcutta High Court also held a similar view in the undermentioned decisions²² This conflict of decisions has now been set at rest by the above Privy Council decision

There is no specific provision in the Code that repugnancy in the verdict of the jury is, as in English law, by itself, a sufficient ground for quashing a conviction The powers under S 423 have, however, been held to be large enough to invoke the application of the English law rule inasmuch as it is a rule of practice based upon natural and substantial justice²³

Where a Sessions Judge, under the erroneous impression that he was bound to accept the verdict of the jury, did so and convicted and sentenced the accused, the High Court on appeal by the accused set aside the conviction and sentence alone (without touching the verdict of the jury) so that the Judge might again have an opportunity of considering if he should accept the verdict or express disagreement with it and refer the case to the High Court It was pointed out that setting aside the conviction and sentence without affecting the verdict of the jury was not prohibited under sub section (2)²⁴

424.* The rules contained in Chapter XXVI as to the judgment

Judgments of subordinate Appellate Courts of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court :

Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

* 1882 . S 424 ; 1872 and 1851 — Nil

(69) 6 Bom H C R Cr 47 (50, 51), *Reg v Ramaswami Mudaliar* (Case under the Code of 1881—If the appellate Court thinks that it is material and has prejudiced the accused, it may treat the case as if it had been tried with the aid of assessors and after excluding such evidence if it considers that the remaining evidence is sufficient to sustain the verdict it may uphold the conviction)

(73) 10 Bom H C R Cr 497 (501, 502), *Reg v Amrita Govinda*

(95) 19 Bom 749 (763), *Queen Empress v Ramchandra*

(See also (18) 5 AIR 1918 Pat 201 (209) : 19 Cri L Jour 886, *Ram Bhagwan v Emperor* (Admission of evidence which should have been rejected — High Court can consider whether rest of evidence is sufficient to sustain verdict))

Also see S 297, Note 13

"Calcutta High Court, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 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3733, 3734, 3735, 3736, 3737, 3738, 3739, 3740, 3741, 3742, 3743, 3744, 3745, 3746, 3747, 3748, 3749, 3750, 3751, 3752, 3753, 3754, 3755, 3756, 3757, 3758, 3759, 3760, 3761, 3762, 3763, 3764, 3765, 3766, 3767, 3768, 3769, 3770, 3771, 3772

Synopsis

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| 2 Scope and object of the section | 7 What the appellate judgment should contain |
| 3 Contents of judgment — General See Section 367 Note 4 | 8 Who can pronounce judgment |
| 4 Points for determination See Section 367 Note 5 | 9 "Other than a High Court" |
| 5 Reasons for decision See Section 367, Note 7 | 10 Effect of non observance of the provisions of this section See Section 537, Note 1 ⁹ |

NOTE to the Synopsis See the Notes indicated for the following topics

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| Applicability to appeals from orders under Ss 110 250 476 and 1 ⁹ (3) See Note 2 | Judgment on merits even in case of default of appearance See Note 7 |
| Benefit of doubt to accused See Note 7 | Judgment—To be definite See Note 6 |
| Comparison with O 20 R 2 See Note 8 | Judgment to be self-contained and to give full analysis of evidence See Notes 2 and 7 |
| Consideration of defence evidence though not referred to by trial See Note 7 | Judgment to be temperate and sober and not satirical See Note 7 |
| Consideration of improper evidence — Irregular See Note 7 | Judgment written after transfer and pronounced by successor — Illegal See Note 8 |
| Death of High Court Judge without signing See Note 9 | No discussion of evidence or statement of reasons — Mere assurance of careful consideration — Not sufficient See Notes 2 and 7 |
| Detention of judgments See Note 8 | Points for determination decisions and reasons See Notes 7 and 10 |
| Inapplicable to summary rejection under S 121 See Note 2 | Separate discussions on and findings as to each accused See Note 7 |
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| Independent judgment with its explicit opinion See Note 7 | What are not proper judgments See Note 7 |

1 Legislative changes — This section was first introduced in the Code of 1882, there has been no amendment to it since

Even before the enactment of this section, the High Courts had insisted on the appellate Courts writing a proper reasoned judgment when an appeal was dismissed¹

2 Scope and object of the section — The object of the section is twofold, firstly, to produce uniformity in procedure and to ensure that judgments of subordinate criminal Courts are written in such a way as to promote public confidence in their decisions and to safeguard them against the possible suggestion that cases are disposed of without proper consideration² and secondly to enable the High Court in revision to grasp the nature of the case without reference to the records³ The High Court in criminal

Section 424 — Note 1

- 1 (69) 5 Mad H C R App xii (xii) (The High Court cannot revise the proceedings of appellate Court unless reasons are set out)
- (76) 1876 Pun Re No 6 Cr p 9 (10) *Ulam v Crown* (This case was dissented from in 1881 Pun Re No 31)
- (72 92) 1872 92 Low Bur Rul 516 (517) *Kyawzin v Queen Empress*
- (See (71) 8 Bom H C R Cr 101 (102) *Reg v Moroba Bhaskarj*.)

Note 2

- 1 (45) 32 AIR 1945 Oudh 52 (53) 46 Cri L Jour 684 220 Ind Cas 430 *Mahomed Mustaqim v Sukhra*
- (12) 13 Cri L Jour 559 (560) 8 Nag L R 84 15 Ind Cas 970 *Jayram v Emperor*
- (97) 19 All 506 (507) 1897 All W N 142 (TB) *Empress v Pandeh Dhat*
- 2 (45) 32 AIR 1945 Oudh 52 (53) 46 Cri L Jour 684 220 Ind Cas 430 *Mahomed Mustaqim v Sukhra*

- (17) 4 AIR 1917 Pat 336 (337) 18 Cri L Jour 750 (751) *Talebar Chowdhry v Emperor* (A judgment even if it be under S 421 should conform with rules in Ch XXVI)
- (27) 14 AIR 1927 Nag 68 (89) 27 Cri L Jour 1404 *Marola v Mt Kasa Bai*

revision as a rule depends mainly upon the findings arrived at by the lower appellate Courts on questions of evidence. It is therefore the duty of such Courts to see that their judgments are self contained and give a full analysis of the evidence³

Where an appellate Court merely says that it has very carefully gone through the records of the case and dismisses the appeal without a discussion of the evidence or without giving reasons the assurance of the appellate Court can hardly be considered as a substitute for the judicial determination of the questions of evidence involved in the case. Such a judgment is not likely to inspire confidence in the trial of appeals in Courts below⁴

This section applies only when an appeal is admitted and heard under S 423 but not where it is summarily rejected under S 421 of the Code⁵. See also S 421 Note 7

The provisions of this section have been held to apply to appeals against orders passed under S 110⁶ S 250⁷ and S 476⁸

3 Contents of judgment — General — See Sect on 367 Note 4

4 Points for determination — See Sect on 367 Note 5

5 Reasons for decision — See Sect on 367 Note 7

6 Remarks in judgment — See Sect on 367 Note 8

7 What the appellate judgment should contain — The appellate judgment should comply so far as may be practicable with the provisions of S 367¹. Thus the appellate judgment should contain among other things the point or points for determination on the decision thereon and the reasons for the decision². There is a difference of opinion on

- 3 (43) 30 AIR 1943 Mad 66 (66-67) 44 Cr L Jour 287 204 Ind Cas 389 *I. v. Bonthu Appadu*
 (30) 17 AIR 1930 Lah 1051 (1051-1052) 32 Cr L Jour 271 *Ahmad Ali v Emperor*
 [See (40) 27 AIR 1940 All 80 (81) 41 Cr L Jour 249 *Ram Singh v Emperor* (Failure to write a proper judgment would be to encourage convicted persons to waste the money and time of the High Court in making applications in revision)]
 4 (30) 17 AIR 1930 Lah 1051 (1052) 32 Cr L Jour 271 *Ahmad Ali v Emperor*
 5 (1900-07) 1 Low Bur Rul 270 (271) *Taung Do v Crown*
 (93 1900) 1993 1900 Low Bur Rul 606 (607) *Nga Po Kin v Queen Empress*
 (99) 1 Dom L R 225 (225) *Queen Empress v Gopala*
 (95) 20 Dom 540 (541) *Empress v Narubai*

the order was not proper))

- [But see (17) 4 AIR 1917 Pat 336 (337) 18 Cr L Jour 700 (751) *Teledar Chowdhry v Emperor*]
 6 (22) 23 Cr L Jour 378 (378) 67 Ind Cas 202 (202) (All) *Sunehri v Emperor*
 (13) 14 Cr L Jour 419 (419) 40 Cal 376 20 Ind Cas 403 *Fidos Hosse v Emperor*
 (16) 3 AIR 1916 All 197 (197) 17 Cr L Jour 309 38 All 393 (394) *Lal Behari v Emperor*
 7 (22) 9 AIR 1922 Pat 157 (158) 23 Cr L Jour 261 *Deo Narain Mahto v Chhatoo Raut*
 8 (27) 14 AIR 1927 Cal 284 (284) 54 Cal 355 *Hamid Ali v Madhu Sudhan Das* (Per Chotruer J)

Note 7

- 1 (40) 27 AIR 1940 S nd 113 (114) 41 Cr L Jour 724 *Abdul Karim v Emperor*
 (37) 24 AIR 1937 Pesh 88 (89) 39 Cr L Jour 337 *Abdul Wahid v Emperor*
 (25) 12 AIR 19 5 Cal 266 (66) 25 Cr L Jour 901 *Gaharali v Emperor*
 (20) 7 AIR 1920 Lal 335 (335) 21 Cr L Jour 2 3 *Badraban v Emperor*
 (10) 11 Cr L Jour 348 (349) 37 Cal 194 5 Ind Cas 929 *Ram Lal Singh v Haricharan*
 2 (45) 30 AIR 1945 Oudh 57 (53) 46 Cr L Jour 684 20 Ind Cas 430 *Mahomed Mustaqim v Sukhray*
 (43) 30 AIR 1943 Cal 465 (466-467) 1 I L R (1043) 1 Cal 423 45 Cr L Jour 71 209 Ind Cas 105 (DB) *Abdul Ghani v Emperor* (Points for determination and reasons for decision not given — Only defence arguments and defence case dealt with — Case is one of no proper judgment and b. 537 cure defect)

the question whether, when the appellate Court agrees with the judgment of the lower Court and dismisses an appeal it is sufficient merely to state in the appellate judgment

I have considered the evidence and I agree with the Magistrate in his conclusions and in his reasons one set of cases holding that it is sufficient³ another set of cases holding that it is not sufficient⁴ and a third set of cases holding that it may be sufficient in a simple case but not in a complicated case⁵

The true test would however appear to be really to see whether the judgment indicates that the appellate Court has really and not nominally considered the case and arrived at an independent judgment⁶ It is not necessary for the appellate Court to write

(41) 45 Cal W N 794 (795) *Rajani Kumar Bhoosik v Emperor*

(1^o) 8 Nag L R 84 (89) 13 Cr L Jour 539 15 Ind Cas 975 *Jawam v Emperor*

(40) 27 AIR 1940 All 18 (19) 1 L R (1939) All 865 41 Cr L Jour 20 *Bansidhar v Emperor*

(40) 27 AIR 1940 Snd 113 (114) 41 Cr L Jour 74 *Abdul Karim v Emperor*

(38) 25 AIR 1938 Cal 500 (503) 39 Cr L Jour 791 *Kal Charan v Priya Nath*

(37) 24 AIR 1937 Pesh 88 (89) 39 Cr L Jour 337 *Abdul Wahid v Emperor*

(36) 23 AIR 1936 Nag 160 (160) 1 L R (1937) Nag 38 39 Cr L Jour 349 *Bapurao v Emperor*

(33) 20 AIR 1933 Nag 328 (303) 35 Cr L Jour 136 *Jodha Ujjar Gond v Emperor*

(10) 11 Cr L Jour 349 (349) 37 Cal 194 5 Ind Cas 999 *Ram Lal Singh v Hari Charan Ahir*

(13) 14 Cr L Jour 570 (570) 1 Upp Bur Rul 169 21 Ind Cas 170 *Nga Po Han v Emperor*

(2^o) 9 AIR 1902 Pat 157 (158) 23 Cr L Jour 261 *Deo Narain Mahto v Chhatoo Raut*

(04) 9 Cal W N xxxi (xxii) *Ekhatar Khan v Emperor*

(21) 8 AIR 1921 Lah 100 (100) 2 Lah 308 23 Cr L Jour 9 *Dalip Singh v Emperor* (An appellate judgment which the High Court is unable to follow without the help of original judgment is not according to law)

(00) 2 Cr L Jour 170 (171) 30 Cal 178 *Elcotts Mukherjee v Emperor*

[See (4^o) 29 AIR 1942 Oudh 444 (445) 43 Cr L Jour 781 201 Ind Cas 791 *Debi Dayal v Emperor*

(A judgment of an appellate Court setting out the case of the accused and the prosecution and then dealing with the evidence of both sides is a legal judgment.)

(9^o) 1890 All W N 60 (60) In the matter of the petition of *Zafaryab Ali* (Judgment passed in revision)]

3 (87) 19 All 506 (509) 1897 All W N 140 (F B) *Queen Empress v Pandeh Bhat*

Patilbura Raoji Bala v Emperor

Lakhan Singh v Emperor

Churn Singh

4 See the cases cited in foot notes (v) to (1b)

5 (26) 13 AIR 1908 All 318 (318 319) 27 Cr L Jour 449 *Shankar v Emperor*

(81) 18 AIR 1931 Pat 879 (881) 11 Pat 143 37 Cr L Jour 1197 *Agore Dutta v Emperor*

6 (23) 10 AIR 1903 Rang 188 (188) 1 Rang 301 24 Cr L Jour 900 *Bhag v Emperor* (It should not be a mere supplement to the trial Court's judgment)

(40) 27 AIR 1940 All 18 (19) 1 L R (1939) All 865 41 Cr L Jour 200 *Bansidhar v Emperor*

(38) 25 AIR 1938 Cal 500 (502 503) 39 Cr L Jour 791 *Kal Charan v Priya Nath* (Appellate Court's judgment)

Emperor

per

or

(84) 1884 Pun Re No 31 Cr p 56 (56) *Hakim Singh v Empress*

(31) 1931 Mad W N 119 (120) *Manika Reddi v Emperor*

[See (2^o) 23 Cr L Jour 378 (378) 67 Ind Cas 200 (200) (All) *Sunehri v Emperor* (Perfunctory judgment bad)]

[See also (21) 8 AIR 1901 Oudh 100 (100) 24 Oudh Cas 230 *Madad Ali v Emperor* (No proper consideration of case against one accused.)

(05) 10 Cal W N xxxix (xxxix) *Bhagabat Singh v Emperor*

(07) 6 Cr L Jour 137 (137) (Lah) *Mohammad Shah v Emperor* (Where the appellate judgment does not show that it has examined the evidence it becomes necessary to examine the case in detail in revision)]

a long and elaborate judgment' or repeat *in extenso* all that has been stated by the trial Court.⁸ The judgment should, however, be independent and self contained so that the High Court in revision may be able to follow it without reference to the trial Court's judgment.⁹

It was held in the following cases that there was no proper judgment where it simply stated.

- (1) "I have heard the appellants' pleader, and have also gone through the evidence and read the judgment of the lower Court. I do not see any reason to alter the finding of the lower Court."¹⁰
- (2) "I see no reason to doubt the guilt of the accused. The appeal is rejected."¹¹
- (3) "I can see no reason to suspect the evidence as regards the finding of the property."¹²
- (4) "Read proceedings. I see no reason for interfering with the decision or sentence. Appeal dismissed."¹³
- (5) "After hearing the arguments of the pleaders for the appellants and examining the record, I am of opinion that the lower Court had ample ground for convicting the accused of rioting. I do not consider the sentence too severe."¹⁴
- (6) "I am satisfied that the judgment of the trial Court is substantially right."¹⁵
- (7) "I see no reason to distrust the finding of the lower Court. The sentence passed, however, appears harsh. I reduce the term of imprisonment to fifteen days."¹⁶

7. (37) 24 AIR 1937 Pesh 83 (89) : 39 Cri L Jour 337, *Abdul Wahid v. Emperor*.

(28) 15 AIR 1929 Lah 863 (863) : 29 Cri L Jour 705, *Qadir Daksh v. Emperor*.

(21) 8 AIR 1921 Lah 102 (102, 103) : 2 Lah 308 : 23 Cri L Jour 8, *Dalip Singh v. Emperor*.

(09) 9 Cri L Jour 523 (523) : 2 Ind Cas 225 (All), *Shiam Lal v. Emperor*. (The question is not about the length of the judgment but about the matter it contains)

(05) 2 Cri L Jour 170 (171) : 32 Cal 178, *Ehcours Mukerjee v. Emperor*.

(64) 1964 Suth W R Gap Cr 8 (8), *Queen v. Harshur Churen Singh* (Appellate Court confirming the decision of lower Court need not enter into prolix detail)

8. (31) 1931 Mad W N 119 (119, 120), *Manika Reddi v. Emperor*.

(17) 4 AIR 1917 Cal 285 (285) : 20 Cal W N 1296 (1300) : 18 Cri L Jour 294, *Arindra Raybanshi v. Emperor*.

(19) 6 AIR 1919 Cal 668 (669) : 20 Cri L Jour 238 (239), *Kufiuddin Sarkar v. Emperor*.

(16) 3 AIR 1918 All 49 (49) : 17 Cri L Jour 461 (461), *Gayani v. Emperor*.

9. (40) 27 AIR 1940 All 18 (19) : 1 L R (1939) All 805 : 41 Cri L Jour 220, *Bansidhar v. Emperor*. (It is not enough for the appellate Court to say that all points arising in case have been considered by Court below and have been correctly decided)

(38) 23 AIR 1938 Cal 522 (522) : 39 Cri L Jour 791, *Kali Charan v. Priya Nath*.

(21) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, *Abdul Wahid v. Emperor*.

(37) 24 AIR 1937 Sind 26 (27) : 30 Sind L R 392 : 38 Cri L Jour 363, *Ghous Bux v. Emperor* (Appellate judgment should not be supplementary to the judgment of trial Court)

(35) 22 AIR 1935 Cal 316 (321, 322) : 62 Cal 749 : 36 Cri L Jour 982, *Abdul Rahman v. Emperor*. (If appellate Court can gather from judgment of lower appellate Court what its decision is that is sufficient.)

(1937) 24 AIR 1937 Pesh 88 (89)

(1937) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, Abdul Wahid v. Emperor.

(1937) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, Abdul Wahid v. Emperor.

(1937) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, Abdul Wahid v. Emperor.

(1937) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, Abdul Wahid v. Emperor.

(1937) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, Abdul Wahid v. Emperor.

(1937) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, Abdul Wahid v. Emperor.

(1937) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, Abdul Wahid v. Emperor.

(1937) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, Abdul Wahid v. Emperor.

(1937) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, Abdul Wahid v. Emperor.

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(1937) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, Abdul Wahid v. Emperor.

(1937) 24 AIR 1937 Pesh 88 (89) : 39 Cri L Jour 337, Abdul Wahid v. Emperor.

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- (8) "I agree with the lower Court that the opposite side is in cultivating possession of the same"¹⁷

See also the undermentioned cases¹⁸

Evidence must be discussed — The law of appeal constitutes the appellate Court a Judge of facts as completely as the Court of first instance¹⁹ It is the final Court on facts²⁰ and the appellant is entitled to have an explicit opinion on the question of fact²¹ It is therefore, the duty of a Court of appeal to exercise an independent judgment in reviewing the evidence as well as in determining questions of law or procedure²²

The Court of appeal should discuss the evidence and probabilities arising from the

17. (21) 8 AIR 1921 Pat 504 (504) 22 Crr L Jour 656, *Mangla Majhi v Emperor*
18. (41) 45 Cal W N 794 (795) *Rajani Kumar Bhowmik v Emperor* (Appellate Court disposing of appeal in about four lines saying that "the prosecution case has been proved beyond a shadow of doubt")
- secution The sentence is not too heavy The appeal is dismissed)
- (40) 27 AIR 1940 All 18 (19) I L R (1939) All 865 • 41 Crr L Jour 220, *Bansidhar v Emperor* (It is not enough for appellate Court to say that all points arising in case have been considered by Court below and have been rightly decided)
- (40) 27 AIR 1940 All 80 (81) 41 Crr L Jour 249, *Ram Singh v Emperor* (Appellate Court after hearing long arguments merely agreeing with what the trial Court said — Judgment not proper)
- (37) 24 AIR 1937 Pesh 88 (89) 39 Crr L Jour 337, *Abdul Wahid v Emperor* (Appellate judgment merely consisting of two words — "Appeal rejected" — Judgment is not proper)
- (83) 20 AIR 1933 Nag 828 (328) • 35 Crr L Jour 138, *Jodhi Ujjar Gond v Emperor* (Judgment as follows — "I have gone through the record The conviction under S 419, Penal Code, is sound The fine of Rs 30 is very light I see no reason to interfere and dismiss the appeal")
- (17) 4 AIR 1917 Oudh 113 (114) 18 Crr L Jour 649, *Bansidhar v. Emperor* (Judgment as follows — "It is obvious that if one quarter of the evidence for the prosecution is true, and I see no reason to doubt that it is the appellant is the most proper person to be bound over under S 110 Criminal Procedure Code" — *Held*, there is no proper judgment)
- (17) 4 AIR 1917 Pat 592 (593) 18 Crr L Jour 994 *Sheo Narayan Raut v Emperor* (Merely stating that a detailed judgment had been recorded by the trial Court and that nothing had been urged in appeal which affected the reason given for the conviction is no judgment at all)
- (18) 3 AIR 1916 All 180 (181) 17 Crr L Jour 167 (167), *Sarwan v Emperor* (Judgment was as follows "It has been shown to be necessary to bind these men over under S 110, Criminal Procedure Code and after hearing arguments on their behalf I can find no reason whatsoever to interfere with the order" — *Held*, it is no judgment)
- (85) 11 Cal 449 (450), *Kamruddin Dai v Sonatun Mandal* (In this case the judgment ran "It is urged that the evidence is quite untrustworthy, and that the decision should be reversed The depositions have been gone through and commented on at considerable length Appeal is dismissed")
- (88) 15 Bom 11 (12), *In re Shitappa* (In this case the judgment ran "The affray was . to be split up There is no ground for doubting the justice of the Magistrate's finding that the two appellants took part in the affray The appeal is dismissed and the conviction and sentence are confirmed")
- (84) 2 Weir 536 (536), *In re Samshur Ali Shah* (In this case the judgment ran "If believed the prosecution evidence is sufficient to warrant the conviction, I decline to interfere")
- 19 (76) 1876 Pun Re No 5 Cr, p 6 (7), *Turin v Crown*
- 20 (24) 11 AIR 1924 Pat 380 (381) 24 Crr L Jour 407, *Jewan Raut v Emperor*
- 21 (24) 11 AIR 1924 Cal 618 (619) 25 Crr L Jour 1044, *Inatulla Sarkar v Emperor*
- 22 (38) 25 AIR 1938 Cal 522 (522 523) 39 Crr L Jour 791, *Kali Charan v Priya Nath* (Appellate Court should not merely consider whether there are reasons for differing from trial Court's judgment)
- (17) 4 AIR 1917 Oudh 113 (114) 18 Crr L Jour 649 (650), *Bansidhar v Emperor*
- (16) 8 AIR 1916 All 197 (197) 17 Crr L Jour 309 (310) 38 All 393 *Lal Behari v Emperor* (Appellate judgment must show on the face of it that the Judge has applied his mind to a consideration of the evidence on the record and of the pleas raised)
- (90) 1890 All W N 148 (148) *Queen Empress v Bushan*
- (15) 2 AIR 1915 Bom 189 (189) 16 Crr L Jour 832, *Devendra Shitappa v Emperor*
- [See also (21) 8 AIR 1921 Pat 497 (487), *Harinath Chowdhry v Emperor*
- (95) 1895 Rat 826 (827), *Empress v Dagdu Gangaram*]

circumstances of the case²³ the reason for the finding should also be stated²⁴ The appellate Court should record a definite finding as to the guilt or innocence of the accused²⁵

Case of each accused should be considered — Where there are more than one accused the appellate Court should discuss the evidence against each accused and give its finding as to the guilt or innocence of each accused²⁶

Court bound to consider the case on merits even when accused is absent — When the appeal is once admitted it cannot be disposed of summarily If the appellant or his pleader is absent it is still the duty of the appellate Court to go through the record and write a judgment in accordance with law²⁷ A judgment stating 'No one appears I see no

23 (45) 32 AIR 1945 Nag 116 (117) 1 L R (1945) Nag 441 46 Cri L Jour 505 219 Ind Cas 320, *Mahomed Hussain v Emperor*

(37) 24 AIR 1937 Nag 394 (395 396) 1 L R (1938) Nag 157 39 Cri L Jour 75 *Raghi Nathmal Shermal v Patiram Sada Pasi* (A mere statement in the judgment that the appellate Court has gone carefully through the whole evidence and that there are many discrepancies in the depositions of witnesses is no discussion of the evidence at all)

(19) 6 AIR 1919 Pat 593 (530) 20 Cri L Jour 615 (617) *Darogi Chamar v Emperor*

(24) 11 AIR 1934 Pat 360 (391) 24 Cri L Jour 407 *Jwan Paul v Emperor*

(04) 1 Cri L Jour 305 (310 311) 28 Bom 479 6 Bom L R 324 *Emperor v Bal Gangadhar Tilak*

(12) 13 Cri L Jour 713 (719) 16 Ind Cas 590 (Mad) *Balusu Lakshmi Jya v Emperor*

(05) 12 AIR 1925 Cal 266 (266) 25 Cri L Jour 901 *Gohar Ali v Emperor*

(26) 27 Cri L Jour 114 (114) 91 Ind Cas 630 (Lab) *Huramat Ali v Emperor*

(08) 09 Cri L Jour 1031 (1039) 112 Ind Cas 359 (Lab) *Dalip Singh v Emperor*

(72) 17 Suth W R Cr 59 (59 60) *In re Goomance* (An appellate Court is bound precisely in the same way as the Court of first instance to test the evidence extrinsically as well as intrinsically)

[Se (27) 14 AIR 1937 Lah 797 (793) *Sardul Singh v Emperor*

(04) 11 AIR 1924 Pat 181 (189) 14 Cri L Jour 181 *Durga Singh v Emperor* (Appellate judgment not referring to oral evidence but drawing inferences from documents and probabilities of case—Strong

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26 (25) 12 AIR 1905 Mad 712 (712) 26 Cri L Jour 1039 *In re Chinna Manikkam*

(40) 27 AIR 1940 Snd 113 (113 114) 41 Cri L Jour 724 *Abdul Karim v Emperor* (Order under S 118 must contain a consideration of the case of each accused separately)

(37) 24 AIR 1937 Snd 26 (27) 30 Sind L R 382 33 Cri L Jour 363 *Ghousbuz v Emperor* (The same

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Emperor *Arindra Rajbanshi v*

(07) 6 Cri L Jour 427 (429) 35 Cal 139 *Jamiat Mullak v Emperor* (The necessity is greater when a large number of persons are jointly proceeded against and directed to furnish security for good behaviour)

27 (45) 31 AIR 1945 Oudh 52 (53) 46 Cri L Jour 694 290 Ind Cas 420 *Mahomed Musazim v Sukhrat*

(43) 30 AIR 1943 Mad 9 (9 10) 44 Cri L Jour 193 204 Ind Cas 293 *In re Chinna Manikkam*

reason to interfere I dismiss the appeal, has been held to be not a proper judgment.²⁹

It has been held that even where the counsel for appellant does not refer to the defence evidence the Court should consider it and give a decision.³⁰

Miscellaneous — The appellate Court should give to the accused the benefit of doubt, if, on going through the records, it has reasonable doubts about the guilt of the accused.³¹

The judgment should be temperate, sober and not satirical.³² The Court should not give inconsistent findings.³³ It is irregular to consider evidence not properly placed before the Court.³³

As to the power of the appellate Court to raise a plea of private defence on behalf of the accused when he has not himself raised the point in the lower Court, see the undermentioned case.³⁴

An appellate judgment should not impute motives to the Judge or Magistrate whose judgment is under appeal.³⁵

8 Who can pronounce judgment — There is nothing in this Code corresponding to O 20, R 2 of the Civil Procedure Code. Where, after the hearing of a criminal appeal the Judge was transferred and he subsequently wrote the judgment and forwarded the same to his successor who pronounced it, it was held that the judgment was passed without jurisdiction and should be set aside.¹

As to whether judgments can be dictated, see S 367, Note 2.

9 "Other than a High Court" — The provisions of this section apply only to subordinate Courts and not to the judgment of a High Court the High Court can undoubtedly dismiss an appeal without giving reasons.² There is no provision in the Code

(23) 10 AIR 1923 Pat 868 (368) 24 Cr L Jour 453, *Neera Lal Rai v Emperor*

(07) 11 Cal W N cxxxv (cxxxv) *Neera v Emperor*

28 (16) 3 AIR 1916 All 43 (44) 17 Cr L Jour 353 (353) *Pam Bhargose v Emperor*

(25) 12 AIR 1913 Lah 644 (644) 26 Cr L Jour 1330 *Thakur Singh v Emperor* (In this case the judgment was 'Appellant absent, waited till 12 noon, I see no reason to interfere with the judgment of the lower Court')

[See also (23) 10 AIR 1923 Pat 297 (298) 26 Cr L Jour 419 *Kabir Shah v Emperor* (Appellant absent — Pleader appearing after judgment signed — Appellate Court can do nothing)]

29 (13) 14 Cr L Jour 419 (420) 40 Cal 376 20 Ind Cas 403 *Fidoos Hossein v Emperor*

[See (17) 4 AIR 1917 Oudh 323 (323) 18 Cr L Jour 639 (639) *Beis v Emperor*]

30 (9-) 1898 Pun Re No. 6 Cr p 15 (17) *Moula Baksh v Empress*

(83) 2 Weir 535 (535) *In re Yalooob Sahib*

[See (17) 4 AIR 1917 Cal 792 (793) 18 Cr L Jour 692, *Kobbat Ali v Emperor*]

31 (44) 31 AIR 1944 Nag 136 (137) 1 L R (1944) Nag 176 45 Cr L Jour 766 215 Ind Cas 5th *Emperor v Ganpat Sitaram* (Criticism of lower Court's judgment in unrestrained language is undesirable)

32 (13) 14 Cr L Jour 419 (420) 40 Cal 376 20 Ind Cas 403 *Fidoos Hossein v Emperor* (If the finding of the Sessions Court is inconsistent with his conclusion that would only be a ground for rehearing the appeal)

33 (37) 24 AIR 1937 Nag 394 (395) 1 L R (1938) Nag 157 39 Cr L Jour 73 *Ragunathmal Shermal v Patiram Sada Ram* (Appellate judgment based on irrelevant matters and entirely on police report — Appeal held should be re heard)

34 (9-) 21 All 100 (105 106) 1898 All WN 202 *Queen Empress v Tummal* (The appellate Court cannot raise such a plea.)

35 (63) 2 Weir 535 (535) *In re Yalooob Sahib*

Note 8

1. (31) 18 AIR 1931 Cal 637 (632) 53 Cr L Jour 60 *Jogesh Chandra v Surendra Mohan*

Note 9

1. (33) 20 AIR 1933 Pat 38 (40) 11 Pat 697 34 Cr L Jour 118 *Kuldip Das v Emperor*

requiring the High Court after pronouncing a judgment in open Court to date and sign the same. Where certain appeals were heard by a High Court Judge and judgments were delivered in open Court and taken down by the judgment writer but the judgments were not signed owing to the death of the Judge it was held that nevertheless the appeals should be deemed to have been finally disposed of.²

10 Effect of non-observance of the provisions of this section — See § 537 Note 12

425.* (1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed. If the finding, sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate.

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court, and, if necessary, the record shall be amended in accordance therewith.

426.† (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

^a|(2a) When any person other than a person accused of a non bailable offence is sentenced to imprisonment by a Court, and an appeal lies from that sentence, the Court may, if the convicted person satisfies the Court that he intends to present an appeal, order that he be released on bail for a period sufficient in the opinion of the Court to enable him to present the appeal and obtain the orders of the Appellate Court under sub section (1) and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.]

^b|(2b) Where a High Court is satisfied that a convicted person has been granted special leave to appeal to His Majesty in Council against any sentence which it has imposed or maintained, or has been granted leave to appeal to His Majesty in Council against an order of the Federal Court on an appeal from the High Court involving the imposition or maintenance of a sentence it may if it so thinks fit order that pending the appeal the sentence or order appealed against be suspended, and also, if the said person is in confinement, that he be released on bail.]

* 1882 S 425 1872 S 299 1861 S 405

† 1882 S 426 1872 S 281 1861 S 421

(26) 13 AIR 1906 Snd 275 (276) 20 Ind L R 87 27 Cr L Jour 343 *Duarka v Emperor*
(10) 11 Cr L Jour 348 (349) 57 Cal 194 5 Ind Cas 999 *Ram Pal Singh v Hari Charan Ahir*
2 (33) 20 AIR 1933 All 40 (40 41) 53 All 132 34 Cr L Jour 703 *Prag Madho Singh v Em*

it had been held that it could do so under its inherent jurisdiction under S 561A. But this view was disapproved of in a decision of the Privy Council which held that the High Court had no such inherent power and that S 426 was the only section which refers to the grant of bail to a convicted person⁴. At the same time the Privy Council pointed out the desirability of conferring such a power on the High Court by legislation. Accordingly, sub-s (2b) was inserted in this section by Act 4 (IV) of 1916, conferring on the High Court the above power.

8 Exclusion of time — Sub-section (3) — Under sub-section (3) when the appeal fails the time during which the accused is released under this section should be excluded in computing the term of which he is sentenced. But it is only when he is released and not where his sentence has been suspended that the term is to be excluded¹.

The sub-section does not mean that the period during which a person is released under this section should be excluded from the term of punishment to which he has been sentenced. What the sub-section means is that in calculating the term, the period of release should be left out of account².

427. When an appeal is presented under * [section 411A, sub-section (2) or section 417,] the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

* These words were substituted for the word and figures "Section 41" by the Criminal Procedure Amendment Act 1913 (26 (XXVI) of 1913) S 5.

1 Scope of the section — This section was added to the Code in 1882. Even before it was added it was held that the High Court had the power to re-arrest the accused pending the disposal of an appeal against his acquittal¹. This section only gives statutory effect to that power².

* 1882 S 427, 1872 and 1861 — Nd

Also see S. 499 Note 4 and S 561A Note 5

[See however (37) 24 AIR 1937 Nag 181 (187) 39 Cri L Jour 334 ILR (1937) Nag 236 *Bashiruddin Ahmed v Emperor* (High Court has no power to grant bail before appeal to Privy Council is filed)]
4 (45) 32 AIR 1945 P C 94 (97, 98) 72 Ind App 120 ILR (1945) Lah 57 46 Cri L Jour 667 70 Ind Cas 91 (P C) *Jairam Das v Emperor*

Note 8

1 (91) 2 Weir 536 (537) *Government Pleader v Kodu Moidin Bouter*
2 (36) 23 AIR 1936 All 12 (18) 36 Cri L Jour 1479, *Narain Singh v Emperor* (The period during which a person is released on bail cannot reduce the term of sentence.)
(34) 21 AIR 1934 All 845 (845 846) 57 All 264 36 Cri L Jour 177, *Darsu v Emperor* (Do)
[See also (36) 23 AIR 1936 All 107 (109) 58 All 589 36 Cri L Jour 155, *Emperor v Mannu* (Person bound over released on bail under S. 499 — Period of release should be excluded in calculating the term)]

Section 427 — Note 1

1 (79) 2 All 340 (341 342) (FB) *Empress of India v Mangru*
(76) 1 Cal 281 (282) *Queen v Gobind Tewari*
[See (1865) 3 Suth W R Cr 4 (5) *Queen v Madares Chowkeedar*]
(75) 2 All 386 (389) *Empress of India v Karim Baksh*
2 (87) 9 All 528 (529) 1887 All W N 156, *Queen Empress v Gobardhan*

428.* (1) In dealing with any appeal under this Chapter, the

Appellate Court may take further evidence or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken, but such evidence shall not be taken in the presence of jurors or assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry.

Synopsis

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|--|---|
| 1 Legislative changes | 7 "Shall certify such evidence to the Appellate Court," etc — Sub-section (2) |
| 2 Scope and object of the section | 8 Presence of accused while additional evidence is taken—Sub-section (3) |
| 3 'Appeal under this Chapter' | 9 Procedure in taking additional evidence—Sub-section (4) |
| 4 'If it thinks additional evidence to be necessary' | 10 Appeal or revision |
| 5 "Shall record its reasons" | |
| 6 'Direct it to be taken by a Magistrate' | |

NOTE to the Synopsis See the Notes indicated for the following topics

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|---|---|
| Act 11 [VI] of 1816 and rules—Further evidence by High Court on appeal from Agent of Mewar Estates See Note 3 | Chemical Examiner's report — No order as to its admission — Nor record of reasons—Effect See Note 5 |
| Additional evidence and Ss 195 and 476 See Note 9 | Discretion in taking additional evidence See Note 4 |
| Additional evidence not to fill up gap in prosecution case See Note 4 | Disposal of appeal by appellate Court itself after fresh evidence See Note 7 |
| Additional evidence or remand under S 493 See Notes 4 and 6 | Examination of accused after additional evidence See Note 9 |
| Additional evidence — Where formal proof is wanted See Note 4 | Inapplicable to S 125 See Note 3 |
| | Inapplicable to S 437 See Note 3 |

* Code of 1882 S 428 — Same
Code of 1872 S 282 paras 1, 3 and 4

282 In any case in which an Appellate Court may make or direct further enquiry be made and additional evidence to be taken

When the evidence has not been taken before itself the result of the further inquiry and the additional evidence shall be certified to the appellate Court and such Court shall thereupon proceed to dispose of the appeal

Unless the appellate Court otherwise directs the presence of the appellant may be dispensed with when the further inquiry is made or evidence taken

Code of 1861 S 422

422 In any case in which an appeal has been allowed it shall be competent to the appellate Court if it think further enquiry or additional evidence upon any point bearing upon the guilt or innocence of the accused to be necessary, to direct such enquiry to be made and additional evidence to be taken. The result of the further enquiry and the additional evidence shall be certified to the appellate Court, and the appellate Court shall thereupon proceed to pass such judgment, sentence, or order as to such Court shall seem right.

Inapplicable to S 476D. See Note 3
 Inherent power of supplementing evidence under S 476D See Note 3
 Judgment after additional evidence — Original or appellate—Legislative changes See Note 10
 'Necessary'—Explained. See Note 4
 No evidence at all — Section inapplicable See Note 4
 No record of reasons See Note 5.
 No reference to police for further investigation See Note 6
 No report or finding See Note 6
 Object of record of reasons. See Note 5

Object of the section See Notes 2 and 4
 Order for further evidence—Withdrawal of appeal and cancellation of order See Note 10
 Presence of accused — Legislative changes. See Note 8
 Proceedings where additional evidence taken. See Notes 2 and 3
 Proof of sanction under S 196 — Not proper See Note 2
 Record of reasons — Legislative changes. See Note 5
 Sections 540, 375 and 439 — O 41, R 27, Civil Procedure Code See Note 2.

1. Legislative changes. — Under the Code of 1872, additional evidence could be taken only upon any point "bearing upon the guilt or innocence of the appellant"¹ These words were omitted in the Code of 1882

2. Scope and object of the section. — This section is analogous to O 41, R 27 of the Civil Procedure Code, and enables the appellate Court to take additional evidence,¹ but having regard to the difference in language between the two sections the decisions passed under the Civil Procedure Code are not a trustworthy guide in interpreting this section² In this Code itself there are other sections which empower Courts to take additional evidence See Sections 540, 375 and 439

The object of the section is to see that justice is done between the prosecutor and the person prosecuted³ The object is also "the prevention of a guilty person's escape through some careless or ignorant proceedings of a Magistrate or the vindication of a wrongfully accused person's innocence, where the same carelessness or ignorance has omitted to record circumstances essential to the elucidation of truth"⁴ In *Varadarajulu v Emperor*,⁵ Wallis, O J, observed

"It would not . . . be creditable to the administration of justice or in accordance with modern ideas on the subject that a conviction or a charge . . . if otherwise sustainable should be upset owing to a misconception on the part of the prosecution as to the proper mode of proving a statutory requisite [sanction of the Local Government under s 196], not affecting the merits, a misconception which was shared by the trial Magistrate"

Another reason for the enactment of this section is to save public time by taking only the additional evidence necessary instead of remanding the whole case for examining once again the witnesses already examined⁶

Section 428 — Note 1

1 (75) 23 Suth W R Cr 34 (35), *Sheikh Mohamad Golab v Mohabeer Singh* (Thus evidence as to place of assault was held to have no bearing on the merits of the case and the appellate Court was directed to decide the case on the evidence already before it)

Note 2

1 (33) 20 AIR 1933 Cal 364 (365) 60 Cal 814 34 Cri L Jour 320, *Amarchand v Emperor* (No question of taking additional evidence but one of referring certain matter to Local Government under Ordinance [10 [X] of 1932) S 48 (2) — S 428, Cr P C, is inapplicable)

(28) 15 AIR 1928 Bom 241 (242) : 52 Bom 686 29 Cri L Jour 990, *Bansi Lal v Emperor* (Evidence was admitted as there was no question of surprise in this case)

2 (28) 15 AIR 1928 Mad 1174 (1175) 30 Cri L Jour 133, *Subramania Iyer v Emperor* (This section is not limited to reception of merely formal evidence)

3 (26) 13 AIR 1926 Lah 809 (310) 7 Lah 148 27 Cri L Jour 453, *Dulla v Emperor* (Evidence necessary for correct finding — Action under this section is justified)

The additional evidence can be taken in appeals against conviction or appeals against acquittal⁷ It can be taken for the prosecution or for the defence⁸ Section 307 provides that the High Court has in proceedings under that section all the powers of an appellate Court The High Court can therefore, on a reference under S 307, call for further evidence under this section⁹

Section 439 also provides specifically that the High Court in revision may exercise the powers under this section¹⁰

See also the case cited below¹¹

3 "Appeal under this Chapter" — The powers under this section can be exercised only where *firstly* there is an appeal and *secondly* the appeal is one under this Chapter (chapter XXXI) A proceeding under S 123 of the Code is not an appellate proceeding and consequently this section does not apply¹ A proceeding under S 437 of the Code is one in revision and this section has no application to such a proceeding also² An appeal under S 476B of the Code is one under chapter XXXV and not under this Chapter and consequently this section does not apply³ It has however been held in the undermentioned cases⁴ that independently of this section the appellate Court in an appeal under S 476B has an *inherent* power to *itself* take evidence and complete an enquiry which it finds to be incomplete See also section 476D, Note 4

An appeal under S 230, sub s (9), must be considered to be one under this Chapter inasmuch as the forum of such an appeal is to be ascertained only by virtue of the provisions of this Chapter, the appellate Court may therefore record additional evidence in such cases⁵

It has been held by the Oudh Chief Court that in an appeal to the Sessions Court from the judgment of an Assistant Sessions Judge the former has no power under this section to record additional evidence or to direct such evidence to be taken and that the language of sub s (1) shows that it is only when a Sessions Court is sitting to hear an appeal from a judgment of a Magistrate that it has got such power⁶

[See (35) 22 AIR 1935 Nag 123 (127) 31 Nag L R 246 36 Cri L Jour 740 *Istrani v Emperor* (If appellate Court considers additional evidence necessary it should proceed under this section—It cannot order a re-trial with the condition that the evidence already on record should be taken into consideration)]

7 (14) 1 AIR 1914 Mad 693 (631) 33 Mad 1078 13 Cri L Jour 236 *In re Sinnu Goundan*

8 (25) 12 AIR 1925 Mad 106 (109 111) 23 Cri L Jour 401 *In re Narayana Menon*

(28) 15 AIR 1928 Mad 1174 (117a) 30 Cri L Jour 133 *Subramania Iyer v Emperor*

9 (29) 16 AIR 1929 Cal 244 (246) 53 Cal 566 30 Cri L Jour 1031 *D beadra Narayan v Emperor*

(73) 20 Suth W R Cr 1 (5) *Queen v Koonjo*

Also see S 307 Note 14

10 (35) 22 AIR 1935 Pat 203 (209) 14 Pat 453 36 Cri L Jour 1013 *Bal Kishun Das v Emperor*

1

1 (19) 6 AIR 1919 Pat 171 (172) 20 Cri L Jour 221 *Mt Narain v Emperor*

2 (07) 6 Cri L Jour 357 (359) 6 Cal L Jour 251 *Monsi Mohun v Ishwar Chunder*

(87) 1892 All W N 146 (147) *Empress v Sanwallia*

3 (24) 15 AIR 1928 Mad 391 (392) 31 Mad 603 29 Cri L Jour 115, *Sami Vannias Laminar v Periaswami Narulu*

(10) 11 Cri L Jour 200 (201) 33 Mad 90 5 Ind Cas 841 *Krishna Ruddy v Emperor*. (Case under old S 195 sub-s (6))

(07) 5 Cri L Jour 284 (289) 30 Mad 311 17 Mad L Jour 193 2 Mad L Tim 84, *Rama Iyer v Venkateshala Padayachi (Do)*

4 (31) 14 AIR 1931 Lah 761 (76 1) 13 Lah 312 33 Cri L Jour 178 (TD) *Dhanpat Das v Balak Das*

(31) 14 AIR 1931 Sd 115 (115) 25 Sd L R 63 33 Cri L Jour 43 *Ramchand v Lila Ram*

(21) 8 AIR 1921 Mad 453 (454) 44 Mad 47 23 Cri L Jour 372 *In re Subbasiri* (It was also held that an application against an order granting sanction was not an appeal.)

5 (30) 17 AIR 1930 Mad 433 (434) 53 Mad 604 31 Cri L Jour 602 *Srinivas Sadas v Sadas Wadas*

6 (35) 22 AIR 1935 Oudh 402 (403) 36 Cri L Jour 614 *Hori Lal v Emperor*

It has been held in the undermentioned case⁷ that S 4 of Act 11 [X1] of 1846 read with R. 44 of the Rules under that Act, empowers the High Court to resort to this section in appeals against convictions by the Agent of the Mewar Estates in West Khandesh. See also the undermentioned case⁸.

4. "If it thinks additional evidence to be necessary." — It has been held in the undermentioned cases,¹ that the power to take additional evidence should not be exercised for the purpose of filling a gap in the prosecution case when the necessary evidence was available to the prosecution at the hearing and ought to have been produced then. In *Varadarajulu Naidu v. Emperor*,² Walis, C. J., has held that action can be taken under this section to supply a defect in formal proof but that before additional evidence is allowed the Court should be satisfied that the case is one of formal proof only. In the cases cited below,³ it has been held that it is not correct to hold that the provisions of the section are to be invoked only for supplying formal proof. In *Akhtar Hussain v. Emperor*,⁴ Macpherson, J., observed as follows :

"In India the onus is placed on the Court not merely to listen to the evidence, but to inquire to the utmost into the truth of the matter, and so to secure justice. Accordingly if any restriction is to be placed upon the power conferred on the appellate Court by S 428, it certainly cannot be that negligence or inadvertence on the part of the prosecution is to be allowed to effect a miscarriage of justice: on the contrary the enactment is, like the other provisions referred to, directed to the attainment of justice even at a late stage in the proceedings, by the introduction of further materials which the Court judges to be essential to a just decision of case. The conditions for the exercise of the power are set out in the section itself, and within these limits it is contemplated that the power will be exercised . . . the appellate Court is by no means condemned to countenance a miscarriage of justice because the

7 (19) 8 AIR 1916 Bom 313 (314, 315) 17 Cri L Jour 533, *Emperor v. Khalpa Ranchod*
8 (34) 21 AIR 1934 Mad 55 (59) : 57 Mad 259. 35 Cri L Jour 511, *Mahomed Nanna Marikayar v. Ahmad* (Appeal to High Court from order under S. 19 of Fugitive Offenders Act, 1881 — High Court can direct additional evidence, though Act does not define powers of appellate Court)

Note 4

- 1 (37) 24 AIR 1937 Mad 181 (181, 182) : 38 Cri L Jour 257, *In re Hanumanthappa* (The object of S 428, Cr P C, is not for the purpose of enabling the prosecution to produce evidence which could easily have been produced at the first trial — It is not to enable the prosecution having failed once to have an opportunity of trying the case all over again)
- (35) 22 AIR 1935 Oudh 402 (404) : 36 Cri L Jour 844 - 11 Luck 231, *Hori Lal v. Emperor* (If the Government Pleader takes upon himself the responsibility of not producing a certain eye witness, then it is not the duty of the appellate Court to fill up the gap in the prosecution evidence by summoning that witness)
- (35) 22 AIR 1935 Mad 325 (326) : 37 Cri L Jour 99, *In re United Motor Finance Co., Ltd*
- (25) 12 AIR 1925 Lah 85 (86) : 5 Lah 404 - 26 Cri L Jour 320, *Emperor v. Jaswant Rai & Co*
- (82) 5 All 217 (221) - 1882 All W N 227, *Empress of India v. Fateh*
- (74) 21 Suth W R Cr 13 (14), *Queen v. Madhub Chunder Giri*
- (13) 36 Mad 457 (467) 12 Ind Cas 961 : 12 Cri L Jour 585, *Jeremiah v. Vas*
- (20) 7 AIR 1920 Mad 928 (932, 933) : 42 Mad 885 20 Cri L Jour 455 (SB), *Varadarajulu Naidu v. Emperor* (Per Sadasiva Iyer, J.)
- [See (28) 15 AIR 1928 Bom 241 (242) 52 Bom 686 : 29 Cri L Jour 990, *Dansulal v. Emperor*.]
- 2 (20) 7 AIR 1920 Mad 928 (929) : 42 Mad 885 20 Cri L Jour 455 (SB)
- 3 (46) 33 AIR 1946 Nag 99 (104) - I L R (1945) Nag 809 (DD) *Ajit Kumar v. Emperor*
- (44) 31 AIR 1944 Oudh 243 (244) - 45 Cri L Jour 730 : 214 Ind Cas 123, *Babu v. Emperor* (No hard and fast rule to fetter discretion of appellate Judge)
- (25) 12 AIR 1925 Mad 106 (109, 111) 25 Cri L Jour 402, *In re Narayana Menon*.
- (28) 15 AIR 1928 Mad 1174 (1175) : 30 Cri L Jour 133, *Subramania Ayyar v. Emperor*.
- [See also (30) 17 AIR 1930 Mad 854 (855) 54 Mad 63 32 Cri L Jour 109, *Konda Reddy v. Mangala Babanna* (Additional evidence which will explain, clear up or perhaps supplement evidence in support of a charge which has resulted in a conviction, can be taken)]
- (26) 13 AIR 1926 Lah 309 (309, 310) 7 Lah 148 - 27 Cri L Jour 463, *Dulla v. Emperor*]
- 4 (25) 12 AIR 1925 Pat 526 (528, 529) : 26 Cri L Jour 1171

prosecutor or even the trial Court fails to realize the necessity of bringing certain evidence on the record even if that evidence is not purely formal.

In the undermentioned Madras case⁵ it has been explained that the word necessary does not import that it is impossible to pronounce judgment without the additional evidence. There may be many cases where judgment can be pronounced without any additional evidence but there are cases where it is necessary as a general measure of justice to record additional evidence.

The necessity for taking additional evidence under this section must be determined on the particular facts of each case.⁶ But it has been held that the necessity for additional evidence must be apparent from the record in the case and must not be derived from external information.⁷ The discretion vested in the Court of appeal should not be exercised arbitrarily⁸ but only when the interests of justice demand such a procedure.⁹

No hard and fast rule can however, be laid down. The appellate Court will not exercise the power under this section when there is no evidence at all but where there is some *prima facie* evidence bearing upon the guilt or innocence of the accused, the appellate Court may act under this section.¹⁰

It has been held in the following cases that the taking of additional evidence is not an improper exercise of discretion.

(1) Where the trial Court fails to call witnesses who are known to be in a position to speak to important relevant facts but who have not been called by either party.¹¹

5 (25) 12 AIR 1925 Mad 108 (108) 25 Cri L Jour 401 *In re Narayana Menon* (In this case accused were allowed to adduce additional evidence so that defence may have every opportunity of putting forward anything that might help their case.)

6 (11) 12 Cri L Jour 585 (590-591) 36 Mad 457 12 Ind Cas 951 *Jeremiah v Vas* (The language of the section seems to indicate cases where the evidence on the record is unsatisfactory or leaves the Court in state of doubt.)

7 (06) 3 Cri L Jour 234 (236) 12 Bur L R 21 *Emperor v Nga Po Gyi* (Affidavits showing that the evidence of civil surgeon was incorrect as the facts were not accepted as it was held that they would throw entirely new aspect on the case.)

8 (10) 11 Cri L Jour 571 (574) 3 Ind Cas 145 (Mad) *In re Bhami Luruman Shanbaga*
(20) 7 AIR 1920 Mad 928 (930-933) 42 Mad 885 20 Cri L Jour 455 (SB) *Varadarajulu v Emperor* (Discretion should be exercised against the accused only in exceptional cases.)

(82) 5 All 217 (221) 1882 All W N 227 *Empress of India v Fateh*

9 (33) 22 AIR 1935 All 63 (84) 36 Cri L Jour 117 *Sarnam Singh v Emperor* (Prosecution bound to produce a certain report not producing it — Accused applying as soon as it comes to his knowledge.)
(31) 1931 Mad W N 731 (732) *Subba Peddi v Emperor*

(28) 15 AIR 1928 Bom 241 (242) 52 Bom 666 29 Cri L Jour 990 *Dansilal v Emperor* (In this case there was no surprise — Evidence had been already tendered but it was such as should not have been admitted by the trial Court — Held appellate Court was justified in taking additional evidence.)

(01) 25 Mad 627 (631) *King Emperor v Alexander Allan* (Attention was not clearly drawn in trial Court to an important question in the case.)

(23) 10 AIR 1913 Mad 600 (601) 24 Cri L Jour 403 *In re Cholancherri Ayamma*

(83) 1893 Rat 190 (191) *Queen Empress v Shivanna* (Offence of bigamy — Fact of first marriage was uncontested in Courts below the High Court directed evidence to be taken as to truth and legality of the first marriage.)

(21) 8 AIR 1921 All 215 (216) 27 Cri L Jour 813 *Nagina v Emperor*

[See (83) 5 All 217 (221) 1882 All W N 227, *Empress of India v Fateh*

(29) 16 AIR 1919 Cal 244 (46) 56 Cal 566 30 Cri L Jour 1031, *Debendra Narayan v Emperor*

(21) 8 AIR 1921 Mad 687 (688) 23 Cri L Jour 700 *In re Ramaswami Tevan*]

[See also (14) 1 AIR 1914 All 533 (540) 16 Cri L Jour 49 *Dick v Emperor*]

10 (44) 31 AIR 1914 Oudh 243 (244) 45 Cri L Jour 730 214 Ind Cas 193 *Dabu v Emperor*

(Where in a case under S 110 Cr P C, the Sessions Judge in appeal not being quite convinced by the prosecution evidence, remands the case and orders the taking of fresh evidence as he thought it necessary to have it on record and for which he has recorded reasons the order though rather unusual

is not a rule to fetter the discretion of the

L. Chandrasekharendra Sastri v Emperor (1919 Emp J)

3 Cri L Jour 345 219 Ind Cas 255 (DL)

Girjanandan Singh v Emperor (Summons issued to defence witnesses — Accused insisting on their attendance — Appellate Court should give priority under S 424 to examine such witnesses.)

- (2) Where the Court of first instance refuses to take the evidence offered either on the erroneous view as to its inadmissibility or for any other reason.¹²
- (3) Where an appellate Court finds that certain documents admitted in evidence have not been proved according to law, that the examination of the accused under S 342 is not satisfactory and that the accused should be examined afresh.¹³
- (4) Where the prosecution witnesses have not been cross examined at the trial, the witnesses not having been recalled after charge, and the accused wishes their evidence to be brought before the appellate Court.¹⁴
- (5) Where the accused complains that a confession has been obtained from him by undue influence or force and where the trial Court fails to inquire into the allegations.¹⁵
- (6) Where the accused is said to be insane and the medical or expert evidence has not been taken on the point.¹⁶

The Court of appeal has also under S 423, the power to remand the whole case for re trial.¹⁷ Whether a remand under that section or taking additional evidence under this section is the proper procedure will depend upon the facts of each case,¹⁸ but where an illegality in the conduct of the case has been committed, as for instance, the non compliance with the provisions of S 256 or S 312, the proper course would be to remand the case.¹⁹ An order setting aside the conviction and sending the case back for further evidence but not for complete trial is illegal.²⁰

Where in view of the allegations in the grounds of appeal as to what happened in the trial Court at the time of pronouncing judgment it became necessary to ascertain the truth of the allegations and the appellate Court summoned and examined the Magistrate of the trial Court it was held that the evidence so taken was not covered by this section but that the appellate Court had power to enquire by report or otherwise what transpired in the Magistrate's Court and that the appellate Court's procedure in making the enquiry was not wrong.²¹

(42) 29 AIR 1942 Pat 143 (144) 43 Cri L Jour 134 • 197 Ind Cas 213, *Bhola Nath v Jitendra Nath*. (Handwriting expert may be examined)

(38) 25 AIR 1938 Mad 900 (902) • 40 Cri L Jour 35, *In re Donald Dixon* (In such a case, the appellate Court should avail itself of the power under this section)

12 (96) 19 Mad 375 (381) 6 Mad L Jour 195, *Queen-Empress v Varasami* (There was refusal to take evidence on the ground that it was inadmissible)

13 (36) 23 AIR 1936 Pat 438 (43 additional evidence to be taken at the same time)

14 (38) 25 AIR 1938 Cal 781 (782) I L R (1939) 1 Cal 205 40 Cri L Jour 47, *Munshi v Musaffar, npress v Bhagi* (Case of retracted confession)
Kashinath
v Ganu Bapu
v Sheikh Mustafa

15 (38) 25 AIR 1938 Cal 781 (782) I L R (1939) 1 Cal 205 40 Cri L Jour 47, *Munshi v Musaffar, npress v Bhagi* (Case of retracted confession)

16 (38) 25 AIR 1938 Cal 781 (782) I L R (1939) 1 Cal 205 40 Cri L Jour 47, *Munshi v Musaffar, npress v Bhagi* (Case of retracted confession)
Ratnam v Corporation of Calcutta (Case of great public importance—Re-trial was ordered)
19 (29) 16 AIR 1929 Bom 309 (310, 311, 313) 53 Bom 578 31 Cri L Jour 309, *Emperor v Lakshman Ramshet*

17 (38) 25 AIR 1938 Cal 781 (782) I L R (1939) 1 Cal 205 40 Cri L Jour 47, *Munshi v Musaffar, npress v Bhagi* (Case of retracted confession)
v Emperor
re Pattabharamayya

5. "Shall record its reasons." — The provision was first introduced in the 1898 Code. Whenever additional evidence is now taken under this section reasons for the same should be given.¹ This provision is a guarantee against the appellate Court exercising its powers arbitrarily.²

In an appeal against the conviction of an accused for possession of cocaine, the appellate Court sent for the Chemical Examiner's report which was not tendered in evidence in the lower Court, and without any formal order admitting this further evidence and without recording the reasons for taking such additional evidence, admitted the report and ultimately dismissed the appeal. It was held that the additional evidence ought not to have been perused in appeal unless the provisions of this section were complied with.⁵

It has, however, been held that the mere fact that reasons have not been recorded is not an illegality vitiating the trial and that the defect is curable under s. 537 if it has not caused a failure of justice.⁴

6. "Direct it to be taken by a Magistrate." — The Court can only direct additional evidence to be taken by a Magistrate. It cannot call for a report from such Magistrate¹ or a finding on such additional evidence² and act thereon,³ nor can it send the case to the police for further investigation.⁴

A Court or Magistrate who is directed to take additional evidence can take only such evidence as has been directed or asked to be taken, and not more, whereas if the case is remanded under s 423 the accused is entitled to lead such additional evidence as he may desire.¹

7. "Shall certify such evidence to the Appellate Court," etc. — Sub-section (2) — The Magistrate directed to take additional evidence under this section should

Note 3

1. ('24) 11 AIR 1924 All 193 (194) : 26 Cri L Jour 200, *Wali Muhammad v Emperor*.
(26) 13 AIR 1926 Lah 309 (309) : 7 Lah 148. 27 Cri L Jour 463, *Dulla v Emperor*.
(10) 11 Cri L Jour 571 (574) : 8 Ind Cas 145 (Mad), *In re Bhani Luzman Shantaga*.
(10) 11 Cri L Jour 734 (734) : 8 Ind Cas 943 (Mad), *In re Chintalapudi Kotiah* (Appellate Court in admitting additional evidence did not conform to the provisions of this section — The appeal was directed to be re-heard)
2. ('20) 7 AIR 1920 Mad 928 (933) : 42 Mad 885. 20 Cri L Jour 455 (SB), *Varadarajulu Naidu v Emperor*.
3. ('24) 11 AIR 1924 All 193 (194) : 26 Cri L Jour 200, *Wali Muhammad v Emperor*.
4. ('30) 17 AIR 1930 Mad 493 (484) : 53 Mad 688 : 31 Cri L Jour 602, *Seeniah v Abdul*
(11) 12 Cri L Jour 240 (241) : 10 Ind Cas 290 (Mad), *Emperor v Kanna Benu*.
[See ('10) 11 Cri L Jour 734 (734) : 8 Ind Cas 943 (Mad), *In re Chintalapudi Kotiah*. (In this case reasons were not recorded and the judgment seemed to be influenced by irregularly admitted additional evidence—No hearing of appeal was ordered)]

Note 6

1. ('23) 12 AIR 1925 Pat 450 (452) : 4 Pat 204 : 27 Cri L Jour 524, *Gula Misra v. Emperor* (A report not allow the trial Court to re-decide the case) (Section 423 does not allow the trial Court to re-decide the case)
- (1969) 3 Bom L R App Cr 62 (64)
- (1916) 3 AIR 1916 Pat 219 (221) : 17 Cri L Jour 332 : 1 Pat L Jour 99, *Gajanand v. Emperor*.
[See (1918) 5 AIR 1918 Pat 582 (583) : 19 Cri L Jour 77, *Bhano Singh v. Emperor*. (Appellate Court ordering re-trial and at the same time directing that evidence on the record should be treated as evidence in the case—*Held*, order was irregular)]
3. (1916) 3 AIR 1916 Mad 775 (775, etc.) : 16 Cri L Jour 767, *Sudhansu Muthu v. Enani Samban*.
4. (1900) 1900 All W N 130 (130), *Empress v. Maheshra*.
5. (1906) 3 Cri L Jour 304 (305) : 3 Cal L Jour 303, *Mrs. Sarvagyan v. Emperor*.
[See also (1937) 24 AIR 1937 Nag 285 (286) : 11 L R (1937) Nag 341 : 33 Cri L Jour 1013, *Sagarani v. Emperor*. (Appellate Court can direct the taking of further evidence in support of the prosecution, *fortiori* it is open to the Court to direct that the accused persons may be given a chance of all further evidence—*Order*)]

promptly comply with the same¹ and certify the evidence to the appellate Court which after perusing the additional evidence should itself dispose of the appeal²

8 Presence of accused while additional evidence is taken — Sub-section (3) — Under the corresponding section of the Code of 1872 the presence of the appellant could be dispensed with unless the appellate Court otherwise directed. Under the later Codes, the evidence should ordinarily be taken in the presence of the accused, though the Court has power to dispense with such presence¹. If the original trial had been with a jury or assessors it is not necessary that the additional evidence should be taken in the presence of the jury or the assessors².

9 Procedure in taking additional evidence—Sub section (4) —In taking additional evidence under this section the provisions contained in chapter XXV, 112, S 353, etc. should be followed¹.

If during the reception of the additional evidence by the Magistrate any offence against public justice as is mentioned under S 195 is committed such Magistrate is competent to prefer a complaint with reference to the same under S 476². As to the necessity of examining the accused after additional evidence is taken, see Note 9 on S 342.

10 Appeal or revision — Under S 422 of the Code of 1861 where a Court of appeal took additional evidence and disposed of the appeal the judgment was considered to be an original judgment and it was held that an appeal lay against such judgment to the High Court on the merits¹. The section was amended in 1869, and since then a judgment passed by the appellate Court after taking the additional evidence was held to be only an appellate judgment from which there was no appeal².

A Court of revision will not interfere with an order under this section made by a

Note 7

1 (1865) 4 Suth W R Cr 1 (1) Circular No 11 of 20th November 1865

2 (16) 3 AIR 1916 Mad 775 (776-778) 16 Cri L Jour 767 *Sudalaimuthu Chettiar v Enan Samban*.
(15) 2 AIR 1915 Mad 756 (756) 16 Cri L Jour 79 *Muthukaruppan Sertai v Pelayya Kudumban*

Note 8

1 (28) 15 AIR 1923 Bom 200 (200) 50 Bom 699 29 Cri L Jour 972 *Narayan Keshav v Emperor*.
(Section 342 does not apply to evidence taken under the present section)

(06) 3 All L Jour 112n (112n) *Sheo Achal v Emperor*

(91) 13 All 171 (189) 1891 All W N 48 *Queen Empress v Pohpi*

(06) 3 Cri L Jour 376 (378) 29 Mad 100 *Suryanarayana Row v Emperor* (Accused cannot be compelled to be present at the time of taking additional evidence)

[See also (41) 28 AIR 1941 Nag 66 (69) 1 L R (1942) Nag 34 41 Cri L Jour 356 186 Ind Cas 660, *Nathu Singh Lazman Singh v Emperor* (Section 342 does not come into operation when additional evidence is taken under S 428)]

2 (38) 25 AIR 1933 Cal 781 (781) 1 L R (1938) 1 Cal 205 40 Cri L Jour 47 *Munshi v Musaffar*.

(07) 6 Cri L Jour 154 (159) 11 Cal W N 904 *Emperor v Jasha Bewa*

(93) 15 All 136 (137) 1893 All W N 50, *Queen Empress v Ram Lal*

Also see S 285 Note 5

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(21) 8 AIR 1921 All 215 (216) 27 Cri L Jour 813 *Nagina v Emperor* (Using evidence under Section 288)]

2 (71) 15 Suth W R Cr 64 (66) *Queen v Buktear Mayfaraz*

Note 10

1 (1865) 2 Suth W R Cr 13 (14, 24) *Queen v Mohesh Chunder*

2 (71) 15 Suth W R Cr 33 (34) *In re Dhunobur Ghose*

(1900) 27 Cal 372 (375) 4 Cal W N 491 *Queen Empress v Isahak* (Under S 422 before the amend

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Court of appeal unless it is satisfied that the appellate Court had committed an error of law which has prejudiced the accused on the merits³

An appeal was pending before the first class Magistrate. He ordered some additional evidence to be taken under this section. One of the parties to the appeal filed a petition before the Additional District Magistrate who withdrew the appeal to his file and disposed of it without taking the additional evidence. It was held that he had the power to do so and that he was not bound by the opinion of the first class Magistrate⁴. It was observed that

'Under s 428 the appellate Court if it thinks additional evidence necessary may take such evidence before deciding the appeal but there is nothing in the Code of Criminal Procedure or any reason to render it illegal or irregular for the appellate Court to dispense with such evidence if further consideration or argument leads the Court to the conclusion that such evidence is not necessary

429.* When the Judges composing the Court of Appeal are equally

Procedure where Judges divided in opinion, the case, with their opinions thereon, of Court of Appeal are shall be laid before another Judge of the same Court, equally divided and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Synopsis

- 1 Scope and applicability of the section
- 2 'Case'
- 3 'Judgment or order shall follow such opinion'
- 4 Appeal (Omitted)

NOTE to the Synopsis See the Notes indicated for the following topics

Death or transportation — Difference of view as to — Effect See Note 3	Reference under S 307 See Note 1
Difference of view — No ground for acquittal See Note 3	Revison—Section 439 See Note 1
Inapplicability to bail. See Note 1	Scope of enquiry before third Judge See Note 2
Inapplicability to revisions under Sect on 107 Government of India Act See Note 1	Section 195—Inapplicability of this section to See Note 1
Legislative changes See Note 1	Several accused—Difference of view as to one only See Note 2
Letters Patent See Notes 1 and 4	Third Judge not to disagree on agreed point. See Note 2
No reference to Full Bench by the third Judge See Note 1	Whole case is before third Judge and not merely points of difference See Note 2

1. Scope and applicability of the section — This section provides for the procedure to be followed where the Judges of the Court of appeal are equally divided in opinion. This provision was first introduced in the Code of 1872. Before that year such cases were governed by the Letters Patent. Under the Letters Patent before its amendment in 1928 the opinion of the senior Judge prevailed and no reference to a third Judge was allowed¹. As regards the amendment in 1928 see Letters Patent (Calcutta), Clause 36.

The section applies not only to appeals but also to revision petitions by virtue of S 439 sub section (1)²

* 1852 S 429, 1872 S 271 para 8, 1861 — Nil.

- 3 (25) 12 AIR 1915 Pat 576 (530) 26 Cr L Jour 1171 *Akhtar Hussain v Emperor* (Order admitting additional evidence was not interfered with)
 (18) 6 AIR 1918 Pat 272 (272 273) 19 Cr L Jour 90³ 3 Pat L Jour 63³ *Mohamed v Emperor* (Revisional Court set aside the order refusing to take additional evidence.)
 4 (108) 7 Cr L Jour 329 (330) 31 Mad 277 18 Mad L Jour 69, *In re Alagu Ambalam*
 Also see S 407, Note 4

Section 429 — Note 1

- 3 N W P H C R 117 (119 121) (1 B), *Queen v Ayn Singh*
 W B Cr 45 (45) 2 Beng L R 25 (F B) *Queen v Karam Thakoor*
 W N 873 (---) *Kunhambu v Local Fund Officer, Chirakkal*

promptly comply with the same¹ and certify the evidence to the appellate Court which after perusing the additional evidence should itself dispose of the appeal²

8. Presence of accused while additional evidence is taken — Sub-section (3). — Under the corresponding section of the Code of 1872 the presence of the appellant could be dispensed with unless the appellate Court otherwise directed. Under the later Codes, the evidence should ordinarily be taken in the presence of the accused, though the Court has power to dispense with such presence¹. If the original trial had been with a jury or assessors, it is not necessary that the additional evidence should be taken in the presence of the jury or the assessors.²

9. Procedure in taking additional evidence.—Sub-section (4) —In taking additional evidence under this section the provisions contained in chapter XXV, viz, s 353, etc, should be followed¹

If during the reception of the additional evidence by the Magistrate any offence against public justice as is mentioned under s 195 is committed, such Magistrate is competent to prefer a complaint with reference to the same under s 476². As to the necessity of examining the accused after additional evidence is taken, see Note 9 on S 312

10. Appeal or revision — Under s. 422 of the Code of 1861, where a Court of appeal took additional evidence and disposed of the appeal, the judgment was considered to be an original judgment and it was held that an appeal lay against such judgment to the High Court on the merits¹. The section was amended in 1869, and since then a judgment passed by the appellate Court after taking the additional evidence was held to be only an appellate judgment from which there was no appeal²

A Court of revision will not interfere with an order under this section made by a

Note 7

1 (1865) 4 South W R Cr Cr 1 (1), Circular No 11 of 20th November 1865.

2. (16) 3 AIR 1916 Mad 775 (776, 778) 16 Cr L Jour 767, *Sudalamuthu Chettiar v. Enan Saradan*.
(15) 2 AIR 1915 Mad 756 (756) 16 Cr L Jour 79, *Muthukaruppan Sertai v Velayya Kudumban*

Note 8

1 (28) 15 AIR 1926 Bom 200 (200) : 52 Bom 699 . 29 Cr L Jour 972, *Narayan Keshav v Emperor*.
(Section 342 does not apply to evidence taken under the present section)

(66) 3 All L Jour 112n (112n), *Shco Achal v. Emperor*

(91) 13 All 171 (188) : 1891 All W N 48, *Queen Empress v. Pohpi*

(06) 3 Cr L Jour 376 (376) : 29 Mad 100, *Suryanarayana Row v. Emperor*. (Accused cannot be compelled to be present at the time of taking additional evidence)

[See also (41) 28 AIR 1941 Nag 66 (69) : 1 L R (1942) Nag 34 : 41 Cr L Jour 556 : 186 Ind Cas 660,
operation when additional

7, *Munshi v Muszaffar*.

Also see S 285, Note 5

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witness be asked if it was correct.)

(21) 8 AIR 1921 All 215 (216) : 27 Cr L Jour 813, *Nagina v Emperor* (Using evidence under Section 288))

2. (71) 15 South W R Cr Cr 64 (66), *Queen v. Buktcar Maifaras*

Note 10

1 (1865) 2 South W R Cr Cr 13 (14, 24), *Queen v Mohesh Chunder*.

2. (71) 15 South W R Cr Cr 33 (34), *In re Dhunobur Ghose*

(1900) 27 Cal 372 (375) . 4 Cal W N 497, *Queen Empress v Isahak* (Under S 423 before the amendment of 1869, appellate Court was required to pass such judgment or sentence or order as it deemed fit but this is not the case now. The appellate Court has now only to proceed to dispose of the appeal.)
(69) 6 Bom H C R Cr 61 (66), *Reg. v Nantauram Ullanram* (Do)

Court of appeal unless it is satisfied that the appellate Court had committed an error of law which has prejudiced the accused on the merits³

An appeal was pending before the first class Magistrate. He ordered some additional evidence to be taken under this section. One of the parties to the appeal filed a petition before the Additional District Magistrate who withdrew the appeal to his file and disposed of it without taking the additional evidence. It was held that he had the power to do so and that he was not bound by the opinion of the first class Magistrate⁴. It was observed that:

'Under s 428 the appellate Court, if it thinks additional evidence necessary, may take such evidence before deciding the appeal, but there is nothing in the Code of Criminal Procedure or any reason to render it illegal or irregular for the appellate Court to dispense with such evidence if further consideration or argument leads the Court to the conclusion that such evidence is not necessary''

429.* When the Judges composing the Court of Appeal are equally

Procedure where Judges divided in opinion, the case, with their opinions thereon, of Court of Appeal are shall be laid before another Judge of the same Court, equally divided and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Synopsis

1. Scope and applicability of the section
2. "Case."
3. "Judgment or order shall follow such opinion"
4. Appeal. (Omitted)

NOTE to the Synopsis See the Notes indicated for the following topics:

Death or transportation — Difference of view as to — Effect See Note 3	Reference under S 307 See Note 1
Difference of view — No ground for acquittal See Note 3	Revisions—Section 439 See Note 1
Inapplicability to bail. See Note 1	Scope of enquiry before third Judge See Note 2
Inapplicability to revisions under section 107, Government of India Act See Note 1.	Section 195—Inapplicability of this section to See Note 1
Legislative changes. See Note 1	Several accused—Difference of view as to one only. See Note 2
Letters Patent See Notes 1 and 4	Third Judge not to disagree on agreed points See Note 2
No reference to Full Bench by the third Judge See Note 1	Whole case is before third Judge and not merely points of difference See Note 2

1. Scope and applicability of the section. — This section provides for the procedure to be followed where the Judges of the Court of appeal are equally divided in opinion. This provision was first introduced in the Code of 1872. Before that year such cases were governed by the Letters Patent. Under the Letters Patent before its amendment in 1928 the opinion of the senior Judge prevailed and no reference to a third Judge was allowed¹. As regards the amendment in 1928, see Letters Patent (Calcutta), clause 26.

The section applies not only to appeals but also to revision petitions by virtue of s 439, sub section (1)².

* 1882. S 429, 1872. S 271 para 8, 1861 — Nil.

3. (25) 12 AIR 1925 Pat 526 (530) 26 Cri L Jour 1171, *Alhtar Hussain v Emperor* (Order admitting additional evidence was not interfered with)
 (18) 5 AIR 1918 Pat 272 (273) : 19 Cri L Jour 902 : 3 Pat L Jour 632, *Mahomed v Emperor*.
 (Revisional Court set aside the order refusing to take additional evidence)
 4 (08) 7 Cri L Jour 329 (330) 31 Mad 277 : 18 Mad L Jour 89, *In re Alagu Ambalam*
 Also see S. 407, Note 4

Section 429 — Note 1

- 1 (70) 2 N W P H C R 117 (119 121) (F B), *Queen v Nyn Singh*
 (68) 10 South W R Cr 45 (45) : 2 Beng L R 95 (F B), *Queen v Asim Thakoor*
 2 (32) 1932 Mad W N 873 (884), *Aun*
sent Fund Oversee, Chirakkal

The same procedure has been provided for such cases in a reference under s 378 for confirmation of death sentence. The principle of this section applies to a reference under s 307³

The powers conferred by the Code under s 195 sub s (6) (now repealed)⁴ or over applications for bail⁵ are not, however, part of the appellate and revisional jurisdiction conferred under Chapters XXXI and XXXII of the Code and consequently, where there is a difference of opinion this section does not apply but clause 86 of the Letters Patent applies.

It was held that this section did not apply to revision petitions preferred to the High Court under s 107 of the Government of India Act of 1915 as such petitions were outside the powers conferred by the Code. Such cases were governed by the Letters Patent⁶. Under s 224 of the Government of India Act of 1935 the High Court has no revisional jurisdiction over the judicial orders of subordinate Courts.

A third Judge to whom reference is made under this section cannot make a reference to a Full Bench⁷.

2 'Case'—Where upon a difference of opinion between two Judges the 'case' is laid before a third Judge, the *whole case* is referred to a third Judge and not merely the point or points upon which the Judges differ, it is the duty of the third Judge to consider all the points involved before he gives his opinion¹. The third Judge should not, however, differ on a point on which both the referring Judges agreed unless there are strong grounds to do so. Such cases may occur where the Judges are agreed that an accused cannot be acquitted but differ whether he ought to be convicted or whether a new trial should be ordered,² or where they are agreed that the accused is guilty but disagree on a subsidiary point or on a consequential order under s 517 of the Code³.

In cases, however, where there are two or more accused and the Judges are agreed in opinion with regard to one of them but are divided as regards the others the case which is laid before the third Judge is only the case of the accused with regard to whom there is a difference of opinion⁴.

3 (91) 15 Bom 452 (474 475) *Queen Empress v Dada Ana* (It is the just and the best procedure to follow)

[See also (66) 3 Cri L Jour 371 (374) 29 Mad 91 *Emperor v Chellan*

(77) 1 Cal L Rep 275 (275 287) *Empress v Mukhun Kumar*]

4 (16) 8 AIR 1916 Mad 1110 (1119) 39 Mad 750 13 Cri L Jour 209 (F B) *Bapu v Bapu* (Application to High Court to revoke a sanction granted by lower Court or to give sanction refused by it)

in v Gattram Ramiah

namre Ram]

v Emperor

6 (20) 7 AIR 1920 Cal 417 (419) 47 Cal 438 31 Cri L Jour 25 *Mohram Dewah v Mirjan Sardar*
(20) 7 AIR 1920 Cal 824 (829) 22 Cri L Jour 99, *India Iron and Steel Co., Ltd v Banso Gopal Tewari*

7 (25) 12 AIR 1925 Cal 1040 (1045 1046) 26 Cri L Jour 315 *Ishan Chandra Samanta v Hriday Krishna Bose*

Note 2

1 (10) 11 Cri L Jour 515 (517 518) 7 Ind Cas 641 38 Cal 202, *Sarat Chandra v King Emperor*
(32) 1932 Mad W N 873 (888 889) *Kunhambu v Local Fund Overseer Chirakkal* (Per Pandita J)
(27) 14 AIR 1927 Bom 177 (182) 51 Bom 310 28 Cri L Jour 373 *Sejmal Punamchand v Emperor*

[See (30) 17 AIR 1930 Sind 225 (241) 31 Cri L Jour 1026 *Mohamed Yusuf v Emperor* (A reference under s 9 (c) of the Sind Courts Act)]

2 (19) 6 A I R 1919 Cal 802 (870) 19 Cri L Jour 753 *Grande Venkata Ratnam v Corporation of Calcutta*

[See (30) 17 AIR 1930 Sind 225 (241) 31 Cri L Jour 1026 *Mohammad Yusuf v Emperor* (Question as to sentences to be passed was referred)]

3 (32) 1932 Mad W N 873 (891) *Kunhambu v Local Fund Overseer, Chirakkal* (Per Waller J)

4 (43) 30 AIR 1913 All 272 (272) 1 L R (1913) All 82 44 Cri L Jour 765 208 Ind Cas 262 (DB)
Subedar Singh v Emperor

(10) 11 Cri L Jour 515 (517, 518) 7 Ind Cas 641 38 Cal 202 *Sarat Chandra Mitra v Emperor*

(31) 18 AIR 1931 Lah 513 (520) 32 Cri L Jour 888, *Ahmad Sher v Emperor*

3 "Judgment or order shall follow such opinion" — Where a case is referred to a third Judge, he is entitled to give his own opinion, and it will be according to such opinion that judgment will follow¹ He need not necessarily decide the case according to the opinion of the Judge who was in favour of an *acquittal*² Where the Judges are agreed as to the guilt of the accused in a murder case but differ as to whether the sentence should be one of transportation for life or of death, the High Court of Calcutta has held that the fact that there is such a difference of opinion is itself a ground for holding that the death penalty should not be awarded, though the rule is not an inflexible one and cannot be considered to prevent the third Judge to whom a reference is made under this section from considering the case for himself and to judge for himself whether death penalty should or should not be given.³

4 Appeal [Omitted]

430.* Judgments and orders passed by an Appellate Court upon

Finality of orders appeal shall be final, except in the cases provided for in on appeal section 417 and Chapter XXXII.

1 Scope of the section. — Sections 407 to 415A, provide for appeals against convictions, and s 417 for appeals against acquittals, in trials An appeal is to all intents and purposes, a trial¹ Therefore, in the absence of a specific provision to the contrary, it would be open to contend that a conviction by an appellate Court is also open to appeal under the said provisions This section is intended to negative such a result and provides that an appellate judgment or order is *final*,² subject to the provisions of s 417 and Chapter XXXII (revision) A sentence is said to be final when it cannot be set aside or interfered with in any manner by any Court³

This section does not, in any way, affect the provisions of s 360, which, by force of s 424, is applicable to judgments in appeals also

Reading the two sections together, as they ought to be, it follows that an appellate Court, like the trial Court, cannot alter or review its own judgment or order Nor is such judgment or order open to any further appeal except as provided by s 417

The question has arisen as to whether a judgment given in an appeal without hearing the appellant or his pleader is a bar to the Court reconsidering the matter subsequently either by directly reviewing its previous decision or by way of entertaining a fresh appeal or application for the same purpose The answer to the question depends largely upon a consideration of the provisions of ss 421 and 423 Section 421 lays down the

* 1882 S 430, 1872 S 285 1861 S 428

Note 3

1 (10) 11 Cri L Jour 515 (517, 518) 7 Ind Cas 641 38 Cal 202 *Sarat Chandra v Emperor*

2 See (87) 1887 All W N 125 (127), *Empress v Dandu* (Dissenting from 1896 All W N 275)

Also see S 378 Note 2

3 (30) 17 AIR 1930 Cal 193 (193) 31 Cri L Jour 817, *Emperor v Dulari Chandra*

Also see S 378, Note 3

Section 430 — Note 1

1 See Note 18 on S 423

no power to review its own order dismissing a criminal appeal and confirming the conviction and sentence)

(66) 5 Suth W R Cr 61 (63 64) Beng L R Sup Vol 436 *Queen v Godas Rasool* (Do)
(72) 17 Suth W R Cr 2 (2) *In re Krishna Churn and Moheram of Assam* (Do)
(72) 17 Suth W R Cr 47 (47, 49) 9 Beng L R 6 *Queen v Chandra Jugi* (Do)]

3 (86) 12 Cal 536 (538) *Dulari Das v Nisbat Hossain*,
High Court has

alprinds (Case

High Court has

conditions, on the fulfilment of which an appellate Court is entitled to dismiss an appeal summarily. These conditions vary with two classes of appeals, which may, for the sake of convenience of expression, be called *jail appeals*, that is, appeals which are presented through the officer in charge of the jail and *non-jail appeals* which would include all other appeals.

As regards jail appeal, S 421 requires the Court to peruse the petition of appeal and the copy of the judgment under appeal before dismissing it. If this is done, the judgment of dismissal is final and cannot, under the provisions of S 369, be altered or reviewed by the same Court, as for example, by entertaining a fresh appeal or application in respect of the same matter,⁴ even though the appellant was actually not heard in the matter.⁵ The reason is that in jail appeals this section does not make it essential that the appellant should be heard before the appeal is dismissed.⁶ On the other hand, where the Court dismisses a jail appeal without perusing the petition of appeal or the copy of the judgment accompanying it, it will be acting without jurisdiction and the dismissal is not a valid judgment or order which is entitled to that finality which is conferred on judgments by S 369, a subsequent appeal or application in respect of the same matter is open to consideration on its merits.⁷

As regards non jail appeals, S 421 imposes an additional duty on the appellate Court, besides that of a perusal of the petition of appeal and of the copy of the judgment

⁴ (24) 11 AIR 1924 Oudh 425 (425). 25 Cri L Jour 1313, *Ram Aular v Emperor* (Dissenting from 1924 Oudh 425, 25 Cri L Jour 453)

682, 15 Luck 703, *Mt Raj Kumari v Emperor*
becomes final as soon as it is dated and signed —

— not essential to
—Dissenting

represented
in previous

I v Nga Ba
peal against

are entitled to show cause against his con-
sentence)

ick 30, *Ram Jas v Emperor* (Summary

dismissal of a jail appeal is a bar to a subsequent entertainment of another appeal presented by the
same prisoner through counsel)

Emperor.

Ram. (In this
peal passed by

case the High Court under its revisional jurisdiction set aside the order of the
the Sessions Judge)

Emperor (There cannot be

Din v Emperor (Dis

Emperor (The

Jour 300 *Lachhman Chamar v Emperor*
summary dismissal of jail appeal does not debar

Arumugha Padayachi
439 46 Mad 382, *Kunhamad Haji v*

⁵
⁶ *Emperor*

392, *Pem Mahlon v Emperor*
Jour 441, *Bansgopal v Emperor* (Appeal
of dismissal amounted to order of rejection

appealed against, and that is, that the appellant or his pleader should have had a reasonable opportunity of being heard in support of the appeal, before it is dismissed summarily. Where these conditions are satisfied and the appeal is dismissed, the dismissal is final and cannot be reconsidered in any manner such as the entertainment of a fresh appeal or application for the same purpose,⁸ even though the appellant or his pleader was absent at the hearing and was consequently not heard.⁹ But where no such opportunity has been given the dismissal of the appeal would be without jurisdiction and will not bar a reconsideration of the matter.¹⁰

Where an appeal is not summarily dismissed under S 421, the Court is bound to give notice to the parties under S 422, send for the records of the case from the lower Court, peruse the same, and hear the parties if they appear, before making a final order in the appeal. If these conditions are fulfilled the judgment or order of the appellate Court is not open to reconsideration by the same Court and is final. The fact that the parties or their pleaders were not present notwithstanding the opportunity given to them, and were consequently not heard, does not affect the finality of the appellate judgment or order.¹¹ But where the conditions of Ss 422 and 423 are not fulfilled, as where an appeal is dismissed merely for *default of appearance* of the parties,¹² or when no notice has been given to the parties as to the date and place of hearing,¹³ or the parties though present are not heard, the judgment will be without jurisdiction and will not be a bar to a subsequent reconsideration of the same matter.

Where a convicted person has preferred both a jail appeal and an appeal through a pleader and both of them are pending and the Court dismisses the former summarily in ignorance of the latter appeal, still, it cannot set aside the order of dismissal,¹⁴ but the High Court in revision can set aside such order.¹⁵

tolerance as required by S 441.)

revision

11 (23) 10 AIR 1923 Pat 297 (298) 26 Cri L Jour 419, *Kabir Shah v Emperor* (Not clear from facts as to whether party was given notice, probably he was given)

12. (09) 9 Cri L Jour 553 (554) 2 Ind Cas 247 5 Nag L R 76, *Ratanchand v Emperor*. (Order of dismissal was held not to be a judgment and hence S 369 was held to be inapplicable)

(23) 10 A I R 1923 Mad 426 (432, 433) 46 Mad 382 24 Cri L Jour 439, *Kunhamad Haji v Emperor* (When criminal appeal or revision is dismissed for default of appearance, there is no decision on merits and therefore there is no proper disposal of it according to law and the Court may re-hear it)

(09) 3 Ind Cas 393 (394) 10 Cri L Jour 287 (Cal), *Bibhuti Mohan Roy v Dasmonidassi* (See also) (19) 6 AIR 1919 Cal 409 (410) 46 Cal 60 20 Cri L Jour 265, *Rajab Ali v Emperor*

Also see S 423, Note 4

13 (19) 6 AIR 1919 Cal 409 (416) 46 Cal 60 20 Cri L Jour 265, *Rajab Ali v Emperor*

(09) 9 Cri L Jour 553 (554, 555) 5 Nag L R 76 2 Ind Cas 247, *Ratanchand v Emperor*

14 (26) 13 A I R 1926 All 178 (179) 43 All 203 26 Cri L Jour 1621, *Emperor v Meera Ram* (Although in such a case Court dismissing the appeal has no power to set aside the dismissal, the High Court has such a power in exercise of its revisional jurisdiction)

15 (26) 13 AIR 1926 All 178 (179) 43 All 203 26 Cri L Jour 1621, *Emperor v Meera Ram*

(06) 4 Cri L Jour 373 (373) 3 All L 93 *Bhawani Debi v Emperor*

It has been held by the High Courts of Madras and Bombay that the dismissal of an appeal under S 421 on the ground that the appeal is barred by limitation is a valid judgment and is final¹⁶ A contrary view has however, been expressed in the under mentioned case¹⁷ It is submitted that the latter view is incorrect

A was charged with offences under ss 302 and 301 of the Penal Code At the trial, he was acquitted of the offence under S 302 and was convicted of the offence under S 301 A's appeal against his conviction under S 301 was dismissed by the High Court Then the Provincial Government appealed against A's acquittal of the offence under S 302 It was held that the order of the High Court passed in A's appeal from his conviction under S 301 did not preclude the High Court from hearing the appeal against his acquittal.¹³ See also the undermentioned decision¹⁹

2 Temporary dismissal of appeal — The temporary dismissal of an appeal is a procedure unknown to the law An appellate Court cannot, therefore, dismiss an appeal till the decision of a civil suit between the parties¹ The appellate Court can, however, postpone the decision of an appeal in suitable cases.²

3 Effect of dismissal of appeal on application under section 439 for enhancement of sentence — See Notes on Section 439

431. Every appeal under [section 411A, sub-section (2) or Abatement of appeals section 417] shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant

a These words and figures were substituted for the word and figures Section 417 by the Criminal Procedure Amendment Act 1943 (26 [XXVI] of 1943) S 5

1. Scope and applicability of the section — This section deals with the question of abatement of appeals An appeal under S 417 or S 411A (2) abates on the death of the accused Every other appeal except an appeal from a sentence of fine abates on the death of the appellant. The exception as to an appeal against a sentence of fine was introduced in the Code of 1898 it having been held under the old Code that in such cases the appeal abated and that the only remedy of the legal representative was to apply to the Government¹ The object of introducing the exception was to prevent the estate of the deceased appellant

* 1882 S 431 1872 and 1861 — Nil

16 (23) 10 A 1 R 1923 Mad 426 (427) 46 Mad 362 21 Cri L Jour 439 *Kun'aha nad Haji v Emperor*

441 *Bansgopal v Emperor* (The appeal must be described as

rejected and not dismissed in such cases)

18 (32) 19 A 1 R 1932 Nag 121 (123 124) 28 Nag L R 233 33 Cri L Jour 619 (FB) *Mohammad Gul Rohilla v Emperor* (Overruling AIR 1932 Nag 73 33 Cri L Jour 728)

Also see S 417 Note 3

19 (40) 27 A 1 R 1940 Oudh 396 (397) 41 Cri L Jour 725 *Emperor v Madho Singh* (Appellate Court in course of hearing of appeal ordering that evidence of certain witnesses should be recorded by trial Court — Appellate Court then disposing of appeal though such evidence not recorded — Procedure irregular)

Note 2

1 (18) 5 AIR 1918 All 247 (246) 19 Cri L Jour 358 (359) *Lachhmi Narain v Bindraban*

2 (18) 5 AIR 1918 All 247 (248) 19 Cri L Jour 359 (359) *Lachhmi Narain v Bindraban*

Also see S 421 Note 1

Section 431 — Note 1

from being damaged.² See also S 240 Note 19. Where the conviction of a deceased person is allowed to stand in appeal the fine imposed upon him can be realised from his legal representatives.³

As to the abatement of applications for revision see S 439 Note 43. As to the abatement of appeals under S 476B see S 476B Note 8.

CHAPTER XXXII

OF REFERENCE AND REVISION

432.* A Presidency Magistrate may, if he thinks fit refer for the

Reference by Presidency Magistrate to High Court opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon

Synopsis

- | | | |
|---|---|--|
| 1 Scope of the section
2 Reference by Presidency Magistrate
3 Any question of law | } | 3a May give judgment on such reference
4 Arises in the hearing of any case
5 Order on such reference See Section 433 |
|---|---|--|

NOTE to the Synopsis. See the Notes indicated for the following topics.

- | | |
|--|---|
| Contents of reference See Note 3
No reference before commencement of hearing See Note 4
Quest on already settled by precedents—Correctness doubted—No reference See Note 3
Questions referred for decision alone to be referred and not others See Note 4 | Questions of fact See Note 3
Reference by other Magistrates See Note 2
Reference by Sessions Judge or District Magistrate See Note 2
Reference under various Acts See Note 1
What are questions of law See Note 3 |
|--|---|

1 Scope of the section — This section enables a Presidency Magistrate to refer for the opinion of the High Court any question of law which arises in respect of any case pending before him. Thus he can refer questions of law arising in respect of proceedings under the Police Act¹ the Extradition Act² the Stamp Act³ the Bombay Abkari Act⁴ the Bombay Municipal Act⁵ the Calcutta Municipal Act⁶ the Madras City Municipal Act⁷ etc.

2 Reference by Presidency Magistrate — This section empowers only a Presidency Magistrate to make a reference to the High Court. A Sessions Judge or a District Magistrate has no power to make a reference except as provided by S 433² and no

* 1852 S 432 1872 and 1851 — N 1

- 2 (08) 9 Cr L Jour 103 (104) 1908 Pun Re No 24 Cr Pre n Singh v. Dola
 (19) 6 AIR 1919 Lah 347 (348) 1919 Pun Re No 8 Cr 90 Cr L Jour 214 Daulat v. Emperor
 3 (41) 28 AIR 1941 Pat 526 (577) 42 Cr L Jour 653 195 Ind Cas 126 Ramdhani Gope v. Jagesher Mahto

Section 432 — Note 1

- 1 (91) 15 Bom 530 (537) Queen Empress v. Sheriar Ardeser Erani (Act 43 [XLI] III) of 1890)

- 4
 4
 v. G. I. P. Railway Company
 6 (15) 2 A I R 1915 Cal 728 (729) 16 Cr L Jour 317 Corporation of Calcutta v. Manmohar Nath Set
 (04) 1 Cr L Jour 69 (70) 8 Cal W N 147 Corporation of Calcutta v. Keshub Chunder Sen
 7 (13) 14 Cr L Jour 47 (48) 18 Ind Cas 271 (24d) Sawmji Chetaj v. Corporation of Madras
 Note 2
 1 (08) 9 Cr L Jour 248 (248) 1 Sind L R 4 Crown v. Bani

other Magistrate trying the case has any power at all to make any reference to the High Court.²

The High Court has no jurisdiction to *direct* a Magistrate to state a case under this section, if in his discretion he does not desire to do so, and in any case the High Court will not direct him to state a case after he has recorded an order of acquittal.³

3. "Any question of law."—A reference can be made under this section only on *questions of law*, that is, questions relating to procedure, jurisdiction, construction and interpretation of the provisions of law, etc.¹ There is no power to refer any question of fact² and even if any opinion is expressed by the High Court in respect of any such question of fact, it will not have the force of a ruling.³ The Magistrate cannot also refer questions of law if such questions have already been settled by judicial precedents binding on him even though he may doubt the soundness or correctness of such precedents.⁴ He should state the question on which he requires the opinion of the High Court *distinctly* and in the form of a *definite question of law*,⁵ it is not necessary for him to set out the entire facts in the order of reference.

3a "May give judgment . . . on such reference."—Under the first part of this section, the Presidency Magistrate has power to make a reference to the High Court in the form of a definite question of law without setting out the facts of the case. But, at times it may be undesirable to make the reference in the form which involves giving a decision on law divorced from the facts. It is therefore, desirable in such cases to use the second part of this section—that is to say, the Magistrate should give the judgment in the case subject to the decision of the High Court on the reference. By adopting this course duplicity of hearing in both Courts would probably be avoided and all the facts would be before the High Court once for all.¹

4. "Arises in the hearing of any case"—The Magistrate cannot refer any question of law if the accused has just been placed before him and the hearing of the case

(80) 2 All 771 (772), *Empress of India v Bhup Singh* (Reference by Sessions Judge)

(85) 1885 Rat 214 (214) *Queen Empress v Bapuji* (Do)

[See also (16) 2 AIR 1015 All 185 (186) 16 Cri L Jour 433 *Emperor v Mohan Lal*]

2 (08) 7 Cri L Jour 400 (401) 12 Cal W N 604 *Mohesh Sonar v Emperor* (The trying Sub-divisional Magistrate cannot refer any question to the High Court)

(84) Oudh S C No 71 p 82, *Queen Empress v Kallu* (Do)

Also see S 423, Note 38 and S 438 Note 4

3 (44) 31 AIR 1944 Bom 107 (108) ILR (1944) Bom 302 45 Cri L Jour 612 212 Ind Cas 396 (FB), *P D Shamdasani v Central Bank of India Ltd* (No 1) (Although it thinks that there is a serious question of law which requires to be considered)

Note 3

1 (92) 16 Bom 159 (161) *Queen Empress v Muhammad Rajudin* (Whether Presidency Magistrate can inquire into a case committed by coroner under Coroners Act 4 [1v] of 1871)

(1900) 4 Cal W N 26 (27) *Ram Kumar v Ramjee* (Presidency Magistrate dismissing a warrant-case for non-appearance of complainant and issuing fresh summons for same offence—Validity of orders referred)

— v Ariff

for the question whether on the facts

see

3 (09) 9 Cri L Jour 248 (248) 1 Sind L R 4, *Crown v Bakul*

4 (30) 17 AIR 1030 Bom 49 (54) 54 Bom 146 31 Cri L Jour 633 *Emperor v Ismail*

5 (96) 1896 Rat 838 (839) *Queen Empress v Sheikh Ibrahim*

(16) 3 AIR 1916 Mad 655 (656) 39 Mad 686 16 Cri L Jour 670, *In re Hawkins*

Note 3a

1 (39) 26 A I R 1939 Cal 529 (530) 40 Cri L Jour 762 I L R (1939) 2 Cal 411 (S B), *Emperor v Hemendra Prasad* (Overruled on another point in AIR 1945 P C 156 72 Ind App 241 (PC))

has not commenced¹ The words "arises in the hearing of any case" show that the power of reference conferred upon the Presidency Magistrate is confined only to such questions of law which it is the Magistrate's duty to decide² He ought not to refer any other question of law which is not necessary for the determination of the case³

5 Order on such reference — See Section 433

433.* (1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall dispose of the case according to the decision of the High Court whom the reference was made, who shall dispose of the case conformably to the said order.

(2) The High Court may direct by whom the costs of such reference shall be paid

1. Scope of the section — The High Court is strictly confined to the terms of the reference made by the Presidency Magistrate under S 432, it has no power to deal with facts or to consider any other contentions that may have been raised in the case before the Magistrate¹ Where the High Court passes an order under this section and the Magistrate gives a decision in conformity with such order, it has no power to reconsider or review that order in case the matter comes up before it in appeal²

The decision of the High Court on a reference under S 432 is an *opinion* and not a "judgment decree or order" within the meaning of section 205 (1) of the Government of India Act of 1935³

434.† [Power to reserve questions arising in original jurisdiction of High Court Procedure when question reserved] (*Omitted by the Criminal Procedure Amendment Act, 1943, (26 [XXVI] of 1943), Section 6.*)

The omitted section ran as follows —

434 (1) When any person has, in a trial before a Judge of a High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon be remanded to jail, or, if the Judge thinks fit, be admitted to bail, and the High Court shall have power to review the case, or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit

* 1882 S 433, 1872 and 1861 — Nil.

† 1882 S 434, 1872 and 1861 — Nil.

Note 4

1 (99) 1 Bom L R 521 (522) *Queen Empress v Nanu Amir*

2 (29) 16 A I R 1929 Cal 756 (757) 57 Cal 1042 31 Cr L Jour 506 (FD) *Girish Chandra v Emperor*

3. (29) 16 A I R 1929 Cal 756 (757) 57 Cal 1042 31 Cr L Jour 506 (FD) *Girish Chandra v. Emperor*

Section 433 — Note 1

1 (96) 3 Cr L Jour 365 (366) 33 Cal 193 *Emperor v. Molla Fazla Karim*.

2. (93) 1893 Rat 638 (638) *Queen Empress v Confu*.

3. (39) 26 A I R 1939 Cal 529 (530) 40 Cr L Jour 782 1 L R (1939) 2 Cal 411 (S D), *Emperor v Hemendra Prasad*

435.* (1) The High Court or any Sessions Judge or District Magistrate, or any Sub divisional Magistrate empowered by the ^a[Provincial Government] in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court ^band may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

* Code of 1898, original S 435

435 (1) The High Court or any Sessions Judge or District Magistrate or any Sub-divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness legality or propriety of any finding sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court

(2) If any Sub-divisional Magistrate acting under snb-s (1) considers that any such finding sentence or order is illegal or improper or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate

(3) Orders made under sections 143 and 144 and proceedings under Chapter XII and section 176 are not proceedings within the meaning of this section

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate no further application shall be entertained by the other of them

Code of 1882 — S 435

Snb-section (4) was added in 1898, otherwise the section was the same

Code of 1872 — Ss 294, 295 and 520

294 The High Court may call for and examine the record of any case tried by any subordinate Court for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed and as to the regularity of the proceedings of such Court

295 Any Court of Session or Magistrate of the District may, at all times call for and examine the records of any Court subordinate to such Court or Magistrate for the purpose of satisfying itself or himself as to the legality of any sentence or order passed, and as to the regularity of the proceedings of such subordinate Courts

For the purposes of this section every Magistrate in a sessions division shall be deemed to be subordinate to the Sessions Judge of the division

520 Orders made under sections 518 and 519* are not judicial proceedings

* 1872 Ss 518 and 519 = 1898 Ss 141 and 143

Code of 1861 — Ss 405 and 434

405 It shall be lawful for the Sudder Court to call for and examine the record of any case tried by any Court of Session for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed and as to the regularity of the proceedings of such Court If it appear to the Sudder Court that the sentence passed is too severe the Sudder Court may pass any mitigated sentence warranted by law If the Sudder Court shall be of opinion that the sentence or order is contrary to law the Sudder Court shall revert the sentence or order and pass such judgment sentence or order as to the Court shall seem right or if it deem necessary, may order a new trial

434 It shall be at all times lawful for a Court of Session and for a Magistrate to call for and examine the record of any Court immediately subordinate to such Court or Magistrate for the purpose of satisfying themselves as to the legality of any sentence or order passed and as to the regularity of the proceedings of such subordinate Court If the Court of Session or Magistrate shall be of opinion that the sentence or order is contrary to law, the Court or Magistrate shall refer the proceedings for the orders of the Sudder Court It shall not be lawful for any other Court than the Sudder Court to alter any sentence or order of any subordinate Court except upon appeal by parties concerned duly made according to the provisions of Chapter XXX of this Act

Explanation — All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 437.]

(2) If any Sub-divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate

“(3) * * * * *

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

a. Substituted by A O for Local Government”

b The words ‘and may when calling examination of the record at the end of sub-section (1) were inserted and the explanation to sub section (1) was added by the Code of Criminal Procedure (Amendment) Act 18 [XVIII] of 1923

c Sub-section (3) was omitted *ibid*

Synopsis

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| <p>1 Scope of the section</p> <p>2 What Courts can revise proceedings under this section</p> <p>3 “High Court,” meaning of</p> <p>4 “May call for”</p> <p>5 High Court will not entertain application unless the lower Court has first been approached</p> <p>6 Applicant in contempt See Section 439 Note 11</p> <p>7 The proceedings must be that of a criminal Court</p> <p>8 The Court whose proceedings are revised must be an inferior Criminal Court — Explanation</p> <p>9 Such inferior Court must be within the local limits of the revising Court’s jurisdiction</p> <p>10 “Any proceedings” may be called for</p> <p>11 Revision of proceedings under Ss 143, 144, 176 and under Chapter XII</p> | <p>12 Correctness, legality or propriety of any finding, sentence or order and regularity of any proceeding</p> <p>13 Extent of power of Sessions Judge or District Magistrate</p> <p>13a Extent of power of Sub divisional Magistrate — Sub-section (2)</p> <p>14 Revision not to be entertained by both the Sessions Judge and the District Magistrate — Sub-section (4)</p> <p>15 Bar of revision</p> <p>16 Revision of proceedings of village officers</p> <p>17 Order under the Code for execution of extradition warrant — Revision, if barred</p> <p>18 Limitation for application for revision See Section 439 Note 42</p> <p>19 Second application for revision</p> <p>20 Dismissal for default—Restoration</p> <p>21 Duty of Court whose records are called for</p> |
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NOTE to the Synopsis See the Notes indicated for the following topics

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| <p>Action <i>suo motu</i> See Note 4</p> <p>Appeal to District Magistrate — Revision direct to High Court See Note 5</p> <p>Civil and criminal proceedings See Notes 10 and 7</p> <p>Independent powers of Chartered High Courts under the Government of India Act See Notes 1, 11 and 16</p> <p>“Immediately subordinate” See Note 8</p> <p>Inherent powers of High Court — Section 561A See Note 1</p> <p>Interference at any stage See Note 1</p> <p>Interference only in case of miscarriage of justice See Note 4</p> <p>Legislative changes See Notes 8 10 11 14 and 15</p> <p>Letter of explanation with records See Note 21</p> <p>Nature of revisional powers See Notes 5 and 15</p> <p>No call for records within appealable time See Note 21</p> <p>No enforcement by Sessions Judge to District Magistrate for action See Note 13</p> <p>No revision of proceedings of Courts not See Note 8</p> | <p>No revision to High Court from certain Courts See Note 9</p> <p>No transfer to Additional Sessions Judge See Note 2</p> <p>Object of the section See Note 1</p> <p>Orders really without jurisdiction — Revision lies See Notes 11 and 15</p> <p>Power of superior Courts over inferior Courts See Notes 1 and 13</p> <p>Proceedings under Ss. 195 and 476 See Note 7</p> <p>Revision against administrative proceedings See Notes 7 and 10</p> <p>Revision by District Magistrate — Sessions Judge not to refer under S 433 See Note 14</p> <p>Section 125 — No bar to revision to High Court See Note 5</p> <p>“Situate” — Meaning See Note 9</p> <p>Subordinate and inferior Courts See Note 8</p> <p>Test—Nature of Court and not of proceeding See Note 7</p> <p>What are not Courts See Note 7</p> <p>What are not Criminal Courts See Note 7</p> <p>Who can apply See Note 4</p> |
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1 Scope of the section — This section empowers the Courts specified therein to call for the records of inferior criminal Courts and examine them for the purpose of satisfying themselves as to whether a sentence, finding or order of such inferior Court is legal, correct or proper, or whether the proceedings of such inferior Courts are regular¹ A High Court has, in addition to the power under this section an inherent power to make such orders as are necessary for the ends of justice (S 561A)² Under S 107 of the Government of India Act (1915), a chartered High Court had, independently of this section, also power to revise orders of inferior Courts under its powers of superintendence³ But under sub s (2) of S 224 of the Government of India Act, 1935, a High Court has no such power⁴

The object of conferring powers of revision under this section is to give superior criminal Courts a supervisory jurisdiction in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals⁵ The aim of the Legislature is, however, to secure the setting right of a patent

Section 435 — Note 1

1 (40) 27 AIR 1940 Sind 65 (65 66) ILR (1940) Kar 157 41 Cri L Jour 566, *Emperor v Juma Machhi*

(78) 2 Bom 564 (570) *Imperatrix v Dongaji Andaji* (High Court can call for record even after the death of the prisoner pending an appeal before the lower appellate Court and pass any order)

(66) 3 Bom H C R Cr 1 (2 3) *Reg v Bhaskar Kharkar*

(09) 10 Cri L Jour 385 (398) 36 Cal 994 3 Ind Cas 361, *Protab Singh v Khan Mahomed*

(10) 11 Cri L Jour 478 (477) 7 Ind Cas 369 (All), *Muhammad Alam v Emperor*

[See (32) 4 All 417 (419) 1882 All W N 93 *Empress of India v Nathu Khan* (Section 54 Forests

r 536 194 Ind Cas 214 *Nasrullah v*

in such a case to order commitment for

trial without the necessity of a fresh and unnecessary inquiry)]

2 (24) 11 AIR 1924 All 777 (776) 46 All 879 25 Cri L Jour 1242 *Mt Ram Sri v Sri Kishen*

3 (19) 6 AIR 1919 P C 31 (35) 43 Mad 148 20 Cri L Jour 593 46 Ind App 176 (P C) *Annie Besant v Advocate General of Madras* (High Court's power to issue writ of certiorari is not taken away by Criminal Procedure Code S 435)

(08) 7 Cri L Jour 499 (501) 12 Cal W N 678 *Lekhraj Ram v Debi Pershad*

(23) 10 AIR 1923 Mad 275 (275) 24 Cri L Jour 464 *Punja Syamala v Emperor* (Even if High t 1915)

t such powers)
adar (Order of

(19) 6 AIR 1919 All 46 (46) 42 All 28 20 Cri L Jour 615 *Kadhory v Emperor* (Though Munsif's Court is not inferior Court within S 435 High Court can interfere in revision in proceedings for contempt of Court)

(24) 11 AIR 1924 All 69 (69) 45 All 676 *Kashi Nath v King-Emperor*

(33) 20 AIR 1933 Bom 1 (4) 57 Bom 93 34 Cri L Jour 199 (SB) *Balkrishna Hari v Emperor*

(99) 26 Cal 874 (878) 3 Cal W N 564 *Sunderjee Nanji v Maylon* (The High Court may have a power of interference in proceedings notwithstanding the annulment of its powers of revision under the Code)

Also see S 439 Note 1

4 See (40) 27 AIR 1940 Bom 266 (267) ILR (1940) Bom 415 41 Cri L Jour 855 *P J Rogers v Shrinivas Gopal* (Inferior Court's judgment not before High Court in appeal or revision — High

heoprasad v Emperor
ah

shwanath Pandurang
ferred by law — High

Court will quash proceedings in revision)

(34) 21 AIR 1934 Sind 20 (21) 35 Cri L Jour 391, *Atmaram v Emperor* (High Court may be asked to put right any incorrect irregular or improper sentence or order passed by subordinate Court or to set right any irregularity not condoned by S 537)

error or defect, and not to give the Court a roving commission either in the direction of stamping with approval the proceedings of a lower Court, or in the direction of questioning about and looking to see if, possibly under a fair record, there lies some traces of a possible error, in the absence of some well founded suspicion of error it is inexpedient to scrutinize orders which, upon the face of them bear token of careful consideration and appear good and lawful⁶

In order that the power under this section may be exercised, the following conditions must be satisfied —

(1) the proceeding must be that of a *criminal Court* see Note 7,

(2) such Court must be an *inferior Court* see Note 8.

(32) 19 AIR 1932 Lah 362 (363) 13 Lah 599 33 Cri L Jour 341, *Ibrahim v Guran Ditta Mal* (High Court sitting as Court of revision is entitled to rectify errors in law which would lead to injustice)

(32) 19 AIR 1932 Lah 258 (259) 33 Cri L Jour 500 *Emperor v Sardara* (Judgment of trial Magistrate perverse on the question of sentence—High Court interfered)

(32) 19 AIR 1932 Lah 188 (189) 33 Cri L Jour 108, *Robert John Bradley v Emperor* (Accused summoned by second class Magistrate, but his case subsequently transferred to Additional District Magistrate—Case tried by latter summarily without accused knowing it—Accused held to be prejudiced by the trial)

(31) 18 AIR 1931 Lah 145 (149) 32 Cri L Jour 700 *Parasram v Emperor* (Appeal not preferred though allowed — Still High Court can exercise its revisional powers when there is serious miscarriage of justice)

(31) 18 AIR 1931 Mad 236 (240) 32 Cri L Jour 744 *Satyanarayana Choudhary v Emperor* (High Court will interfere in the interest of public peace)

(30) 17 AIR 1930 Nag 59 (59) 31 Cri L Jour 110, *Punnuswami v Mt Almeli Bai* (Magistrate's procedure highly irregular and seriously prejudicing accused — No proper inquiry — High Court interfered)

(30) 17 AIR 1930 Rang 349 (350) 32 Cri L Jour 206, *Ali Hossein v Emperor* (The High Court in revision is not bound by S 412 but may examine the record for the purpose of seeing whether the accused have had a fair trial and whether their plea of guilty was based on a proper conception of the facts)

(29) 16 AIR 1929 Mad 847 (848) 31 Cri L Jour 190, *Sidda Peddi v Dasari Adigadu* (Irregularity is material and sufficient to invoke S 435)

(20) 7 AIR 1920 Pat 378 (392) 21 Cri L Jour 289 *Sadanand v Emperor* (The proper function of a Court of revision is to see that subordinate criminal Courts do conduct criminal cases with fairness and propriety and that nothing is done in the trial of an accused person which may reasonably lead to the impression that the accused has not received fair treatment and an impartial and fair trial)

(18) 5 AIR 1918 Pat 197 (199) 19 Cri L Jour 249 3 Pat L Jour 147, *Mewa Lal v Emperor* (Holding trial at a place where accused is totally incapable of making proper defence amounts to material irregularity — High Court set aside conviction)

(18) 5 AIR 1918 Nag 62 (62) 20 Cri L Jour 671, *Gound v Emperor* (A Court of revision is not concerned with the policy underlying a legislative enactment, it is only concerned with the legality

(09) 9 Cri L Jour 72 (73) 35 Cal 1093 *Rahimuddin Hauladar v Emperor* (Conviction set aside on the ground that accused had no opportunity of examining witnesses in defence)

(08) 8 Cri L Jour 250 (255) 1908 Pun Pe No 11 Cr, *Phuman v Emperor* (Technical flaws and minor errors in the procedure of the lower Courts and even mistakes in the appreciation of evidence are good grounds for interference where they have resulted in substantial prejudice or injustice to the accused)

(04) 7 Cri L Jour 202 (204) 1903 Pun Re No 4 Cr *Shiv Nath v Emperor* (When illegal order is passed and action taken which involves matters coming within the purview of law and justice and within the scope of authority of Courts such authority cannot be ousted by the mere *spas dixit* of the officer that he was not acting as a judicial officer — High Court in revision has power to prevent such a breach of law)

(04) 1 Cri L Jour 937 (939, 1000) 10 Bar L R 263, *Emperor v Klaw Zan Hla*

(65) 1885 Pun Re No 42 Cr p. 69 (89) *Ram Kala v Ganga* (High Court has power under S 433 to revise illegal order passed under S 135)

6 (99) 1899 All W N 135 (136), *Empress v Dukes*

(3) such Court must be situate within the local limits of the jurisdiction of the revision Court see Note 9, and

(4) the purpose for which the records are called for should be one to enable the revision Court to satisfy itself as to the *correctness, legality or propriety* of any finding sentence or order recorded or passed and as to the *regularity* of any proceedings of such inferior Court

The High Court's right to have matters brought to its notice and to examine the record for itself is as much a part of the administration of justice as its duty to hear appeals and revisions and interlocutory applications. Hence where a revision petition by a prisoner addressed to the High Court is handed over to the Jail Superintendent and the latter deliberately withholds it from the High Court and declines to forward it the Jail Superintendent interferes with the administration of justice and is guilty of a criminal contempt.⁷

The records of a proceeding can be called for under this section even when the proceeding is *pending* before the inferior criminal Court.⁸

2 What Courts can revise proceedings under this section — The power to call for the records of an inferior criminal Court can be exercised only by the Courts specified in the section namely —

(1) the High Court

(2) the Sessions Judge

(3) the District Magistrate, or

(4) the Sub divisional Magistrate empowered by the Provincial Government in this behalf

An Additional Sessions Judge cannot exercise the powers of a Sessions Judge and act under this section¹ except in cases which may be transferred to him by or under any general or special order of the Sessions Judge.² (See s 438 sub s (2) and Note 12 thereon) A special Judge cannot exercise the powers of a Sessions Judge and act under this section.³ Similarly, a joint Magistrate cannot exercise the powers of a District Magistrate and act under this section.⁴ So also an order signed by another person for the District Magistrate calling for a proceeding is an order without authority.⁵

3 "High Court," meaning of — See Section 4 (1) (j)

The High Court for the purposes of revision against an acquittal in proceedings from the Santhal Parganahs is the Commissioner of Bhagalpur and not the High Court of Patna.⁶

7 (45) 32 AIR 1945 Nag 53 (49) 1 L R (1915) Nag 74 (DB) *Balkrishna Narayan v N S Jatar*
8 (41) 28 AIR 1941 Rang 114 (115 116) 1941 Rang L R 82 42 Cr L Jour 573 194 Ind Cas 370
King v Maung Po Thaing

Note 2

- 1 (1900 1902) 1 Low Bur Rul 119 (120) *Crown v Abdul Gaffur*
(06) 3 Cr L Jour 88 (88) 7 Bom L R 998 *In re Pitambar Dwarakadas*
(76) 25 Suth W R Cr 21 (22) *Shomdeo Noolyo v Rung Lal* (Joint Sessions Judge under the Code of 1872)
- (85) 9 Bom 164 (168) *In re the petition of Misa Asmal* (A joint Sessions Judge cannot exercise the powers of a Sessions Judge under Chap XXXII)
- 2 See (85) 9 Bom 352 (354) *Reference by the Sessions Judge of Surat* (In this case which was decided before the enactment of sub-s (2) of s 438 in the Code of 1893 it was held that an application under Chap XXXII (Revision) made to a Sessions Judge could not be transferred to a Joint Sessions Judge — This is no longer law in view of s 438 (2))
- 3 (05) 2 Cr L Jour 534 (538) 9 Cal W N 829 *Sheobux Ram v Emperor*
- 4 (70) 14 Suth W R Cr 25 (26) *Queen v Chooraman, Sant*
- 5 (41) 28 AIR 1941 Rang 114 (115 116) 1941 Rang L R 82 42 Cr L Jour 573 194 Ind Cas 370
King v Maung Po Thaing (Order issued by the headquarters assistant and signed by him for District Magistrate is void)

Note 3

- 1 (26) 13 AIR 1906 Pat 449 (450) 6 Pat 83 28 Cr L Jour 80 *Anwar Ali v Chairman Deoghar Municipality*

The application referred to in sub s (4) of the section is an application by a party to the proceeding, e g, the accused, the Crown or the complainant³ An application by third person will be treated as supplying information to the Court on which it may act The Court will, however act on such information only if there are a priori grounds for apprehending that a miscarriage of justice has taken place⁵ Thus, where a person convicted refused to take part in the proceedings but a member of the bar applied for revision of the proceedings, the High Court refused to call for the record, on the ground that there was nothing to show that there was any miscarriage of justice, and further observed that the Court should be loath to interfere on behalf of a person convicted in a criminal case if that person is an adult and of ordinary intelligence when that person himself in no way contests the propriety of his conviction⁶ Where the Bar Association applied for revision against the conviction of certain members of the Bar who refused to take any part in the proceedings the Chief Court of Oudh interfered in revision observing that the Bar Association was right in making the application⁷ See also Note 9 on Section 439

7 (30) 17 AIR 1930 Oadh 497 (4th), 32 Cri L Jour 104 *Mohanlal Salve v Emperor*

In the undermentioned case⁸ it was held that the procedure of a Magistrate applying to the District Magistrate for advice in regard to a question of jurisdiction in a case pending before him was erroneous and that he ought to have completed the inquiry himself and passed such order as to him seemed legal and proper

Applicants in revision to High Court must be prepared with their cases and with the documents in support. The High Court will not send for the record unless there is sufficient material to justify that course and will not adjourn the case merely to enable a party to do what he should have done before prosecuting the application⁹

5 High Court will not entertain application unless the lower Court has first been approached — The Sessions Judge and the District Magistrate have concurrent jurisdiction with the High Court to call for the record of inferior criminal Courts under this section. The practice is however firmly established that the High Court will not entertain an application for revision where the applicant could have applied to the Sessions Judge or the District Magistrate and has not done so¹. The object of the practice

8 (12) 13 Cr L Jour 786 (786) 37 Bom 144 17 Ind Cas 530 *Emperor v Abdul Rahman*
Also see S 177 Note 1

9 (40) 27 AIR 1940 Bom 283 (283) 42 Bom L R 481 (481) 42 Cr L Jour 52 *Mukund v Emperor*
Note 5

1 (40) 29 AIR 1942 Bom 148 (149) ILR (1012) Bom 249 43 Cr L Jour 708 200 Ind Cas 724 (DB) *Savilaram Sadoba v Dyaneshwar Vishnu* (Revision to Sessions Judge withdrawn — Appeal on to Sessions Judge held as sufficient compliance with spirit of rule — Revision to High Court held could be entertained against Magistrate's order)

(42) 29 AIR 1942 Oudh 438 (439) 43 Cr L Jour 739 201 Ind Cas 466 *Surajbhai v Emperor*

(41) 28 AIR 1941 Oudh 268 (269) 42 Cr L Jour 349 193 Ind Cas 47 *Debi Singh v Emperor*

(41) 1941 Nag L Jour 619 (619) *Yeshwant Rao v Emperor*

(40) 27 AIR 1940 Pat 299 (299) 41 Cr L Jour 257 *Chokat Ahir v Suraj Singh*

(87) 88 Cr L Jour 1024 (1025) 171 Ind Cas 167 (Oudh) *Raja Ram v Emperor*

(33) 20 AIR 1933 All 283 (283) 53 All 261 34 Cr L Jour 1048 *Muhammad Hashim v Notified Area of Moghal Sarai*

(19) 8 AIR 1919 All 258 (260) 41 All 587 20 Cr L Jour 347, *Mansoor Husain v Emperor*

(27) 14 AIR 1927 All 834 (834) 28 Cr L Jour 475 *Sukhray Singh v Emperor*

(29) 16 AIR 1929 All 272 (272) 30 Cr L Jour 1079 *Jadunandan v Sheopahal*

(19) 6 AIR 1919 Mad 1004 (1008) 19 Cr L Jour 56 *Venkataramana Ajjar v Emperor* (High Court rarely interferes in revision till other remedies open to a petitioner in the lower Court have been resorted to unsuccessfully)

(24) 11 AIR 1924 Mad 228 (229) 25 Cr L Jour 310, *Gopobondhu Delara v Venkatesam Pantulu* (Fact that order for compensation passed along with order of discharge is revisable by the High Court only does not alter the procedure)

(31) 18 AIR 1931 Mad 778 (779) 55 Mad 178 33 Cr L Jour 43 *Ganesh Mull v Emperor*

(26) 18 AIR 1926 Nag 285 (285) 27 Cr L Jour 71 *Bajirao v Mt Dadibas*

(29) 16 AIR 1929 Nag 13 (14) 29 Cr L Jour 618 *Ginnat v Emperor*

(29) 9 AIR 1922 Oudh 147 (147) 25 Oudh Cas 37 24 Cr L Jour 275 *Sat Narain Singh v Emperor*

(17) 4 AIR 1917 Pat 596 (597) 18 Cr L Jour 863 *Musan Rai v Birich Roj*

(18) 5 AIR 1918 Pat 588 (589) 19 Cr L Jour 589 3 Pat L Jour 302 *Bipin Bihari v Emperor*

(84) 1 Cr L Jour 1075 (1075) 10 Bar L R 346 *Maung Po Tha v Tun Aung Gjaw*

(05) 3 Cr L Jour 53 (55) 28 All 268 1905 All W N 279 *Gulray v Bakar Husain*

(08) 7 Cr L Jour 48 (48) 30 All 116 1908 All W N 25 *Shafiqat Ullah v Wali Ahmad Khan*

(09) 10 Cr L Jour 190 (191) 36 Cal 643 2 Ind Cas 846 *In re Bhuyan Abdus Sobhan Khan*

(21) 8 AIR 1921 All 30 (31) 43 All 497 22 Cr L Jour 715 *Sharif Ahmad v Qabul Singh*

(24) 11 AIR 1924 All 1 (4) 45 All 656 24 Cr L Jour 817, *Abdul Wahid v Abdullah*

(26) 13 AIR 1926 All 27 (28) 48 All 23 27 Cr L Jour 19 *Kamalapati Panth v Emperor*

(27) 14 AIR 1927 All 899 (830) 28 Cr L Jour 544 *Nathe Singh v Emperor*

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is firstly, to prevent the time of the High Court from being wasted and secondly, to have the advantage of the opinion of the Sessions Judge or the District Magistrate in case the matter should eventually come before the High Court³. The object of the practice is not attained by the mere fact that an appeal was preferred to the District Magistrate⁴. The practice does not however oust the jurisdiction of the High Court to entertain a revision in contravention of the practice⁵ and the discretion of the High Court is not fettered by any hard and fast rule⁶. Thus in a special case as when an application is presented by a third party in the interests of the public or when the appeal from the Court whose order is challenged lies directly to the High Court the High Court can entertain an application in revision even though no such application was made to the Sessions Judge or the District Magistrate⁷. Where an inferior criminal Court passed an order under S 117 and the party

(98) 15 AIR 1928 Sind 69 (70) 28 Cri L Jour 978 22 Sind L R 201 *Emperor v Bahumdino* (High Court would not as a rule exercise those powers in a case where the Magistrate making the report has jurisdiction to dispose of the matter himself)

(09) 25 All 126 (127) 1902 All W N 197 *Harbans Rai v Chunni Lal*

which concurrent jurisdiction is not

(1900-01) 5 Cal W N 248 (248) *Tarak Nath Nandi v Gopinda Chandra*

(91) 8 AIR 1971 Cal 76 (76) 48 Cal 534 29 Cri L Jour 650 *Rash Behari v Phani Bhusan* (Case under S 133)

(23) 10 AIR 1973 Cal 674 (674) 50 Cal 423 25 Cri L Jour 576 *Abdul Matlib v Nandlal Khatel* (Where however, the application in revision had been entertained and heard and a rule had been granted it ought to be disposed of on the merits and not dismissed on the ground that no application had been made to the Sessions Judge)

(27) 14 AIR 1977 Lah 689 (690) 28 Cri L Jour 815 8 Lah 514 *Mahomed Ishag v Emperor* (The case under S 439 unless District

(Application under Charter Act —

Appeal though allowed not taken — Application in revision not entertained)

(86) 1896 All W N 290 (295) *Empress v Mohar Singh* (Where an appeal lies against an order no revision lies until the petitioner had appealed against it and the appeal had been disposed of)

(80) 2 All 276 (280) *Empress of India v Nalambur Dabu* (Where there is a Court of appeal resort should be had to it before coming in revision)

Also see S 133 Note 31 S 436 Note 4 and S 439 Note 23

2 (41) 28 AIR 1941 Oudh 268 (269) 42 Cri L Jour 349 193 Ind Cas 47 *Debi Singh v Emperor*

(33) 20 AIR 1933 All 293 (293 284) 53 All 261 34 Cri L Jour 1048 *Muhammad Hashim v Notified Area of Moghul Sarai*

4 (39) 19 AIR 1932 All 120 (126) 53 Cri L Jour 595 51 All 331 *Balkrishna Sharma v Emperor*

or
Naidu (It is
applied to the

in v Emperor

(When the application is connected with another application on which has been made and which can be entertained only by the High Court it may be entertained)

(19) 13 Cri L Jour 269 (269) 14 Ind Cas 609 (All) *Gulzari Lal v Ganga Ram*

(31) 21 AIR 1934 Cal 139 (140) 35 Cri L Jour 541 *Sureniranath v Gosa Behari* (Where the lower Court of concurrent jurisdiction postponed the case and the matter was urgent)

(33) 20 AIR 1933 All 612 (613) 55 All 857 34 Cri L Jour 1053 *P V Biju v Emperor*

(39) 19 AIR 1932 All 125 (126) 54 All 331 53 Cri L Jour 523 *Balakrishna Sharma v Emperor* (Appeal lying directly to High Court)

(See (44) 51 AIR 1944 Oudh 310 (311) 46 Cri L Jour 756 290 Ind Cas 437 *Dost Mohammad King-Empress* (Order under S. 517 passed by Magistrate — High Court alone can set aside reference or revision — No revision before Sessions Judge — Revision direct to High Court maintainable)

concerned who could have approached the District Magistrate under S 125 did not do so but applied directly to the High Court in revision, it was held that he could do so on the ground that the power under S 125 was not a *judicial* one⁷ Though High Court will not usually entertain applications made to it directly, still if they are admitted they must be disposed of on merits⁸

According to R 15 of chapter IV of the Nagpur High Court Rules, an application for revision of an order passed by a criminal Court of appeal may be made directly to the High Court and the applicant need not first apply to the Sessions Court.⁹

6 Applicant in contempt — See Section 439 Note 11

7 The proceedings must be that of a criminal Court.—The proceeding the record of which is called for, must *firstly*, be that of a Court. Where such proceeding is not that of a Court at all, the section has no application. Thus a Judge acting as a *persona designata* under special powers conferred on him as such is not a Court and his action cannot be revised¹ A Judge or Magistrate who has vested in him a dual capacity as an executive officer and as a Court, and who acts in his *executive or administrative capacity* cannot be considered to be acting as a Court and his proceedings cannot be revised under this section² The following are also not Courts within the meaning of this section

- (19) 5 AIR 1918 Pat 172 (174) 19 Cri L Jour 126 *Munshi Mian v Emperor*
 (31) 19 AIR 1931 Oudh 418 (419 419) 33 Cri L Jour 195 *Krishnadatta v Badri*]
 7 (24) 11 AIR 1924 Oudh 241 (241) 24 Cri L Jour 616, *Emperor v Balwant Singh*,
 (14) 1 AIR 1914 Oudh 305 (306) 15 Cri L Jour 721 *Sheo Singh v Emperor*
 (17) 4 AIR 1917 All 428 (428) 18 Cri L Jour 630 39 All 488 (489) *Sitaram v Emperor*
 [But see (05) 2 Cri L Jour 335 (335) 1905 All W N 143 *Emperor v Abdur Rahim* (Dis sented from in AIR 1904 Oudh 241 24 Cri L Jour 619)]
 (18) 5 AIR 1918 Nag 173 (173) 19 Cri L Jour 900 *Martand Rao v Emperor*]
 8 (42) 29 AIR 1940 Oudh 438 (439) 43 Cri L Jour 739 201 Ind Cas 469 *Surajbali v Emperor*
 (AIR 1939 All 978 58 All 159 34 Cri L Jour 1115 (FB) relied on)
 (41) 29 AIR 1941 Pat 548 (548) 43 Cri L Jour 110 197 Ind Cas 74 *Bihar Municipality v Ram nandi Kuter*
 (41) 29 AIR 1941 Pat 444 (447) 42 Cri L Jour 347 192 Ind Cas 893 *Prasad Gareri v Mst Kesari*
 (40) 27 AIR 1940 Pat 299 (209) 41 Cri L Jour 257 *Chokat Akar v Suraj Singh*
 (23) 10 AIR 1903 Cal 674 (674) 50 Cal 423 25 Cri L Jour 509 *Abdul Mallab v Nandalal Khatel*
 [See also (42) 29 AIR 1942 Pat 150 (152) 43 Cri L Jour 537 199 Ind Cas 219 *Lalo Mahto v Emperor*
 (Once revis on case has come before High Court it can deal with it under Ss 435 and 439—It need not see whether the petition is in order and whether the affidavit was properly sworn by accused)]
 9 (41) 28 AIR 1941 Nag 316 (317) 1 L P (1941) Nag 606 43 Cri L Jour 24 196 Ind Cas 548
Nathuram Gotsram v Emperor (Criminal Revn Na 122 of 1941 overruled)

Note 7

- 1 (30) 17 AIR 1930 Bom 486 (486) 54 Bom 664 39 Cri L Jour 397, *In re Usman Haj, Mahomed*
 (The special power of the Chief Presidency Magistrate under S 45 Bombay City Police Act 1900 is not as criminal Court but as a *persona designata*)
 Also see S 1 Note 6
 2 (43) 30 AIR 1943 Mad 470 (471) 44 Cri L Jour 662 207 Ind Cas 623 *In re Narasimhamurti Patnai* (District Magistrate directing subordinate Magistrates not to allow unauthorised persons to practise as legal practitioners—Order is administrative)
 (41) 28 AIR 1941 Lah 71 (73) 1 LR (1940) Lah 577 42 Cri L Jour 448 193 Ind Cas 561 (DB)
Ghulam Sadiuddin v Emperor (Order of District Magistrate under S 3 Sarais Act calling upon keeper of sarai to register his sarai is not judicial order and is not subject to revision)
 (40) 27 AIR 1940 Cal 30 (31) 1 LR (1939) 2 Cal 532 41 Cri L Jour 442 *Bijoy Krishna v Shyam Narain* (Order of District Magistrate directing the return of a captured elephant to its owner on payment of costs is merely an executive order—No revision)
 (40) 27 AIR 1940 Oudh 416 (416) 41 Cri L Jour 781 *Malomed Ahmad Khan v Emperor* (Order of District Magistrate under S 144 banning procession—Two months after his successor allowing procession subject to certain conditions — Order of successor purely executive order and not one under S. 144 and is not open to revision)
 (39) 26 AIR 1939 All 124 (126 127) 1 LR (1939) All 178 40 Cri L Jour 305 *Mt Hasari v Emperor*
 (Order under S 4, U P Naik Girls Protection Act passed by a District Magistrate)

- (39) 26 AIR 1939 Sind 340 (341) 1LR (1940) Kar 102 41 Cri L Jour 179, *Manghanamal Gianchand v Emperor* (Order by District Magistrate under Rule 17 framed under S 39 A, Bombay District Police Act (4 [IV] of 1890))
- (34) 21 AIR 1934 All 149 (149, 150) 56 All 409 35 Cri L Jour 1296, *Sandai Singh v District Magistrate and Superintendent, Dehry Dun* (Order for execution of warrant under S 7 Extradition Act, is an executive act—A contrary view is held in AIR 1929 Bom 81 53 Bom 149 30 Cr L J 772)
- (34) 21 AIR 1934 Cal 437 (489) 36 Cri L Jour 69 *Nagendra Chandra v Benamali Das* (Order restoring the names of certain persons to the jurors list after the same had been removed from it is an administrative and not a judicial order)
- (30) 17 AIR 1930 Lah 539 (543) 32 Cri L Jour 296 *Abdul Shalur v Mahadeo Parshad* (Order under S 25 of the Police Act 1861 passed by a first class Magistrate is passed in his executive capacity)
- (30) 17 AIR 1930 Sind 162 (163, 164) 31 Cri L Jour 902 24 Sind L R 389 *Secy of State v Gobindram Jaichand Rai* (Order under S 113 (4), Railways Act passed by a Magistrate is only an administrative order)
- (20) 7 AIR 1920 Cal 635 (636) 47 Cal 843 21 Cri L Jour 591, *Karim Bux v Emperor* (Order of District Magistrate directing removal of name from register prepared under S 5 Criminal Tribes Act is in administrative capacity)
- (19) 6 AIR 1919 Mad 610 (610 611) 42 Mad 64 20 Cri L Jour 78 *Arunachallam Pillai v Ponnu swami Pillai* (Administrative orders passed by a District Magistrate cannot be revised by High Court)
- (18) 5 AIR 1918 Lah 302 (302) 19 Cri L Jour 621 1918 Pun Re No 21 Cr *Ahad Shah v Emperor* (District Magistrate acting under S 6 of Act 25 [XXV] of 1867 is not exercising jurisdiction as a Court, civil or criminal, but his proceedings are administrative)
- (15) 2 AIR 1915 Cal 476 (427) 42 Cal 793 16 Cri L Jour 31 *Gullu Sahu v Emperor* (District Magistrate executing an extradition warrant issued under S 7 Extradition Act — Executive act — No revision)
- (07) 6 Cri L Jour 379 (380) 1907 Pun Re No 9 Cr, *Sundar v Emperor* (Order under S 4, Punjab Laws Act requiring foreign vagrants to leave district passed by District Magistrate—Order is executive —No revision)
- (72) 18 Suth W R Cr 67 (68) 10 Beng L R App 4 *In the matter of the petition of Rohoman Sirkar* (Magistrate passing order appointing special constables under S 17 Act 5 [V] of 1861 — Held order was one of purely executive nature)
- (32) 19 AIR 1932 Pat 153 (155) 34 Cri L Jour 346, *Eldeshi Mian v Emperor* (Order refusing to direct the removal of names from a register under the Criminal Tribes Act is passed in executive capacity)
- (18) 5 AIR 1918 Mad 1266 (1270, 1273, 1277) 18 Cri L Jour 239 (239) 39 Mad 1161 (SD) *Mrs Annie Besant v Emperor* (Order under S 3 of the Press Act 1910, cannot be revised)
- (07) 5 Cri L Jour 475 (477) 29 All 563 1907 All W N 168 *In re Dama* (Order passed by a District Magistrate under the rules framed by the Government under S 45(3) of the Code of Criminal Procedure is an executive order)
- (10) 11 Cri L Jour 705 (707) 8 Ind Cas 747 (Bom) *In re Pandurang Shidrao* (Order passed by a District Magistrate under S 44 of the Bombay District Police Act is an executive order)
- (11) 12 Cri L Jour 539 (559) 5 S and L R 51 12 Ind Cas 646 *Imperator v Jaro* (Order under S 3 of the S and Frontier Regulation is an executive order)
- (86) 1896 Pun Re No 21 Cr p 45 (47) *In re A Hadju* (District Magistrate acting under Extradition Rule No 3 Book Circular xxxiv (c) believing the order contained in the rule to give him authority to act as Magistrate—The proceedings and order of the Magistrate held liable to be called for and examined)
- (27) 9 AIR 1922 Sind 21 (21) 15 Sind L R 126 23 Cri L Jour 39 *Safar v Emperor* (Order passed by a Magistrate under S 41 of the Bombay District Police Act (1 [IV] of 1870) is an executive act—The mere fact that there is an enquiry of a judicial nature cannot suffice to give High Court power of revision)
- (18) 5 AIR 1918 Sind 49 (49) 11 Sind L R 113 19 Cri L Jour 534 *Dharmibai v Emperor* (An order passed by a District Magistrate under S 43 of the Bombay District Police Act is an executive order)
- *Dal v Emperor*
- *v Kader Prasad*
of 1920) directing
- that certain huts erected on a disputed char should be sold and the sale proceeds credited to the treasury is not revisable)
- (04) 1 All L Jour 100n (101n) *Narain Singh v King-Emperor*
- (07) 1902 All W N 175 (175), *In the matter of the petition of Sukhdeo Prasad* (Order passed District Magistrate prohibiting petition writers to carry on their business within the precinct District Court is not a judicial act.)

- (1) A Collector directing a *departmental* inquiry into the conduct of a Magistrate³
- (2) A Collector acting in *butwara* proceeding and finding a mukhtear for making false statements in the course of such proceedings⁴
- (3) A District Superintendent of Police as such⁵
- (4) A jury appointed under S 188 of the Code⁶
- (5) The Secretary to the Provincial Government acting under S 4 of the Goondas Act⁷
- (6) A District Registrar⁸

See also the undermentioned cases⁹

Secondly, the proceedings must be that of a *criminal Court*. A criminal Court is one which is constituted as such either under the Code or under any other law for the

(91) 1891 All W N 178 (178) *In the matter of the petition of Bhagelu* (Instructions by Magistrates

Emperor (Order to police as to burial of dead bodies

946 Emperor v Brahmadin (Representations made

by the police to the Magistrate in the form of an official letter is not a part of judicial proceeding)

(10) 11 Cri L Jour 69 (69) 4 Ind Cas 876 (Mad) *K M Chinnaswamy Iyer v Emperor* (Circular of a District Magistrate prohibiting uncertificated pleader from practising in the criminal Courts of the district)

(24) 11 AIR 1924 Lah 55 (58) 4 Lah 1 24 Cri L Jour 664 *Donald v Emperor* (Order of District Magistrate under Lunacy Act (4 [IV] of 1912) is purely executive)

(18) 5 AIR 1918 Lah 219 (220) 1918 Pun Re No 20 Cr 19 Cri L Jour 740 *Gulsar Muhammad v Emperor* (Order of District Magistrate calling on keeper of a press to deposit security is not judicial order)

(94) 1894 Rat 692 (692) *In re Hasbati* (An order duly made by a District Magistrate or Sub-divisional Magistrate under S 48 Bombay District Police Act)

(91) 1891 Rat 540 (540) *Queen Empress v Kaji Sultan* (Order duly made by a District Magistrate under S 43 Bombay District Police Act.)

(26) 13 AIR 1928 Sind 57 (58) 20 Sind L R 63 26 Cri L Jour 1263 *Yusufali Lachmanji v Emperor* (Order directing issue of warrant for levy of port trust dues)

[See (41) 28 AIR 1941 Pat 895 (397) 42 Cri L Jour 504 194 Ind Cas 94 *N L Carrick v Emperor* (Magistrate's action in taking cognizance and transferring a case for trial is a judicial matter)]

[But see (10) 11 Cri L Jour 514 (515) 13 Oudh Cas 198 7 Ind Cas 612, *Prag Tewari v Emperor* (Executive act of revenue officer was revised.—It is submitted that the decision is not correct)]

(96) 3 Cri L Jour 112 (114) 2 Cal L Jour 619 10 Cal W N 222 *Mulfat Ali v Emperor* (Where High Court interfered with order of District Registrar in departmental enquiry)]

When an executive order is the foundation of a judicial proceeding as where the order is disobeyed and the person is sought to be punished for disobedience, the Court can in such proceeding decide on the validity of such order. See

(38) 25 AIR 1938 Bom 338 (339, 340) 1 L R (1938) Bom 403 39 Cri L Jour 792 176 Ind Cas 839

Alla Datta v Emperor
Manghanmal Gianchand

v Emperor

(96) 3 Cri L Jour 256 (268) 10 Cal W N 322, *Umee Chandra Gupta v Emperor*

(81) 6 Cal 88 (90) *Empress v Surjanarain Dass*

(31) 18 AIR 1931 Bom 514 (515) 33 Cri L Jour 169 *Emperor v Anna Vishoba*

3 (28) 15 AIR 1928 Bom 390 (391, 392) 29 Cri L Jour 1063 *In re Lazminarayan*

4 (89) 10 Cal L Rep 14 (14) *In the matter of Dianut Hosen*

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mpuribata Gosari (It seems to have been assumed that

Bania v Emperor
y v Emperor
1371
he v Emperor

9 (80) 1890 Pao Re No 13 Cr, p 24 (25) *Empress v Said Javan* (Order of Deputy Commissioner referring a question of innocence or guilt of an accused to a Council of Elders under Regn 4 [IV] of 1873 and the conviction of the accused by such Council are not judicial proceedings)

(79) 1879 Pon Re No 11 Cr p 30 (32, 33) *Dost Mahomed v Crown* (Do)

time being in force. A Magistrate appointed under this Code is when acting as such Magistrate judicially a criminal Court whose action can be revised under this section¹⁰. A Magistrate appointed under S 531 of the Calcutta Municipal Act 1923 for the trial of offences under that Act¹¹ a Magistrate acting under S 221 Madras Local Boards Act¹² a Court acting under S 3 Eastern Bengal and Assam Disorderly Houses Act¹³ or a Court acting under s 30 of the Frontier Crimes Regulation (s IIII) of 1901¹⁴ or a panchayat constituted under the Bihar and Orissa Village Administration Act 1922¹⁵ is a criminal Court whose proceedings are open to revision under this section. But when a Magistrate though appointed under the Code does not act as such Magistrate but under a special power conferred by a special Act which does not itself constitute him a criminal Court his action is not that of a criminal Court and cannot be revised under this section¹⁶. A

- 10 (41) 28 AIR 1941 Pat 548 (549 550) 43 Cri L Jour 110 197 Ind Cas 74 Bihar Municipality v Ramnanda Kuer (Magistrate acting under S 199 Bihar and Orissa Municipal Act acts judicially)
 (19) 6 AIR 1919 Bom 93 (93) 43 Bom 864 20 Cri L Jour 709 In re Dinbas Jijibhoi Khambata (The Magistrate referred to as such Magistrate in S 161 (2) Bombay District Municipalities Act (3 IIII) of 1901) is an inferior criminal Court)
 (33) 20 AIR 1933 Bom 59 (61) 34 Cri L Jour 239, In re Hornaman (Railways Act (9 [IX] of 1890) S 113—Under S 113 Magistrate functions judicially—Hence his order can be revised by High Court under Criminal Procedure Code)
 (91) 1891 Pun Re No 13 Cr p 41 (43) A Grey v North Western Railway Administration (Magistrate's proceedings under S 113 Railways Act 1890 held open to revision)
 (28) 15 AIR 1908 Bom 117 (119) 52 Bom 262 29 Cri L Jour 513 Pandurang S Katti v Minnie Katti (Order of Chief Presidency Magistrate under S 7 Maintenance Orders Enforcement Act 1921)
 (20) 7 AIR 1900 Cal 731 (736) 22 Cri L Jour 25 Aloke Mohan Saha v Narayanganj Municipality (An order by Magistrate under S 202 Bengal Municipal Act (1884) is a judicial proceeding)
 (18) 5 AIR 1918 Cal 485 (485) 18 Cri L Jour 886 Umesh Chandra v Satish Chandra (Granting or withholding consent to withdrawal of prosecution under S 494)
 (09) 11 Cri L Jour 17 (18) 1909 Pun Re No 9 Cr 4 Ind Cas 611 Mangas Ram v Emperor (Order imposing fine under S 283 Cantonment Code)
 (90) 23 Cal 421 (423) Queen Empress v Ashwin Kumar Ghose (Order imposing fine under S 8

trate hearing an appli

(1900) 4 Cal WN N 825 (826) Shashiram v Queen Empress

Per Bh de J. — It is not necessary for the purposes of S 439 Cr P C, that the District Magistrate should be acting as a Court. }

- 11 (25) 12 AIR 1905 Cal 1251 (1253) 32 Cal 962 26 Cri L Jour 1533 Ram Gopal Gaenka v Corporation of Calcutta
 12 (28) 15 AIR 1908 Mad 495 (496) 29 Cri L Jour 389 Rangesa Rao v Swaminatha Iyer
 (24) 11 AIR 1914 Mad 669 (670) 25 Cri L Jour 352 47 Mad 381 In re Punya Syamalo
 (23) 10 AIR 1903 Mad 275 (275) 24 Cri L Jour 464 Punya Syamalo v Emperor
 13 (10) 11 Cri L Jour 112 (113) 37 Cal 287 5 Ind Cas 323 Payani Khemtalwal v Emperor
 14 (30) 19 AIR 1932 Lah 436 (437) 33 Cri L Jour 333 15 Lah 585 Mt Sahas v Emperor
 15 (41) 28 AIR 1941 Pat 169 (171) 42 Cri L Jour 434 193 Ind Cas 491 Goni Mahlon v Emperor

Emperor (Order under S. 4, U P Nalk Girls Protection Act, passed by District Magistrate & following rules as to enquiry prescri Criminal Procedure Code and Evidence Act—No re

village panchayat constituted under the U P Village Panchayat Act (6 [VI] of 1920) is not a criminal Court¹⁷ See also S 6 Note 4

A Justice of the Peace appointed under S 22 of the Code is not a criminal Court within the meaning of S 6 of the Code and his proceedings are not open to revision under this section¹⁸

A *civil* or *revenue* Court is not a *criminal* Court even though it can exercise some of the powers specified under this Code. Thus, an order passed by a civil or revenue Court under S 195 or S 476 of this Code is not an order of the criminal Court¹⁹. Similarly, a

(39) 26 AIR 1939 Sind 340 (341) 1 L R (1940) Kat 102 41 Cri L Jour 170 *Manghanmal Gianchand v Emperor* (District Magistrate acting as an executive officer in the exercise of powers conferred upon him under S 39A Bombay District Police Act)

(33) 20 AIR 1938 All 281 (281 283) 34 Cri L Jour 1105 *Municipal Board Benares v Ram Sahas Gupta* (U P Municipalities Act 1916 S 160 — District Magistrate entertaining and deciding appeal purporting to act under S 160)

(29) 16 AIR 1909 All 931 (932) 30 Cri L Jour 1159 *Madusudan Lal v Emperor* (District Magistrate exercising jurisdiction under Election Rules does not act as criminal Court and no revision lies from his order)

(23) 10 AIR 1923 All 149 (149) 45 All 135 24 Cri L Jour 597, *Chhotey Lal v Chhedai Lal* (District Magistrate acting under Police Act is not a Court — No revision)

(07) 9 Bom L R 1347 (1348) 6 Cri L Jour 425 *In re Dalsukhram Hurgovindas* (Under S 86 Bombay District Municipal Act (3 [111] of 1901) Magistrate hearing an appeal is merely an appellate authority having jurisdiction on given by the Act)

(15) 2 AIR 1915 Mad 960 (367) 38 Mad 581 15 Cri L Jour 593 *Vijayaraghavalu Pillai v Emperor* (Presidency Magistrate authorized to enquire into the fitness of candidate for election under S 413 Madras City Municipal Act 1904 is not a Court subject to the superintendence of High Court)

17 (88) 28 AIR 1939 Oudh 143 (144) 14 Luck 593 40 Cri L Jour 338 180 Ind Cas 147 (DB) *Badrinath v Sheopali*

(24) 11 AIR 1924 All 265 (265 267) 46 All 167 25 Cri L Jour 1890 *Sat Narayan v Sarju* (Not a criminal Court according to Stuart J but according to Kanhaiyalal J not a Court subordinate to the High Court under S 528 of the Code — It is submitted that the view of Stuart J is not correct) [But see (26) 18 AIR 1928 All 27 (28) 48 All 23 27 Cri L Jour 19 *Kamalpathi Panik v Emperor*]

18 (70) 14 Suth W R Cr 79 (80) *Kallj Prosonno Chatterjee v O A Guise*

19 (20) 7 AIR 1900 Nag 148 (147) 16 Nag L R 23 21 Cri L Jour 270 *Babulal v Emperor* (Order passed by civil Court under S 476 Cr P C)

(26) 13 AIR 1926 All 229 (230) 27 Cri L Jour 278 *Bantoari Lal v Jhunka* (Do)

(06) 28 All 554 (558 561) 3 Cri L Jour 400 1906 All W N 103 3 A L J 394 *Saligram v Ramji Lal* (Overruling 1 Cri L Jour 120 26 All 1)

(02) 1902 All W N 202 (202) *Emperor v Muhammad Khan* (Revenue Court passing order under sect on 476)

(21) 8 AIR 1921 All 365 (366) 43 All 180 22 Cri L Jour 236 *Raj Kunwar v Emperor* (Civil Court taking action under S 476)

(26) 13 AIR 1926 All 577 (578) 27 Cri L Jour 1021, *Emperor v Ram Narain* (Do)

(95) 2 Weir 541 (541)

(95) 2 Weir 602 (603) 5 Mad L Jour 296 *Ramachandra Rao v Subramaniya Pillai*

(01) 4 Oudh Cas 96 (97) *Ram Adhim v Durga* (But Court treated the application as one under S 115 Cr P C)

(14) 1 AIR 1914 Oudh 220 (225 228) 17 Oudh Cas 25 15 Cri L Jour 217 *Thakur Das v Emperor* (Proceeding under S 476 Cr P C may possibly be considered to be one of a quasi criminal nature — But a civil or revenue Court making an enquiry under that section preliminary to a prosecution does

v *Madhuri Saran*

679 *Lachman Prasad v Emperor*

our 178 *Ruktu Singh v Emperor*

(Revenue Court)

(31) 18 AIR 1931 Pat 411 (412) 33 Cri L Jour 147 *Jagannath Acharya v Rajagopalachari* (Held

n *Chern v So Okara*
n *Moins Das*
ler of *Bhup Kunwar*

civil Court taking proceedings against a suitor for contempt is not a criminal Court²⁰ It has, however, been held in the undermentioned cases²¹ that, when exercising jurisdiction under the Criminal Procedure Code, even the civil or revenue Court must for the purposes of this section, be deemed to be a criminal Court. It is submitted that this view is not correct. As has been seen already, a criminal Court must be constituted as such, either under the Criminal Procedure Code or under some other law for the time being in force. The test is not the nature of the proceeding before the Court at a given time, but the nature of the Court by which that proceeding is held²². In the undermentioned case²³ a Full Bench of the Bombay High Court, without holding that a civil Court taking proceedings of a criminal nature is a criminal Court, held that such proceedings are subject to the revisional jurisdiction of the High Court under S 439. The decision proceeds on the ground that S 439 is wider than S 435 and though the latter section applies only to criminal Courts, S 439 applies to any proceeding of a criminal nature although the Court before which such proceeding may take place is not a criminal Court.

See also S 195 Note 23 and S 476B, Note 13

8 The Court whose proceedings are revised must be an inferior Criminal Court — Explanation — Under the Code of 1861 the High Court could call for the record of the criminal proceedings of any Court within its jurisdiction (S 401), while the Court of Session and the District Magistrate could call for the record only of a Court immediately subordinate to such Court or Magistrate (S 484). It was held that a subordinate Magistrate was not immediately subordinate to the Sessions Judge and that

- (04) 1 Cri L Jour 706 (707) 1901 All W N 170 1 All L J 491, *Durga Prasad v King Emperor*
 (07) 6 Cri L Jour 330 (331) 1907 All W N 277 4 All L J 701 *Abdul Raoof v Emperor*
 (15) 2 AIR 1915 Cal 457 (458) 16 Cri L Jour 236, *Deputy Legal Remembrancer & Public Prosecutor, B & O v Ram Udar Singh* (Order refusing sanction to prosecute by civil Court is not order of criminal Court)
 (09) 9 Cri L Jour 24 (24) 4 Low Bur Rul 339, *San Gaing v Emperor*
 (09) 9 Cri L Jour 89 (40) 31 All 89 1 Ind Cas 569, *Mashar Hasan v Saeed Hasan*
 (09) 10 Cri L Jour 895 (397, 405) 3 Ind Cas 826 3 Sind L R 66 *Emperor v Deumal* (Order of an

Court of District Munsif)

- (06) 8 Cri L Jour 400 (407) 3 All L Jour 394 1906 All W N 103 (FB) *Salig Ram v Ramji Lal*
 (Dissenting from 26 All 1 1 Cri L Jour 120)
 (08) 7 Cri L Jour 416 (417) 4 Low Bur Rul 139 *Ramsan Ali v Opporno Charan Chowdry*
 [See (18) 5 AIR 1918 All 329 (329) 40 All 144 19 Cri L Jour 201 *Ram Sahai v Emperor* (Revenue Court taking act on under S 476—High Court has no jurisdiction to interfere with the order)]
 20 (19) 6 AIR 1919 All 46 (47) 42 All 26 20 Cri L Jour 615, *Kadhory v Emperor* (Held that High Court had however power under S 107, Government of India Act to revise)
 21 (04) 8 Cri L Jour 351 (354) 4 Nag L R 140, *Shankar Paa v Shaik Daud* (Munsif acting under S. 195 is a criminal Court)

- (91) 1-21 Jan 1 e No. 13 Cr p 41 (43) *A Grey v North Western L.J. Administration* (Do)
 23 (3-) 25 AIR 1933 1 com 2-5 (2-7) 39 Cri L Jour 465 1 L R (193-) P 231 (FL) *E Ilatu Sadu Ma* (Order of civil Court under S 476B can be revised by High Court)

the latter could not call for the records of the proceedings held by the former¹ It was also held that the words 'immediately subordinate' did not refer to the *judicial powers* of the Magistrate and that all Magistrates in the district were *immediately subordinate* to the District Magistrate²

Under the Code of 1872 the High Court as well as the Court of Session or the District Magistrate could call for the records of the proceedings of all Courts *subordinate* to such Court or Magistrate. It was held in the undermentioned case³ that a committing Magistrate was 'subordinate' to the Court of Session.

The word *inferior* was substituted in the Code of 1882 for the word 'subordinate'. The former is wider than the latter. Being 'subordinate' is necessarily being inferior. A Court statutorily incompetent to hold or exercise equal powers with another is also 'inferior' to the latter even though it is not "*subordinate*" to it. There may be inferiority without subordination but there cannot be subordination without inferiority⁴. Thus a District Magistrate is 'inferior' to the Court of Session, though not *subordinate* to it⁵. A first class Magistrate is necessarily inferior to the District Magistrate inasmuch as under s 17 of the Code he is subordinate to the District Magistrate⁶. A Full Bench of the High Court of Patna has held that as a Special Magistrate under Ordinance 2 [II] of 1942 derives his jurisdiction from the Ordinance he cannot be properly described as an inferior criminal Court and the High Court cannot revise his order⁷. An *Additional* District Magistrate though not subordinate to the District Magistrate except for certain special purposes is nevertheless *inferior* to the latter for the purposes of this section⁸.

A single Judge of the High Court is not inferior to the High Court and the proceedings of the former are not open to revision under this section⁹. A Court cannot sit

Note 8

v Girdhar Dharmdas
Minal Circular No 2 of 1867

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- 2 - - - - -
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- 4 (85) 8 Bom 100 (103) *Queen Empress v Pirya Gopal*
- 5 (43) 80 AIR 1843 Nag 236 (238) 1 L R (1943) Nag 637 44 Cr L Jour 643 207 Ind Cas 431
Abdus Subhan v Gajanan Patrikar
- (16) 8 AIR 1916 Oudh 136 (137) 19 Oudh Cas 108 17 Cr L Jour 293 *Harkaran Singh v Harnam Singh*
- (04) 1 Cr L Jour 1063 (1065) 1904 Pun Re No 15 Cr *Jalloo v Emperor* (Even though specially empowered under S 30)
- (22) 9 AIR 1922 Lah 85 (86) 3 Lah 23 23 Cr L Jour 577, *Kallu v Emperor* (Even in the exercise of his appellate jurisdiction)
- (25) 12 AIR 1925 All 591 (592) 26 Cr L Jour 1282 *Darbani Lal v Emperor*
- (19) 6 AIR 1919 All 258 (260) 41 All 587 20 Cr L Jour 347 *Mansoor Hussain v Emperor*

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- (34) 103 AIR 1018 No 10 Cr P 33 (34) *Warayam v Amir*
- (86) 12 Cal 473 (476) (FB) *Opendra Nath Chose v Dukhna Beua* (Overruling 10 Cal 551)
- (85) 8 Mad 18 (19) 2 Weir 540 (FB) *In the matter of Padmanabha*
- (16) 3 AIR 1916 Nag 97 (98) 12 Nag L B 94 17 Cr L Jour 245 *Yado v Emperor* (Specially empowered Magistrate is inferior to District Magistrate)
- (72) 92 1872 1892 Low Bur Rul 387 (388) *In the matter of a reference by the Judicial Commissioner of British Burma under S 76 Burma Courts Act of 1875*
- (29) 30 Cr L Jour 490 (490) 115 Ind Cas 539 (Lah) *Inder Singh v Emperor*
- (85) 7 All 853 (854) 1885 All W N 257 (FB) *Queen-Empress v Lashari* (Overruling 1884 All W N 286)
- Also see S 350 Note 15
- 7 (43) 30 AIR 1943 Pat 18 (23) 22 Pat 175 44 Cr L Jour 273 204 Ind Cas 451 (FB) *Banwari Gope v Emperor*
- 8 (09) 9 Cr L Jour 104 (104) 1908 Pun Re No 25 Cr *Emperor v Abdul Karim*
[But see (19) 6 AIR 1919 Low Bur 43 (14) 20 Cr L Jour 494, *Emperor v Nawab Ali* (Dissenting from 9 Cr L Jour 104 1908 Pun Re No 25 Cr)]
- 9 (09) 9 Cr L Jour 306 (307) 1 Ind Cas 606 1909 Pun Re No 1 Cr *Hale v Emperor*

in revision upon its own record¹⁰ A Magistrate, other than a District Magistrate specially empowered under § 70, is "inferior" to the District Magistrate¹¹ A Sub divisional Magistrate holding inquiry under § 176 of the Code is a Court inferior to the High Court¹²

Where an appeal under § 47CB preferred before a District and Sessions Judge against the order of a Subordinate Judge was referred by the District Judge to the Assistant Judge, it was doubted by the Bombay High Court whether the Sessions Judge had power under this section to call for the record before the Assistant Judge, inasmuch as the latter was exercising a jurisdiction concurrent with that of the Sessions Judge under § 17 of the Bombay Civil Courts Act of 1869¹³

9. Such inferior Court must be within the local limits of the revising Court's jurisdiction. — The word "situate" means "fixed or located" When applied to a Court, it must be taken to refer to the place where the Court ordinarily sits¹

The dominions of the Sultan of Muscat are not within the local limits of the jurisdiction of the High Court of Bombay and the latter has no criminal revisional jurisdiction over the proceedings of His Majesty's Consul within such dominions² Similarly, Mohurbunj is a place outside British India and the High Court cannot revise proceedings taken by the Superintendent of the Tributary Mahals for offences committed in Mohurbunj³

The special tribunal created by the Defence of India Act is not subject to the appellate jurisdiction of the High Court and its proceedings cannot be revised by the High Court⁴

See also the undermentioned case⁵

10. "Any proceeding" may be called for. — Under the Codes of 1861 and 1872, the revisional powers of the High Court were confined to *judicial* proceedings¹ A proceeding, therefore, which was not judicial was held not to be open to revision under

(1909) 9 Cr L Jour 378 (379) • 1 Ind Cas 747 : 1909 Pun Re No 4 Cr, *Press v Emperor*

Atamelammal

(So assumed JJ)

12. (140) 27 AIR 1940 Rang 69 (70) : 1940 Rang L R 188 41 Cr L Jour 470, *Advocate General v. Mg Chit Maung*

13. (138) 25 AIR 1938 Bom 225 (227) : 39 Cr L Jour 495 I L R (1938) Bom 331 (FD), *Emperor v. Dhatu Sadu Mali* (At the same time it was held that the Sessions Judge could report the matter to the High Court)

Note 9

1. (106) 4 Cr L Jour 443 (445) • 30 Mad 136 : 16 Mad L Jour 441, *Ambu Podural v Emperor*

2. (1900) 24 Bom 471 (472) : 1 Bom L R 840, *In re Rattansing Parshotam*.

to whether Mohurbunj is within British India or

591 • 19 Cr L Jour 833 (F B), *Sheo Nandan*

am Chetty v. Pennappa Mudali. (Sanction to prosecute granted — Sessions Judge in revision staying proceedings started against the accused before a Magistrate outside his local limits — Order is ultra vires)

Note 10

1. (167) 4 Bom H C R A C J 153 (154), *Dapuji Jagjiwan v Magistrate of Kheda*.

(182) 1882 All W N 92 (92), *Ram Gopal v. Sheo Khatal*

the Code² Thus, a proceeding under s 518 of the Code of 1872, which by s 520 of that Code was expressly declared not to be a judicial proceeding, was held not to be open to revision under the Code³

The word "judicial" was omitted in the Code of 1882 and it was provided that any proceeding of a criminal Court could be revised.⁴ It would seem to follow from this that, provided a proceeding is that of a criminal Court, it would be open to revision, irrespective of the nature of the proceeding⁵ Thus, a proceeding under

to expel B from the City as being a prostitute)

('76) 1 All 1 (7, 8) (FB), *Queen v. Gholam Ismail*, (Per Turner, Offg. C J, and Pearson, J)

('81) 1881 Pun Re No 40 Cr, p 101 (102), *Empress v Suleman Khan*

('83) 3 Cal 742 (752, 753), *In the matter of Trylokhanath Biswas*.

('83) 1883 All W N 25 (25), *In the petition of Shere Ali*

[See ('72) 18 Suth W R Cr 22 (22), *Lalla Mitterjeet Singh v Rajcoomar Sirkar*. (Order under S 62 of the Code of 1861)]

[See also ('81) 6 Cal 88 (90), *Empress v Surjanarain Dass*. (Order by executive officer — Judicial Courts cannot question the legality of such order)]

3, ('82) 8 Cal 580 (582) : 11 Cal L Rep 414, *Bradley v Jameson*.

('80) 1880 Pun Re No 2 Cr, p 3 (7), *Hariamal v Empress*

('78) 1878 Pun Re No, 33 Cr, p 79 (81), *Mt. Faizulnissa v. Fais Mahomed*. (Order even if without jurisdiction is not open to revision)

('75) 1875 Pun Re No 17 Cr, p 23 (24), *Abdul Kadar v. Crown*.

('74) 22 Suth W R Cr 52 (54), *In re Afsoo*

('73) 20 Suth W R Cr 53 (54), *Bholanath Bose v Komuriddin*

('77) 1877 Rat 129 (129) (Order passed by first class Magistrate under S 518, Criminal P C, 1872)

('74) 6 N W P H O R 18 (18), *In re Mokut Singh*

('75) 24 Suth W R Cr 80 (81), *Goshain Luchman v Pohoop Narain* (Order open to revision under Charter Act)

('77) 2 Cal 293 (295) (FB), *In the matter of the petition of Ohunder Nath Sen* (Cannot be revised even under Charter Act)

('76) 14 Suth W R 46 (49, 50) (FB), *Abbas Ali Choudhry v Illam Meah*

('76) Weir 3rd Edn 735 (736)

('81) 3 Mad 354 (357) : 2 Weir 90, *Ramannuja Jeeyarswami v Ramannuja Jeeyar*.

('79) Weir 3rd Edn 761 (762)

('76) 14 Suth W R 46 (49, 50) (FB), *Abbas Ali Choudhry v Illam Meah*

('76) 14 Suth W R 46 (49, 50) (FB), *Abbas Ali Choudhry v Illam Meah*

('76) 14 Suth W R 46 (49, 50) (FB), *Abbas Ali Choudhry v Illam Meah*

Elhnath (Order under S 62 of 1862

Where, however, the Magistrate acted in excess of the powers given by S. 518, it was held that the case did not fall within S 520 and therefore was a judicial proceeding which was revisable See the following case :

('77) 1 Cal L Rep 58 (61), *In the matter of Krishna Mohun Dyzack*.

4. ('25) 12 AIR 1925 Mad 39 (40) 47 Mad 722 : 25 Cr L Jour 1009, *Ramanathan Chettiar v. Sudrama Subramanya Iyer*.

S. 110,⁶ S. 514 or S. 515,⁷ S. 517⁸ of the Code or a proceeding for granting bail,⁹ or even an administrative proceeding¹⁰ can be revised under this section. A proceeding dealing with a question in the nature of a civil liability such as a proceeding under S. 488 of the Code is also revisable under this section.¹¹ A contrary view, namely, that the proceeding must be a criminal proceeding has, however, been held in the undermentioned cases.¹² It is submitted that this view is not correct.

It has been held that the order of a District Magistrate rejecting an application for transfer of a case under S. 523 is not open to revision.¹³

11. Revision of proceedings under sections 143, 144 and 176 and under Chapter XII.—As has been seen in Note 10, the High Court could, under the Codes of 1861 and 1872, revise only *judicial* proceedings. Under S. 520 of the Code of 1872, it was specifically provided that orders under Ss. 518 and 519 of that Code corresponding to Ss. 144

Railways Act, 1890, conducted as judicial proceedings—*Held*, the proceedings could be revised even if they had not been judicial.)

[But see (84) 6 All 487 (484) : 1981 All WN 211, *Empress v. Sheodihal Ras* (Non judicial proceedings, not revisable)]

(06) 3 Cri L Jour 256 (261, 269) : 10 Cal WN 322, *Umes Chandra Gupta v. Emperor*, (Order not judicial, no interference)

(92) 1892 All WN 236 (236, 237), *In the matter of the petition of Har Chandra Lal*, (Order must be in a judicial proceeding)

(22) 9 AIR 1922 Lah 148 (147) : 2 Lah 305 : 23 Cri L Jour 113, *Ali Hussain Khan v. Harcharandas*, (Court granting sanction under S. 197 is not a judicial act and no revision lies therefrom)]

6, (23) 10 AIR 1923 All 596 (596) : 24 Cri L Jour 593, *Ashiq Ali v. Emperor*.

7, (05) 2 Cri L Jour 131 (132) : 1905 Pun Re No. 15 Cr, *Masla v. Emperor*.

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passing administrative order)

11 (63) 5 Bom HCR 81 (92), *Beg v. Thaku* (An order for maintenance is a judicial proceeding)

[See (19) 6 AIR 1919 Bom 159 (159) : 43 Bom 607 : 20 Cri L Jour 316, *Devappa Ramappa v. Emperor*, (High Court can revise order under Workmen's Breach of Contract Act (1859), S. 2 (1))]

12 (14) 1 AIR 1914 Lah 339 (400) 1914 Pun Re No. 18 Cr 15 Cri L Jour 601, *Sadrudin v. Emperor*, (Proceeding under S. 36, Legal Practitioners Act, neither criminal nor civil—Neither procedure applies—High Court interferes under its general powers)

(09) 21 All 181 (182) 1899 All WN 15, *In the matter of the petition of Madho Ram*, (The proceeding was however that of a Civil Court)

(09) 10 Cri L Jour 443 (444) : 1909 Pun Re No. 11 Cr, 3 Ind Cas 977, *Mansingh v. Emperor*, (Do)

(88) 1889 Pun Re No. 41 Cr, p. 105 (105, 106), *Jaimal Singh v. Lala Bhagwan Das*, (Proceeding under S. 14, Legal Practitioners Act not a criminal proceeding)

(27) 14 AIR 1927 Sind 23 (23) : 21 Sind L R 51 : 27 Cri L Jour 1127, *Karachi Municipality v. Jafferji Tyabji*, (Proceeding under S. 86, Bombay District Municipal Act, 1901, deals with question of civil liability—Therefore not revisable)

(07) 6 Cri L Jour 425 (426) : 9 Bom L R 1347, *In re Dalsukhrum*, (Do)

(28) 15 AIR 1923 Bom 376 (376) : 29 Cri L Jour 1031, *Ahmedabad City Municipality v. Vadilal*

buildings is in the nature of a mandatory injunction of a Civil Court)]

[See also (25) 12 AIR 1923 Rang 140 (140) : 4 Upp Bar Rul 169 : 25 Cri L Jour 111, *Maunji v. Maunji Tom* (Decision seems to assume that the proceeding must be a criminal one, but holds that proceeding under S. 498 is not of a civil nature)]

13 (35) 22 AIR 1935 Rang 446 (446) : 37 Cri L Jour 220, *Mohamed Isahack v. Emperor*.

(24) 11 AIR 1924 Rang 100 (100) : 1 Rang 632 : 25 Cri L Jour 435, *Ashu v. My Po Khan*

Also see S. 528, Note 16

the Code.² Thus, a proceeding under S 518 of the Code of 1872, which by S 520 of that Code was expressly declared not to be a judicial proceeding, was held not to be open to revision under the Code³

The word "judicial" was omitted in the Code of 1882 and it was provided that any proceeding of a criminal Court could be revised.⁴ It would seem to follow from this that, provided a proceeding is that of a *criminal Court*, it would be open to revision, irrespective of the *nature* of the proceeding⁵ Thus, a proceeding under

2 ('80) 1880 Pun Re No. 13 Cr, p 24 (25), *Empress v Sait Jauas* (Conviction of accused by Council of Elders under Frontier Regn 4[IV] of 1873 is not a judicial proceeding and hence not revisable)

('72) 1881 Pun Re No 67 (68) - 10 Beng L R App 4, *In re Rohoman Sirkar*.

('80) 1880 Pun Re No 26 Cr, p 43 (44, 46, 48), *Mt. Bannu v. Empress* (Order by Deputy Commissioner to expel B from the City as being a prostitute)

('76) 1 All 1 (7, 8) (FB), *Queen v. Gholam Ismail* (Per Turner, Offg. C J, and Pearson, J)

('81) 1881 Pun Re No 40 Cr, p 101 (102), *Empress v Suleiman Khan*

('78) 3 Cal 742 (752, 753), *In the matter of Trylokhanath Biswas*.

('83) 1883 All W N 25 (25), *In the petition of Shere Ali*

[See ('72) 18 Suth W R Cr 22 (22), *Lalla Mitterjeet Singh v Rajcoomar Sirkar*, (Order under S 62 of the Code of 1861)]

[See also ('81) 6 Cal 88 (90), *Empress v Surjanarain Dass* (Order by executive officer — Judicial Courts cannot question the legality of such order)]

3, ('82) 8 Cal 580 (582) ; 11 Cal L Rep 414, *Bradley v. Jameson*

('80) 1880 Pun Re No 2 Cr, p 8 (7), *Harimal v. Empress*

('78) 1878 Pun Re No, 33 Cr, p 70 (81), *Mt Farzulaissa v. Fais Mahomed*, (Order even if without jurisdiction is not open to revision)

('75) 1875 Pun Re No 17 Cr, p 23 (24) *Abdul Kadar v Crown*.

('74) 22 Suth W R Cr 52 (54), *In re Afzoo*

al P C, 1872)

('75) 24 Suth W R Cr 30 (31), *Goshain Luchman v. Pohoop Narain* (Order open to revision under Charter Act)

('77) 2 Cal 293 (295) (FB), *In the matter of the petition of Chunder Nath Sen* (Cannot be revised even under Charter Act)

('70) 14 Suth W R 48 (49, 50) (FB), *Abbas Ali Choudhry v Illim Meah*

('78) Weir 3rd Edn 735 (736)

('81) 3 Mad 854 (357) ; 2 Weir 90, *Ramanuja Jeeyarsami v Ramanuja Jeeyar*.

('79) Weir 3rd Edn 761 (762)

('79) Weir 3rd Edn 763 (763), *In re Seem Nyna Mohidin*

('72) 17 Suth W R Cr 37 (38), *Sheikh Laloo v Adam Sirkar*.

('74) 22 Suth W R Cr 78 (78), *Chunder Coomar Roy v Omesh Chander Mozoomder*.

('74) 21 Suth W R Cr 22 (23), *Arsanoolah v Nozir Mullick*

v. Queen

Eknath (Order under S 62 of 1861)

Where, however, the Magistrate acted in excess of the powers given by S 518, it was held that the case did not fall within S 520 and therefore was a judicial proceeding which was revisable See the following case :

('77) 1 Cal L Rep 58 (61), *In the matter of Krishna Mohun Bysack*.

4. ('25) 12 AIR 1925 Mad 39 (40) 47 Mad 722 . 23 Cri L Jour 1009, *Ramanathan Chettiar v. Sivarama Subramanya Iyer*.

('03) 1903 Pun Re No 23 Cr, p 57 (60, 61) ; 1903 Pun L R No 130, *Din Mohammad v Municipal Committee, Amritsar* (High Court has power to revise an order passed by a Magistrate granting or

re-arrest (Where a der relating to such

... Howing 8 Cri L Jour

... eeding under S 113.

S. 110⁶ S. 514 or S 515⁷ S 51⁶ of the Code or a proceeding for granting bail⁹ or even an administrative proceeding¹⁰ can be revised under this section. A proceeding dealing with a question in the nature of a civil liability such as a proceeding under S 488 of the Code is also revisable under this section¹¹. A contrary view namely that the proceeding must be a criminal proceeding has however been held in the undermentioned cases¹². It is submitted that this view is not correct.

It has been held that the order of a District Magistrate rejecting an application for transfer of a case under S 528 is not open to revision¹³.

11 Revision of proceedings under sections 143, 144 and 176 and under Chapter XII — As has been seen in Note 10 the High Court could under the Codes of 1861 and 1872 revise only judicial proceedings. Under S 520 of the Code of 1872 it was specifically provided that orders under Ss. 518 and 519 of that Code corresponding to Ss 144

Railways Act 1890 conducted as judicial proceedings — Held the proceedings could be revised even if they had not been judicial.)

[But see (84) 6 All 487 (483) 1894 All WN 214 *Eupress v Sheodihal Ras* (Non judicial proceedings not revisable)]

(06) 3 Cri L Jour 256 (261 269) 10 Cal W N 327 *Umes Chandra Gupta v Emperor* (Order not judicial no interference)

(92) 1892 All W N 236 (236 237) *In the matter of the petition of Har Chandra Lal* (Order must be in a judicial proceeding)

(27) 9 AIR 1920 Lah 146 (147) 2 Lah 303 23 Cri L Jour 113 *Ali Hussain Khan v Harehara das* (Court granting sanction under S 197 is not a judicial act and no revision lies therefrom)]

6 (23) 10 AIR 1923 All 596 (596) 24 Cri L Jour 593 *Ashiq Ali v Emperor*

7 (03) 2 Cri L Jour 131 (132) 1903 Pun Re No 15 *Cr Mast v Emperor*

8 (83) 2 Weir 538 (539) *In re Gangamma*

[See also (44) 31 AIR 1914 Oudh 310 (311) 46 Cri L Jour 756 270 Ind Cas 437 *Dost Mohammad v King Emperor* (Order under S 517 Cr P C — Application against order made to High Court under S 520 — Application held could be treated as revision application under S 435)]

(06) 3 Cri L Jour 466 (467) 3 Cal L Jour 573 *Karimuddin Fakir v Naimuddin Kaviraj*

9 (25) 12 AIR 1923 Nag 273 (230 231) 25 Cri L Jour 1363 *Local Government v Gulam Jilani* (Sect on 497 (5) or S 498 does not bar operation of this section)

10 (10) 11 Cri L Jour 112 (113) 37 Cal 287 *Rajani Kishita Wali v Emperor* (Court as such

Jaffery, Tyabji (Proceeding under S 86 Bombay District Municipal Act 1901 deals with question of civil liability — Therefore not revisable)

(07) 6 Cri L Jour 475 (426) 9 Bom L R 1347 *In re Dalsukhran (Do)*

ceeding under S 498 is not of a civil nature]]

13 (35) 22 AIR 1935 Rang 446 (446) 37 Cri L Jour 270 *Mohamed Iskhur v Emperor*

(21) 11 AIR 1924 Rang 100 (100) 1 Pan 639 25 Cri L Jour 435 *Ashu v M J Poo L...*

Also see S 528 Note 16

and 143 of the present Code were not to be considered as judicial proceedings. In that view it was held that an order under s 518 was not revisable by the High Court.¹ All other orders such as orders corresponding to s 145 were open to revision.²

The Code of 1882 did not enact any provision corresponding to s 520 of the older Code, but added a paragraph in s 435 to the effect that orders made under ss 143 and 144 and proceedings under s 176 were not proceedings within the meaning of s 435. Such proceedings could not therefore be revised.³ Proceedings under Chapter XII of the Code were not excluded from revision.⁴

Under the Code of 1898 as it stood before the amendment of 1923 proceedings under chapter XII were also added to the list of orders and proceedings which were declared not to be proceedings within the section. Before the amendment of 1923, therefore an order under ss 143 and 144⁵ and proceedings under chapter XII⁶ or s 176 could not be revised. It was however held in numerous decisions that where the Magistrate purporting to act under those sections acted really without jurisdiction and not in conformity with the requirements thereof the proceeding was really not one within those sections and could

Note 11

- 1 See the cases cited in foot note (3) to Note 10
 2 (89) 5 Cal L Rep 209 (298) *In the matter of Chutrapal Singh* (Order under Sect on 530 (S 145))
 (81) 7 Cal L Rep 352 (353) *Uma Churn Santra v Beni Madhub Roy* (Do)
 (78) 4 Cal 378 (379) *Vachensie v Shere Bal door Sahi* (Do)
 3 (96) 18 Mad 18 (19) 2 Weir 591 5 Mad L Jour 249 *Queen Empress v Tirunaranmha Chari*
 (Sect on 144)
 (96) 1896 Rat 843 (844) *Queen Empress v Bayaj Lazman* (Inquest by a Magistrate into the cause of death)

Sect on 144)
asarij Iyer (Do)

- (83) 2 Weir 118 (119) *Hanumanappa v Hussain Saib*
 (85) 11 Cal 865 (872 873) *Ambler v Puslong*
 (84) 7 Mad 460 (466) 2 Weir 101 *Subba Nayak v Trincaal*
 (80) 18 Mad 41 (42 43) 2 Weir 190 *Agra Bank Ltd v Leishman*
 5 (92) 4 Bom L R 532 (584) *In re Vasudeo Apaji*
 (20) 7 AIR 1920 Bom 867 (387) 22 Cri L Jour 521 *In re Sir Gowasji Jehangir*
 6 (22) 8 AIR 1922 All 99 (190) 23 Cri L Jour 205 *Mohendra Singh v Mt Rajpati*
 (22) 9 AIR 1922 All 31 (31) 23 Cri L Jour 303 *Babu Singh v Angnu Kewal*
 (16) 3 AIR 1916 Pat 396 (396) 17 Cri L Jour 348 *Nemdhari Singh v Ram Tahal Rai* (Proceedings for the award of costs under S 148)
 (14) 1 AIR 1914 S nd 8 (9) 8 S nd L R 207 16 Cri L Jour 235 *Farid Imambuz v Piru Kauro*
 (15) 2 AIR 1915 Oudh 208 (209) 18 Oudh Cas 69 16 Cri L Jour 541 *Ibad Ullah Khan v Rahat Ullah Khan*
 (05) 2 Cri L Jour 236 (237) 2 All L Jour 274 *Baldeo Baksh Singh v Raj Ballam Singh*
 (04) 7 Oudh Cas 334 (335) 1 Cri L Jour 1055 *Bidya Dhar v Jagdish Persad*
 (05) 12 AIR 1925 Oudh 286 (266) 26 Cri L Jour 70 *Mahamed Ayub v Sarfaraaj Alamad* (Case decided before amendment of 1923)
 (04) 1 Cri L Jour 737 (742) 2 Low Bur Bul 239 (FB) *King Emperor v Kyan Baw*
 (29) 9 AIR 1922 Lah 454 (455) 23 Cri L Jour 424 *Jhanda Ram v Topan Ram*
 (13) 14 Cr L Jour 223 (224 225) 19 Ind Cas 319 (All) *Sleeraj Singh v Emperor*
 (15) 2 AIR 1915 Mad 27 (27) 15 Cri L Jour 669 *Vaidjanatha Iyer v Suppalu Ammal*
 (16) 3 AIR 1916 Pat 292 (293 294) 1 Pat L Jour 336 17 Cri L Jour 369 (FD) *Parmessar Singh v Kailaspati*
 (00) 6 Cal W N 612 (612) *Janki Misser v Kaila Misser*

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consequently be revised under this section⁷ There was also a difference of opinion as to

- (09) 9 Cri L Jour 38² (383) 31 All 150 1 Ind Cas 762 *Jhngai Singh v Ram Parlap*
 (12) 13 Cri L Jour 405 (496) 15 Ind Cas 493 (All) *Shohart Singh v Daryo Singh*
 (06) 3 Cri L Jour 48 (48) 1906 All W N 260 *Har Prasad v Pandurang*
 (07) 5 Cri L Jour 117 (119 119) 1907 All W N 50 4 All L Jour 91 *Bibban Singh v Baldeo Singh*
 (09) 8 Cri L Jour 205 (207) 31 Mad 318 18 Mad L Jour 313 *Keswarayudu v Chalapatirayudu*
 (04) 1 Cri L Jour 333 (34²) 26 All 144 1903 All W N 212, *Maharaj Tiwari v Har Charan Rai*
 (09) 8 Cri L Jour 170 (177) 1 S od L R 50, *Balmukund Jagannath v Emperor* (Failure to exercise jurisdiction is not exceeding jurisdiction on)
 (01) 5 Cal W N clxxxvi (clxxxvii) *Kunja Mahtan v Tilak Goala*
 (01) 1 Cri L Jour 677 (679) 17 O P L R 133, *Murat Singh v Mt Paika Dai*

- 7 (17) 4 AIR 1917 Lah 171 (173) 18 Cri L Jour 660 1917 Pun Re No 40 Cr *Kaku v Harnaman*
 (14) 1 AIR 1914 Low Bur 218 (219) 15 Cri L Jour 500, *Mg Tha Zan v Mg Ba Gale*,
 (14) 1 AIR 1914 Oudh 391 (382) 17 Oudh Cas 263 15 Cri L Jour 668, *Mt Gauhar v Emperor*
 (24) 11 AIR 1924 Pat 145 (147) 24 Cri L Jour 917, *Akal Mahtan v Mahabir Mahtan*
 (20) 7 AIR 1920 Bom 367 (367) 22 Cri L Jour 521 *In re Cowasji Jehangir*
 (22) 9 AIR 1922 Pat 435 (437) 2 Pat 91 23 Cri L Jour 549 (FB) *Chebalak Singh v Kamaruddin*,
 (20) 7 AIR 1920 Pat 245 (246) 21 Cri L Jour 601, *Kailashbehari Lal v Jas Narain Pas*
 (20) 7 AIR 1920 Pat 215 (216) 21 Cri L Jour 646, *Bhairo Gope v, Emperor*
 (18) 5 AIR 1918 Pat 578 (580, 581) 19 Cri L Jour 71 *Ram Sahai v Deonandan Prasad*
 (18) 5 AIR 1918 Pat 228 (229) 19 Cri L Jour 113, *Dansi Singh v Emperor*
 (23) 10 AIR 1923 Rang 211 (211) 1 Rang 53 24 Cri L Jour 740, *Nga Po Tin v Nga Po Soung*,
 (Order not justifiable under the section)
 (22) 9 AIR 1922 All 528 (528) 24 Cri L Jour 85, *Gajraj Singh v Emperor*
 (19) 5 AIR 1919 All 311 (313, 314) 20 Cri L Jour 410 *Brahma Nath v Sundar Nath* (Order under S 145 passed by a Magistrate whose jurisdiction was open to doubt)
 (16) 3 AIR 1918 All 237 (238) 17 Cri L Jour 527, *Sri Deo v Emperor*
 (22) 9 AIR 1922 Oudh 300 (302) 20 Oudh Cas 212 24 Cri L Jour 537 *Surendra Bhairan Singh v, Emperor*
 (18) 5 AIR 1918 Nag 136 (136 137) 20 Cri L Jour 107, *Jaswant v Ramrao*

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v Ram Samaj

- (05) 2 Cri L Jour 222 (224) 2 All L Jour 272 *Bihari Lal v Chajju*
 (05) 2 Cri L Jour 28 (29) 7 Bom L R 18, *In re Sangnbasawa*
 (05) 2 Cri L Jour 451 (452) 7 Bom L R 475 *In re Rasal Jamal*
 (01) 5 Oudh Cas 1 (5) *Wajid Ali Shah v Abdul Ghafur Khan*
 (04) 1 Cri L Jour 774 (774, 775) 31 Cal 635, *Manmathanath Mitter v Baroda Prasad Roy*
 (Assumed)
 (04) 1 Cri L Jour 530 (531) 8 Cal W N 590 *Janu Manju v Manruddin* (Do)
 (04) 1 Cri L Jour 243 (251) 8 Cal W N 373, *Isab Mandal v Emperor* (Yes if order is outside scope of section)

Assumed)

- (22) 9 AIR 1922 Lah 348 (349) 2 Lah 372 23 Cri L Jour 225, *Mt Malan v Makhan Singh*
 (16) 3 AIR 1916 Lah 378 (379) 1916 Pun Re No 22 Cr 18 Cri L Jour 36, *Tarachand v Behari Lal*,
 (03) 1903 Pun L R No 115 p 494 (485) *Mahik Sultan v Mt Rano*
 nath

- (17) 4 AIR 1917 Mad 594 (595) 17 Cri L Jour 217, *Marudanayagam I Illi v Mohamed Routhen*
 (23) 10 AIR 1923 Mad 60 (62) 24 Cri L Jour 100, *Thayayee Ammal v Srirangaraya Goundan*,
 (Yes if without jurisdiction, otherwise under S 207, Government of India Act, 1915)

whether a Chartered High Court could interfere with an order under those sections by

- (23) 10 AIR 1913 Mad 24 (95) 94 Cri L Jour 156 *Shukulathi Ro ether v Gulam Mo deen Ro ether*
 (17) 4 AIR 1917 Pat 23 (99) 19 Cri L Jour 10, *Ballam S ngh v Lal Babu*
 (16) 3 AIR 1916 Pat 418 (400) 17 Cri L Jour 296 *Hardeo Singh v Pam Charister*
 (17) 4 AIR 1917 Pat 145 (146) 19 Cri L Jour 599 *Parthali Singh v Ganapa hy Kuer*
 (20) 7 A 1 R 1910 Cal 344 (345) 21 Cri L Jour 593 *Shri Narayan Mukherjee v Salish Chandra Ghosul*
 (23) 10 AIR 1913 Cal 493 (493) 94 Cri L Jour 569 *Sadek Pess v Sachindra Nath Poy*
 () 9 A I R 1910 Mad 76 (77) 93 Cri L Jour 401 *Muthukumaraswamy Nadar v Muhammad Dowl er*
 (07) 11 Cal W N cccxxx i (cccxix) *Amrit Singh v Mt Lakhpati*
 (02) 6 Cal W N 975 (9 5) *Pam Krista v Aglore Naskar*
 (07) 6 Cal W N 340 (342) *Rai Radha Govind v Mohendra Gar*
 (00) 9 Cal W N 11 (11) *Bartwari Lal v Hridoy Chaf ra arly*
 (99) 4 Cal W N 57 (53) *Kesu v Mata Mollai*
 (01) 5 Cal W N 71 (72) *Kefatullah v Ferusuddin Mial*
 (1900) 94 Bom 5 7 (531 532) 2 Bom L R 81 *In re Pandurang Gor nd*
 (01) 95 Bom 119 (186) 2 Bom L R 75, *In re Pand rung Gornd Pujari*
 (19) 5 A I R 1919 Cal 67 (67) 46 Cal 105, 90 Cri L Jour 648 *Sahadat Khan v Tajaddi Sheikh*
 (19) 6 AIR 1919 Cal 99 (100) 20 Cri L Jour 347 *Ambica Nath v Wajedali Khan Pan*
 (19) 0 AIR 1919 Cal 594 (595) 19 Cri L Jour 951 *Chandra Nath v Emperor*
 (18) 5 AIR 1918 Cal 284 (285 286) 18 Cri L Jour 988 *Prafulla Nath v Hoddings*
 (14) 1 AIR 1914 Cal 812 (812) 13 Cri L Jour 907 *Juthan Singh v Ram Narain Singh*
 (98) 2 Cal W N 577 (573) *Poop Lal Dass v Dar d Manook*
 (97) 19 Cal 177 (131 132) *Ananda Chandra v Carr Stephen*
 (07) 10 Cal W N ccl i (ccl) *Sharafat v Hira Dlar*
 (03) 80 Cal 443 (445) 7 Cal W N 174 *Sukru Dosadh v Pam Pergash Singl*
 (01) 98 Cal 416 (419 450 452) 5 Cal W N 478 *Anesh Mollah v Ejaharuddi Mollah*
 (03) 30 Cal 593 (599) 7 Cal W N 890 *Dunne v Kumar Chandra Kisore*
 (03) 25 All 537 (537) 1903 All W N 107 *Mahadeo Kunwar v Bita*
 (07) 4 All 815 (1317) 1903 All W N 74 *In the matter of the petition of Nail u Mal*
 (0) 5 Cri L Jour 117 (118 119) 1907 All W N 50 4 All L Jour 91 *Babban Singh v Baldeo Singh*
 (0a) 9 Cri L Jour 15 (18) 2 Cal L Jour 149 9 Cal W N 127 *Harananda Ojha v Emperor*
 (10) 11 Cri L Jour 11 (11) 4 Ind Cas 5 7 (Cal) *Ram Aular Sahu v Krishnupat Ram*
 (10) 11 Cri L Jour 61 (62) 4 Ind Cas 860 1909 Pao Re No 19 *Cr Bhanna v Emperor*
 (10) 11 Cri L Jour 422 (423) 6 Ind Cas 905 (Lab) *Haider Ali Shah v Emperor*
 (10) 11 Cri L Jour 353 (353) 84 Mad 138 6 Ind Cas 398 *Pananganti Parthasarathy v Venkata swamy Reddi*
 (09) 9 Cri L Jour 265 (266) 1 S nd L R 95 *Crown v Jamal*
 (09) 9 Cri L Jour 35 (36) 13 Cal W N 104 8 Cal L Jour 564 *Abdur Rauf Mla v Rahmuddi*
 (10) 11 Cri L Jour 79 (790) 8 Ind Cas 897 (Cal) *Kalanand Singh v Rameshwar Singh*
 (12) 13 Cri L Jour 480 (487) 16 Ind Cas 486 40 Cal 105 *Sheobalak Rai v Bhagwat Panday*
 (06) 3 Cri L Jour 199 (201) 10 Cal W N 246 *Aljiteswar Singh v Emperor (Section 144)*
 (06) 3 Cri L Jour 52 (53) 3 All L Jour 13 1905 All W N 278 98 All 266 *Chaurasi v Ramai Shankar*
 (07) 5 Cri L Jour 32 (36) 11 Cal W N 198 *Maharaja Surjakanta v Maharaja Jagadindra Ray*
 (99) 26 Cal 675 (679) 3 Cal W N 461 *Daulat Koer v Rameswary Koery*
 (14) 1 AIR 1914 All 62 (63) 36 All 143 15 Cri L Jour 27 *Ram Lochan v Emperor*
 (08) 8 Cri L Jour 119 (120 121) 35 Cal 774 12 Cal W N 848 8 Cal L Jour 71 *Sajjad Ahmad v Parbatichoran P v*
 (07) 6 Cri L Jour 457 (454) 34 Cal 840 *Kolha Koer v Muneshwar Tewari*
 (07) 6 Cri L Jour 394 (395) 31 Mad 87 17 Mad L Jour 535 9 Mad L T m 108 *Arumuga Goundan v Venkatasubba I er*
 (07) 6 Cri L Jour 291 (292) 13 Bur L B 3 4 Law Bur Rul 75 *Vyrtacan Chetty v Mejjappa Chetty*
 (07) 0 Cri L Jour 113 (114) 1907 Pao Re. No 7 *Cr Abdulla Khan v Gunda*
 (03) 8 Cri L Jour 207 (203) 12 Cal W N 696 *Sheikh Mansur Ali v Ma sallah*
 (03) 8 Cri L Jour 230 (232 233) 12 Cal W N 1041 *Leong Mone v Tekun Chun (Section 144)*
 (12) 13 Cri L Jour 719 (719) 16 Ind Cas 577 (Lab) *Sri Rina v Fauzdar Singh*
 (1900) 27 Cal 918 (921) *Daimula Tal ikdar v Maharula Talukdar*
 (93) 2 Cal 857 (855) 2 Cal W N 593 *Queen Empress v Pratap Candra*
 (96) 23 Cal 80 (87) *S rd Narain Singh v Bray Mohun Thakur*
 (13) 14 Cri L Jour 430 (496) 90 Ind Cas 751 *Dan Pershad v Ganesk Pandey*
 (17) 4 AIR 1917 Pat 193 (194 195) 9 Pat L Jour 63 18 Cri L Jour 756 *Sunder Vall v Jhara Lal*

virtue of its powers of superintendence under s 107 of the Government of India Act, 1915 *

- (17) 4 AIR 1917 Pat 191 (193) 2 Pat L Jour 86 18 Cri L Jour 145 *Hamidul Haq v Atai Hossain*
- (21) 8 AIR 1921 Pat 173 (174) 22 Cri L Jour 616 *Lacmi Ojha v Birja Misser*
- (21) 8 AIR 1921 Pat 176 (178) 22 Cri L Jour 491 *Akub Singh v Darbari Mahlon*
- (24) 11 AIR 1924 Pat 47 (49) 21 Cri L Jour 751 *Hayesul Haq v. Shobrani Jolaha*
- (24) 11 AIR 1924 Pat 589 (591) 3 Pat 258 27 Cri L Jour 220 *Uttim Singh v Jodhan Rai*
- (17) 4 AIR 1917 Pat 264 (266) 18 Cri L Jour 392, *Jatan Singh v Dukhia Singh* (Assumed)
- (1900) 4 Cal W N 779 (780) *Empress v Ganpat Kaluar*
- (07) 6 Cri L Jour 339 (399) 35 Cal 117 6 Cal L Jour 697 12 Cal W N 487, *Balajit Singh v Bhaju Ghose*
- (06) 3 All L Jour 140n (140n) *Behari Lal v King Emperor*
- (17) 4 AIR 1917 Pat 624 (625) 18 Cal L Jour 685 *Hari Prasad Tewari v Seuak Das* (Serious material irregularity — High Court can interfere)
- (04) 1 Cri L Jour 1057 (1056) 7 Oudh Cas 334 *Budya Dhar v Jagadish Pershad* (Doubted)
- [See (17) 4 AIR 1917 Pat 435 (436) 18 Cri L Jour 692 *Mukhal Singh v Ram Sarup Singh* (Mistake in law unless affecting jurisdiction is no ground for interference)]
- (05) 2 Cri L Jour 342 (343) 32 Cal 771 9 Cal W N 621 *Ajayanand Roy v Paresb Nath*
- (05) 2 Cri L Jour 569 (570) 9 Cal W N 909 *Nauab Ahajah Solemolla Bahadur v Ishan Chandra Das*
- (14) 1 AIR 1914 Mad 712 (712) 15 Cri L Jour 362 *Karuppanna v Kandasamy*
- (08) 8 Cri L Jour 387 (388) 8 Cal L Jour 242 *Ram Narain Sahu v Anilash Singh*
- [See also (10) 11 Cri L Jour 194 (194) 4 Ind Cas 1128 (Mad), *Bandala Palli v Moka Subbarayadu* (Section 144)]
- (23) 10 AIR 1923 Lah 46 (47) 23 Cri L Jour 724 *Bawa Bansur v Bawa Jamnagar*
- (22) 9 AIR 1922 Pat 224 (226) 1 Pat 75 23 Cri L Jour 152, *Chulan Mohito v Babu Surendranath Chatterjee*
- (06) 3 Cri L Jour 423 (425) 3 Cal L Jour 478 *Samir Sheikh v Javed Sheikh*
- (10) 11 Cri L Jour 141 (143) 32 All 132 5 Ind Cas 471 *Ganga Saran Singh v Bhagwat Prasad* (Irregularity in exercise of jurisdiction — High Court did not think it expedient to interfere)]
- 8 Cases where the High Court could interfere**
- (21) 8 AIR 1921 Pat 392 (394) 22 Cri L Jour 685 *Madan Lal v Emperor* (Order under S 144 passed without jurisdiction)
- (10) 11 Cri L Jour 449 (449) 7 Ind Cas 343 (Mad) *Venkatroya Gounden v Very Rev N Bondy* (High Court interfered under S 15 of the Charter Act)
- (82) 8 Cal 580 (582) 11 Cal L Rep 414 *Bradly v Jameson* (Order under S 144)
- (Order under S 144 without
- Mosumdar** (High Court can interfere with an order under S 144 under S 15 of the Charter Act especially when it is bad in law)
- (02) 2 Weir 94 (95) *In re Srinivasaraghatachari* (Per White C J)
- (05) 2 Cri L Jour 637 (638) 33 Cal 352 (F B) *Khosh Mahomed Surcar v Nazir Mohamed*
- (05) 2 Cri L Jour 670 (676) 33 Cal 33 10 Cal W N 257 2 Cal L Jour 271 *Aulada Kinkar Roy v Danesh Mir*
- (05) 2 Cri L Jour 679 (680) 32 Cal 1093 2 Cal L Jour 280 *Tara Pada Biswas v Nural Huque Mia*
- (05) 2 Cri L Jour 618 (620) 33 Cal 68 2 Cal L Jour 241 9 Cal W N 1016 (FB) *Sukh Lal Sheikh v Tara Chand Ta*
- (15) 2 AIR 1915 Mad 10 (11) 15 Cri L Jour 509 *Palani Chetty v Rathina Chetty*
- (16) 3 AIR 1916 Mad 662 (663) 38 Mad 489 16 Cri L Jour 629 *Gowinda Chetty v Perumal Chetty* (Order under S 144)
- (10) 7 AIR 1920 Mad 209 (211) 21 Cri L Jour 73 *Gopa a Ay v v Krishnaswamy Iyer*
- (20) 7 AIR 1920 Mad 847 (847) 20 Cri L Jour 705 *Ponnappa Isengar v Sri Panamamalai* (Power to be used only if great injury is caused)
- (23) 10 AIR 1923 Cal 93 (96) 24 Cri L Jour 97 *Aran Sordar v Hara Sundar Mazumdar*
- (21) 8 AIR 1921 Cal 30 (31) 48 Cal 592 22 Cri L Jour 913 (S B) *Pigot v Ali Muhammad Mandat*
- (16) 5 AIR 1916 Cal 901 (904) 18 Cri L Jour 1074 *Iar Muhammad Saha v Hayat Muhammad Saha*
- (1900) 27 Cal 692 (918) 4 Cal W N 613 *Laldhari Singh v Sukdeo Narain Singh* (Abuse of jurisdiction — High Court can interfere)
- (89) 16 Cal 60 (85) *Abacawars Debs v Sidescars Debs*
- (92) 19 Cal 127 (131 132) *Ananda Chandra Bhutachary v Carr Stephen*
- (03) 30 Cal 503 (515) 7 Cal W N 404 *Surajya Kanta Achary v Hem Chunder Choudhury*
- (09) 26 Cal 183 (193) 3 Cal W N 42 *Hurballabh Narain v Lucmeswar Prasad*
- (01) 28 Cal 416 (418) *Jagmohan Lal v Ram Kumar Cope*
- (17) 4 AIR 1917 All 969 (263) 18 Cri L Jour 677, *Nathu Sam v Emperor*

Sub-section (3) has been omitted by Act 18 [XVIII] of 1923, and it is now clear that such proceedings are open to review.

See also S. 144, Notes 12 and 15.

- (102) 24 All 315 (317) : 1902 All W N 74, *In the matter of the petition of Nathu Mal*.
 (113) 14 Cr L Jour 5-9 (5-9) 21 L C 321 (Mal), *Goranda Chetty v. Perumal Chetty* (Order under S. 144).
 (120) 7 AIR 1920 Cal 824 (824) : 22 Cr L Jour 99, *Indian Iron & Steel Co. v. Banco Goyal Texora*.
 Cases where the High Court could not interfere.
 (104) 1 Cr L Jour 339 (342) : 26 All 144 : 1933 All W N 212, *Maharaj Tezari v. Harcharan Bha*.
 (117) 4 AIR 1917 All 220 (221) : 39 All 612 : 18 Cr L Jour 823, *Ma'ulikari Singh v. Jaisari*.
 (117) 4 AIR 1917 All 395 (397) : 18 Cr L Jour 418, *Mu'saddi Lal v. Tarif*.
 (118) 5 AIR 1918 All 186 (187) : 19 Cr L Jour 363 : 40 All 354, *Sunder Nath v. Emperor* (Proceedings lawfully taken under Ch. XII cannot be questioned).
 (117) 4 AIR 1917 Mad 610 (611) : 18 Cr L Jour 23, *Krishappa Naidu v. Alurea Arumal* (Order with jurisdiction will not be interfered with).
 (109) 9 Cr L Jour 392 (393) : 31 All 150 : 1 Ind Ca. 762, *Jhargya Singh v. Rur Parlat* (If within jurisdiction High Court cannot interfere even under the Charter Act).
 (105) 9 Cal W N cxxxix (cxxxix), *Taras Hooladar v. Master Hooladar*. (No, if the orders just and right).
 (115) 2 AIR 1915 Cal 644 (644) : 16 Cr L Jour 315, *Chin'amon Jena v. Jagannath Ramaraja Das*. (No, if not without jurisdiction).
 (104) 12 Cal W N cxxxix (cxxxix), *Keshab Chandra Eer v. Haradon Chatterjee*. (No interference unless want of jurisdiction).
 (103) 30 Cal 112 (114) : 6 Cal W N 417, *Manindra Chandra v. Barada Eantis* (No, unless without jurisdiction).
 9 (43) 30 AIR 1943 Cal 35 (35) : ILR (1942) 1 Cal 4-8 : 44 Cr L Jour 299 : 204 Ind Ca. 370 (DE), *Rashid Aliudina v. Jivandas Khemph*.
 (42) 29 AIR 1942 Lah 171 (171, 172) : ILR (1942) Lah 510 : 43 Cr L Jour 747 : 201 Ind Ca 572 (FE), *Editor, Tribune v. Emperor*.
 (40) 27 AIR 1940 Rang 63 (69) : 1940 Rang L R 1-2 : 41 Cr L Jour 470, *Advocate-General v. Mr. Chit Maung* (Proceedings under S. 176).
 (39) 26 AIR 1939 Pat 208 (207) : 40 Cr L Jour 533, *Kunjo Mandal v. Sargu Ram Mariani* (Order as to costs in proceedings under S. 145 — Duration exercised on wrong principles — High Court will interfere).
 (36) 23 AIR 1936 Nag 271 (272) : 38 Cr L Jour 375 : ILR (1937) Nag 174, *Emperor v. Samratil*. (High Court can interfere in revision in cases where finding of possession in proceedings under S. 145 is manifestly wrong).
 (26) 13 AIR 1926 Pat 196 (197) : 27 Cr L Jour 142, *Chhalkauri Lal v. Isher Singh*. (High Court can revise on grounds of illegality as well as of jurisdiction — In this case, however, there being no illegality reference was refused).
 (33) 20 AIR 1933 Cal 348 (351) : 34 Cr L Jour 334, *Francis Duke Coleridge Sumner v. Jowindra Kumar*. (High Court has to consider not merely the legality but the propriety of the order as well).
 (32) 19 AIR 1932 Mad 720 (721) : 33 Cr L Jour 626 : 56 Mad 149, *Pitchai v. Mohamed Akbar*. (Proceedings under S. 144).
 (31) 18 AIR 1931 Bom 135 (137) : 32 Cr L Jour 507 : 55 Bom 392, *Emperor v. Ganesh Vaidar*. (High Court can interfere with order under S. 144, if it is not reasonable or bona fide).
 (31) 18 AIR 1931 Mad 242 (244) : 32 Cr L Jour 763, *In re Sivaramamurti*. (Proceedings under S. 144).
 (30) 17 AIR 1930 Mad 242 (246) : 31 Cr L Jour 324 : 53 Mad 320, *Muthusami Sorenayagam v. Thangammal Aiyar*. (Decisions of single Judge in AIR 1928 Mad 1109 : 52 Mad 69 : 30 Cr L Jour 119 and 30 Cr L Jour 629, not followed).
 (29) 16 AIR 1929 Pat 46 (47) : 7 Pat 269 30 Cr L Jour 302, *Gobindram v. Basanti Lal*. (Proceedings under S. 144).
 (32) 19 AIR 1932 Pat 135 (136) : 34 Cr L Jour 253, *Raj Nandan Misser v. Cheddi Thakur*. (High Court can interfere in cases of erroneous finding by Magistrates).
 (34) 21 AIR 1934 Rang 124 (125) : 12 Rang 265 : 35 Cr L Jour 1500, *Thakur Ba Thang v. Emperor*.
 (29) 16 AIR 1929 Mad 647 (647) : 31 Cr L Jour 190, *Sidda Faddi v. Dasara Adigadam*. (Magistrate passing order without recording any evidence in case of dispute relating to possession of property — Irregularity is material and sufficient to invoke S. 435).
 (25) 12 AIR 1925 Pat 593 (595) : 26 Cr L Jour 870, *Abdul Shakur v. Abu Sayed*.
 (26) 13 AIR 1926 Pat 51 (52) : 25 Cr L Jour 1511, *Harbans Narain v. M'd. Sauid*.
 (27) 14 AIR 1927 Pat 393 (394) : 7 Pat 1 : 29 Cr L Jour 776, *Lakshmi Kuer v. Gajadhar Prasad*. (Section 146 — High Court will interfere even with administrative orders in special cases).
 (24) 15 AIR 1928 Bom 390 (393) : 29 Cr L Jour 1063, *In re Lakshminarain*. (Proceedings under S. 176).

12. Correctness, legality or propriety of any finding, sentence or order and regularity of any proceeding. — The power of revision extends to considering not only the *legality* of the orders passed, but also the *correctness or propriety* of the proceeding or of the orders passed¹ For this purpose the Court of revision has *jurisdiction* to go into questions of fact and see whether the order or proceeding, though not wrong in law, is proper or correct. See Notes 15 and 16 on S 439.

The words 'finding, sentence or order' are three separate matters on which a revision may be heard. Thus, it is perfectly legal for the Judge to order under S 440 that the counsel should not be heard on the question of finding but that there should be hearing only on the question of sentence² As to the meaning of the words 'finding,' 'sentence' 'order' and 'proceeding' as used in this section see the undermentioned case³.

In a pending case no question as to the correctness or propriety of a *finding* can arise, consequently the superior Court can examine the proceedings of the inferior Court only to satisfy itself as to their regularity⁴.

An order by a Magistrate refusing an application to "recommend to the District Magistrate that the prosecution should be withdrawn is the only order that can be passed on such an application and there can be no ground for revising such order even if it were revisable⁵.

13. Extent of power of Sessions Judge or District Magistrate. — Where a Sessions Judge or a District Magistrate calls for and examines the record of proceeding of an inferior Court, and finds that any finding, sentence or order is not correct, legal or proper, or that the proceedings are irregular he can (except in cases covered by ss 436 and 437 and the portion of sub s (1) of this section) only *refer* the matter to the High Court under S 438¹ He has no authority to hear the case as one judicially before him and send

[See (25) 12 AIR 1925 Cal 1022 (1023) 26 Cri L Jour 558 *Anath Bandhu v Wahid Ali* (Powers at present wider than they were under S 107, Government of India Act 1915)]

[See also (23) 12 AIR 1925 Pat 33 (34) 3 Pat 809 26 Cri L Jour 268, II v *Lou & Co, Ltd v Manindra Chandra Nandy*]

Note 12

1 (25) 12 AIR 1925 Cal 1022 (1023) 26 Cri L Jour 558 *Anath Bandhu v Wahid Ali* (Powers at present wider than they were under S 107, Government of India Act 1915)]

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word 'sentence' means a direction by which a punishment is prescribed and meted out to a person who has been convicted of an offence. Order covers commands or directions that something shall be done, discontinued or suffered, but it does not include sentence and finding. The word proceedings is wider than the expression judicial proceedings and covers everything done and recorded by an inferior or minor Court acting as a Court. But it means everything of this kind which is not a finding sentence or order. The words 'finding, sentence' 'order and proceedings' cover everything which may be remedied in revision.)

4 (42) 29 AIR 1942 Nag 18 (38) 1 I L R (1942) Nag 491 43 Cri L Jour 323 193 Ind Cas 228, *In re Harbhajan Singh Sodhi*

5 (43) 30 AIR 1943 Lah 301 (305) 45 Cri L Jour 162 209 Ind Cas 593 *Claman Lal Duan Chand v Emperor* (But proceedings were quashed under S 561A of the Code)

Note 13

1 (41) 28 AIR 1941 Pat 105 (106) 42 Cri L Jour 310 192 Ind Cas 781, *Luthi Singh v Ramkrishn Singh* (Magistrate passing order under S 145—District Magistrate's jurisdiction in respect of aforesaid order is not appellate — Nor can he revise it himself — District Magistrate can call for record under S 435 and if he considers fit to interfere he should refer it to High Court under S 438)

(38) 25 AIR 1914 Cal 416 (416) 39 Cri L Jour 569 *Superintendent & Membrance of Legal Affairs Bengal v Nabin Chandra*

(36) 23 AIR 1916 All 852 (853) 34 Cri L Jour 301 *Moti v Beni*

(33) 1933 Mad W N 1031 (1011) *Kashida Porida v Sutarno Mohimany* (Complaint for delinquent against a village headman—Magistrate holding that sanction under S 197 was necessary for prosecution —Sessions Judge setting aside order of the Magistrate holding that no complaint was necessary—Held, Sessions Judge acted without jurisdiction in setting aside the order and must have referred the matter to the High Court)



his 'findings' to the High Court and thus convert what is only an exercise of a supervising authority into a judicial proceeding³ He cannot quash the proceedings³ or set aside the order⁴ or stay proceedings⁵ of such inferior Court or take any other action of that kind⁶

The Sessions Judge and the District Magistrate have concurrent jurisdiction under this section and consequently, where an application is made under the section to the Sessions Judge he cannot endorse the same to the District Magistrate for action but must deal with it himself⁷

It may also be noted in this connexion that where a subordinate Magistrate is properly seised of a case, a superior Magistrate or the Sessions Judge cannot except under this section or by withdrawal of such case, take any action in regard to such proceeding⁸

See also section 433 Note 3

(24) 11 AIR 1924 Cal 634 (635) 26 Cri L Jour 65 *Sitoh Bahatar v Nobadati* (District Magistrate has no jurisdiction to make an order giving directions to a Magistrate as to the order and manner of trial of cross cases)

2 (81) 1881 All W N 76 (76) *Empress v Murlidhar*

(01) 3 Bom L R 677 (678) *King Emperor v Mulla Ibrahim* (Cannot record evidence)

(82) 1882 All W N 146 (147) *Empress v Sanwalia*

(08 09) 5 Bom H C R Cr 65 (66) *Reg v Chantarayya* (Cannot annul conviction and direct the commitment to the Court of Session upon proper charge)

(75) 12 Bom H C R 234 (236 237) *Reg v Tukaram Ragho* (District Magistrate cannot annul the conviction by subordinate Magistrate on the ground that evidence warrants a graver charge than the Magistrate has authority to try)

3 (29) 18 AIR 1920 Cal 204 (205) 30 Cri L Jour 401 *Kasim Ali v Md Tofazzal Hossain*

(1900) 23 Mad 540 (543) 2 Weir 22^o *Kandasami Chetty v Soli Goundan*

(72) 4 N W P R C R 6 (6) *Queen v Mata Dayal* (Cannot quash a commitment for illegality)

4 (44) 81 AIR 1944 Oudh 810 (811) 46 Cri L Jour 758 220 Ind Cas 437, *Dost Mohammad v King Emperor* (Order passed by Magistrate under S 517 cannot be set aside by Sessions Judge)

(41) 28 AIR 1941 Pat 105 (106) 42 Cri L Jour 340 192 Ind Cas 784 *Luti Singh v Ram Kirit Singh*

(38) 23 AIR 1930 All 852 (853) 33 Cri L Jour 301 *Moti v Beni*

(25) 12 AIR 1925 Oudh 44 (45) 25 Cri L Jour 359 *Bindra v Mt Bhagwantia* (Order dismissing complaint for default amounts to acquittal and is not liable to be set aside under this section)

(24) 11 AIR 1924 Oudh 331 (333) 25 Cri L Jour 440 *Hiralal v Emperor*

(08) 7 Cri L Jour 304 (305) 1908 All W N 74 5 All L Jour 562, *Mithi Lal v Laxmi Prasad*

(03) 28 Mad 130 (132) 2 Weir 689 *Raghunatha Pandaram v Emperor* (Sub-divisional Magistrate acting under S 528 — District Magistrate cannot interfere)

(22) 9 AIR 1922 Pat 554 (554) 23 Cri L Jour 562 *Ramkumar Lal v Thalur Ojha* (District Magistrate cannot upset order of Magistrate under S 145)

(24) 11 AIR 1924 All 675 (676) 46 All 673 25 Cri L Jour 1168 *Debi Ram v Emperor*

5 (41) 28 AIR 1941 Rang 114 (116) 1941 Rang L R 82 42 Cri L Jour 573 194 Ind Cas 370 *King v Maung Po Thaing*

(05) 2 Cri L Jour 534 (538) 9 Cal W N 879 *Sheobux Ran v Emperor*

(03) 26 Mad 137 (139) 2 Weir 196 *Shanmugam Chell v Pennappa Mudali* (Especially when the proceedings are pending before a Magistrate outside the local limits of his jurisdiction)

6 (42) 29 AIR 1942 Bom 84 85 86) 1 LR (1942) Bom 198 43 Cri L Jour 56^o 199 Ind Cas 351 (DB) *Hasdarsha Lalsha v Dhondau Abaji* (District Magistrate has no power to revise the opinion of the subordinate Magistrate in a case reported to him under S 346 Cr P C)

(38) 25 AIR 1938 Cal 416 (416) 39 Cri L Jour 569 *Superintendent & Remembrancer of Legal Affairs Bengal v Nabim Chandra* (Applied applying to Sessions Judge claiming a sessions trial, during his trial under S 409 Penal Code—Sessions Judge cannot direct Magistrate to commit accused to sessions)

(conviction cannot be made)
(at gate a sentence of person who has

trial)

7 (90) 1890 Rat 525 (527) *Queen Empress v Tajbhas*

(03) 1903 Pun L R No 151 p 619 *Ram Labhaya v Ram Das*

Also see S 436 Note 4

8 (1900) 27 Cal 798 (800) *Jhumuk Jha v Pattuk Mandal*

(29) 16 AIR 1929 Cal 457 (458) 57 Cal 17 31 Cri L Jour 747, *Siddh Nath v Emperor*

13a Extent of power of Sub-divisional Magistrate—Sub-section (2) — Under sub s. (2) a Sub divisional Magistrate acting under this section has power only to forward the record to the District Magistrate with such remark thereon as he thinks fit. He has no power to set aside the order¹

As to the power of Sub divisional Magistrate to make reference in cases submitted to him under S 350, see Note 3A on that section

14 Revision not to be entertained by both the Sessions Judge and the District Magistrate — Sub-section (4) — There was a conflict of opinion under the old Code as to whether the entertaining of an application for revision by the District Magistrate or the Sessions Judge barred the other of them from entertaining a fresh application for revision¹ Sub section (4) was newly inserted in 1896 in order to settle this conflict of opinion, and it is now clear that when an application has been made to either the Sessions Judge or the District Magistrate, it cannot again be entertained by the other of them² It does not make any difference that the application made to the latter is by a party *other* than the one who made an application to the former the sub section must be construed as meaning that where either the Sessions Judge or the District Magistrate has had an application in revision in the same matter moved by either party the other Court would have no jurisdiction to hear a further application in the same matter even though made by another party³ The words *further application* in this sub section mean any other application in respect of the order in question passed by the inferior Court⁴

The intention of the Legislature in enacting this sub-section is to avoid a conflict of opinion between Courts of co ordinate jurisdiction⁵ and to prevent them from simultaneously exercising their powers of revision in such a way as would amount, as it were, to hearing an appeal by one of them from, or reviewing an order passed by the other of them⁶

Although this sub section speaks of entertaining an *application* the principle on which it is based will equally apply to action taken *suo motu*. Thus where a revision has been entertained by a District Magistrate the Sessions Judge cannot *suo motu* again revise the proceedings⁷ Where the District Magistrate ordered a further enquiry on revision it was held that the Sessions Judge could not make a reference under S 438 of the Code against the order of the inferior Court⁸

(34) 21 AIR 1934 Nag 89 (41) 25 Cri L Jour 411 *D C Samuel v Emperor*

(03) 80 Cal 449 (451 452) *Badhabullav v Benode Behari*

Note 13a

1 (41) 28 AIR 1941 Pat 169 (172) 42 Cri L Jour 454 193 Ind Cas 491 *Conf Mahton v Emperor* (Sub-divisional Magistrate has no power to stay proceedings of Panchayat Court under Bihar and Orissa Village Administration Act)

(37) 1937 Mad W N 182 (183) *Nagoji v Moran Veeraruna* (Order dispensing with personal attendance of accused — Sub divisional Magistrate cannot set aside the order in revision)

Note 14

1 (90) 12 All 434 (435) 1890 All W N 99 *Queen Empress v Prithu* (1es)

(95) 1895 All W N 38 (40) *Qadir Baksh v Sheikh Abdullah* (No)

2 (06) 5 Cri L Jour 132 (133) 17 Mad L Jour 153 3 Mad L T 24 *Karpasundaram Pillai v Emperor*.

(13) 14 Cri L Jour 123 (124) 18 Ind Cas 683 (Cal) *Siddik v Chakauri Khansamh* (Where the District Magistrate in directing a further enquiry acted under S 435 the Sessions Judge should not direct a further enquiry)

(03) 26 Mad 477 (478) 2 Weir 540 *Kalimuthu v Emperor*

[See also (24) 11 AIR 1924 Oudh 241 (242) 24 Cri L Jour 616 *Emperor v Dalwant Singh* (As a Court of revision on the District Magistrate is not inferior to the Sessions Judge)]

3 (30) 17 AIR 1930 AU 257 258 52 All 257 31 Cri L Jour 99a *Mohammad Husain v Mt Hanhi*

4 (13) 14 Cri L Jour 134 (135) 1912 Pan Fe No 10 Cr 18 Ind Cas 676 *Emperor v Waryam*

5 (10) 17 AIR 1930 AU 257 (259) 52 All 257 31 Cri L Jour 995 *Mohammad Husain v Mt Hanhi*

(03) 26 Mad 477 (478) 2 Weir 542 *Kalimuthu v Emperor*

6 (01) 4 Oudh Cas 119 (122) *Debi Din v Emperor*

7 (14) 1 AIR 1914 Low Bur 260 (261) 8 Low Bur Rat 361 17 Cri L Jour 497 *Po Gyi v Emperor*

(13) 14 Cri L Jour 134 (135) 1912 Pan Be No 10 Cr 18 Ind Cas 685 *Emperor v Waryam*

(02) 26 Mad 477 (478) 2 Weir 542 *Kalimuthu v Emperor*

8 (13) 14 Cri L Jour 134 (135) 1912 Pan Be No 10 Cr 18 Ind Cas 685 *Emperor v Waryam*

But the word "made" used in the subsection means not only *made* but also "entertained and decided" Consequently, where an application made to a District Magistrate was not entertained by him, a fresh application to the Sessions Judge is not barred by this sub section⁹ Similarly, where an application made to the Sessions Judge is *withdrawn* and is rejected for want of prosecution, a fresh application to the District Magistrate is not barred¹⁰

15 Bar of revision — A revision always lies unless the jurisdiction to revise is taken away by express words or by necessary implication¹ Thus, s 22 of the Press Act, 1910, s 15 of the Extradition Act, 1903, s 16 of the Reformatory Schools Act, 1897,² expressly take away the revisional powers of the Court in regard to the orders respectively specified therein Under subs (3) of this section as it stood before 1923, the right of revision in respect of orders under ss 143, 144 and proceedings under Chapter XII and s 176, was expressly taken away In the undermentioned case,³ the right of revision in respect of an order under s 386 of the Code, as it stood before 1923, was held to be *impliedly* barred by that section See also the undermentioned cases⁴

But even in respect of such orders, a revision will lie, if the order is not authorized by the provision under which it is purported to be passed The reason is that in such cases the order of the Court under that provision is without jurisdiction, and it must be assumed that the action was taken under the Court's general jurisdiction, in which case it is open to revision⁵ On this principle orders under Chapter XII of the Code and under s 176 were frequently interfered with in revision See Note 11 But a Full Bench of the High Court of Allahabad held, with reference to s 26 of the Special Criminal Courts Ordinance 2 [II] of 1912, (since repealed) that even if a Special Judge did not conform strictly to the

9 (31) 18 AIR 1031 Mad 772 (773) 54 Mad 842 32 Cri L Jour 1278, *Appachi Goundan v Emperor*.

10 (01) 4 Oadh Cas 119 (122) *Debi Din v Emperor*

Note 15

1 (12) 13 Cri L Jour 31 (32) 5 Sind L R 179 13 Ind Cas 223 *Karam Bahadin v Emperor* (25) 12 AIR 1925 Rang 12 (13) 2 Rang 321 26 Cri L Jour 289, *Maung Po Lon v Emperor* (Orders passed under the Upper Burma Ruby Regulation of 1887, s 6 are within the scope of the Criminal Procedure Code as regards appeal and revision though no provision is made in the regulation for an appeal or revision)

(32) 19 AIR 1932 Lah 436 (437) 13 Lah 585 33 Cri L Jour 333, *Mt Sakhai v Emperor* (Sections 48 and 49 of the Frontier Crimes Regulation 1901, do not bar the revisional jurisdiction of the High Court in cases tried under s 59 of the Regulation)

2 (04) 1 Cri L Jour 609 (610) 6 Bom L R 550, *Emperor v Amir Bakhsh* (Finding as to age of youthful offender — Revision is barred under s 16 Reformatory Schools Act)

(99) 21 All 391 (398) 1899 All W N 138 (FB) *Queen-Empress v Hori*
[See (25) 12 AIR 1925 Rang 12 (13) 2 Rang 321 26 Cri L Jour 289, *Maung Po Lon v King Emperor*]
Also see s 399, Note 8

3 (15) 2 AIR 1915 Lah 227 (228) 16 Cri L Jour 166, *Hira Lal v Emperor*
4 (43) 30 AIR 1943 Pat 18 (20) 22 Pat 175 44 Cri L Jour 273 201 Ind Cas 451 (FB) *Banwari Gopal v Emperor* (Special Criminal Courts Ordinance 2 [II] of 1912 (repealed by Ordinance No 19 [XIV] of 1943) s 26 — Order by Special Magistrate — High Court has no power of revision)

(39) 26 AIR 1939 Cal 259 (260) 11 LR (1938) 2 Cal 523 40 Cri L Jour 359 *Hari Sadhan v Probhakar Ray* (Order of Union Bench under Bengal Village Self Government Act (5 [V] of 1910) — By virtue of s 93 of that Act revision under this Code is barred)

5 (14) 1 AIR 1914 Cal 22 (25) 14 Cri L Jour 673 (675) 41 Cal 400 *Emperor v Gullis Sahu* (Extradition Act)

[See (33) 20 AIR 1933 Lah 1019 (1020) 35 Cri L Jour 505 *Christy v Christy*]

The following cases are cases under the Reformatory Schools Act, 1897, in which the High Court interfered in revision on this principle

(93) 21 All 391 (397, 401) 1899 A W N 138 (FB), *Queen Empress v Hori* (Overruling 20 All 155, 20 All 159)

(99) 20 All 160 (161) 1897 All W N 231, *Queen Empress v Dillar*

(1900) 27 Cal 133 (136) *Queen Empress v Mahimuddin*

(1900 0) 1 Low Bur Rul 68 (69) *Crown v Darood Sahib*

(97) 1897 Rat 947 (949) *Queen Empress v Bhagia Bhao*

provisions of the Ordinance the real and jurisdiction of the High Court was completely ousted by the very wide words of S 20 of the Ordinance⁶

Where a remedy by way of appeal is available, the proper course will be to file an appeal and not to apply for revision⁷ See S 439 sub s (5)

16 Revision of proceedings of village officers — A village Magistrate in Madras and police jalds in Bombay have been constituted criminal Courts in respect of certain matters, by Madras Regulations 11 (XII of 1916 and 4 (IV) of 1921 and by the Bombay Village Police Act, respectively. By S 1, however the provisions of the Code do not apply to them and consequently it was held that the High Court could not revise their proceedings under the Code, though it could do so under their powers of superintendence under S 15 of the Charter Act (Government of India Act 1915 s 107)¹ But under S 221 of the Government of India Act 1935 the High Court's revisional powers over judicial orders of Subordinate Courts have been taken away

17 Order under the Code for execution of extradition warrant — Revision, if barred. — It has been held by the High Courts of Allahabad and Calcutta that when a Magistrate orders the arrest of an accused person on an extradition warrant under S 1 of the Extradition Act (15 [XV] of 1903), he is only acting in his executive capacity and not as a Court and that therefore, the order cannot be interfered with in revision¹ A contrary view, namely, that the order is a judicial one and therefore, could be interfered with in revision, has been held by the High Court of Bombay² It has also been held by the latter High Court³ and by the High Court of Patna⁴ that s 15 of the Extradition Act only ousts the jurisdiction of the High Court to enquire into the propriety of warrant issued under S 7, but leaves open the High Court's power to interfere with the Magistrate's action if it was proved that such action was consequent upon a warrant which was plainly illegal In the undermentioned cases⁵ where the Magistrate

(01) 29 Cal 423 (424) 5 C W N 211 *Reasut v Courtney* (Propriety and legality of the order can be considered)

consider legality and pro-

of 1876 set aside under

[See also (01) 24 Mad 13 (15, 16) 1 Weir 882, *Queen Empress v Rama*

(03) 21 Mad 430 (432) 1 Weir 880 *Queen Empress v Pambalingam*]

6 (43) 30 AIR 1913 All 26 (38) ILR (1913) All 238 44 Cri L Jour 216 205 Ind Cas 113 (TB), *Salig Ram v Emperor*

7 (84) 1894 All W N 293 (293) *Gulal Singh v Surat Pam*

(74) Oudh S C No 2, p 2, *Crown v Bhikkh*

[See also (45) 32 AIR 1945 Oudh 20 (21) 47 Cri L Jour 27 220 Ind Cas 490 *Gogoi v Emperor* (Sessions Judge has discretion to reject revision application by applying S 439 (5) where appeal lies and no appeal has been brought)]

Note 16

(89) 1889 Rat 478 (479) *Queen Empress v Hargouin*]

[See also (21) 8 AIR 1921 Bom 425 (426) 45 Bom 96 21 Cri L Jour 723 *Chiman Damodar v Emperor*]

Note 17

1 (34) 21 AIR 1934 All 148 (149) 56 All 409 35 Cri L Jour 1296, *Sandal Singh v District Magistrate and Superintendent Dehra Dun*

(15) 2 AIR 1915 Cal 426 (427) 42 Cal 793 16 Cri L Jour 31 *Gulali Salu v Emperor*

2 (29) 16 AIR 1929 Bom 81 (83)

3 (05) 2 Cri L Jour 439 (443)

4 (22) 9 AIR 1922 Pat 442 (444)

5 (14) 1 AIR 1914 Cal 22 (25)

(Per Rana J)

Emperor

Salu

had acted under S 10 of the Act, the High Court of Calcutta held the same view as that of the High Court of Bombay regarding the interpretation of S 15 of the Act. See also the undermentioned case⁶

18 Limitation for application for revision — See S 433, Note 42

19. Second application for revision — A fresh application for revision on the same grounds as those on which a previous application was based is not maintainable¹. The reason is threefold *firstly*, it is a universal principle of law in the absence of direct statutory provision that when a matter has been finally disposed of by a Court the Court is *functus officio* and cannot entertain a fresh prayer for the same relief unless and until the previous order of final disposal has been set aside,² *secondly*, the subsequent revision if treated as a review of the previous order, is barred by the provisions of S 369,³ and *thirdly*, one Judge of the High Court is not a criminal Court inferior to the High Court. See Note 8. The principle will apply to all points which the party ought to have raised in the previous application⁴. Thus, where A makes an application in revision and deliberately keeps back one point, he will not, by a second application, be allowed to raise the point omitted, though it may be otherwise if a real point has been omitted by some *bona fide* mistake for which he is not responsible⁵.

Suppose now that the Sessions Judge or the District Magistrate revises the proceedings of an inferior Court *suo motu*, or the High Court revises proceedings on a reference by the Sessions Judge. Can an application for revision be subsequently entertained on the same grounds as those which formed the subject matter of the previous revision? There is a conflict of opinion on the point. In *Nga Than v Emperor*,⁶ a District Magistrate who had dealt with a case in revision *suo motu* and decided that there was no cause for interfering with an order of discharge of the accused, entertained an application

[See also (11) 12 Cri L Jour 322 (322) 38 Cal 547 10 Ind Cas 618, *Rudolf Stallman v Emperor* (Magistrate acting under the Extradition Act is not subject to revisional jurisdiction)]

(11) 12 Cri L Jour 346 (346) 10 Ind Cas 946 38 Cal 550 *In re Dev Das* (High Court cannot interfere in the conduct of an enquiry held under S 14 Extradition Act)]

6 (09) 9 Cri L J 111 (111) 10 Ind Cas 101 (101) 38 Cal 547 (101) 38 Cal 547 (Warrant issued under S go into circumst)

Note 19

- 1 (27) 14 AIR 1927 All 724 (725 726) 29 Cri L Jour 88, *Sripat Narain Singh v Gahbar Rai* (Fresh application for revision before another Judge on the same ground not maintainable)
- (23) 10 AIR 1923 Mad 276 (276) 23 Cri L Jour 746, *Appayya v Venkatappayya* (Even if the previous order was in default of paying printing charges)
- (11) 12 Cri L Jour 407 (408) 38 Cal 933 11 Ind Cas 591 *Narain Singh v Jagru Sahu* (Rule granted on one only of several grounds—Fresh rule on other ground cannot be issued)
- (35) 22 AIR 1935 All 466 (468) 36 Cri L Jour 1286 57 All 867, *Banwarlal v Emperor*
- (26) 13 AIR 1926 Nag 323 (324) 27 Cri L Jour 339, *Local Government v Doma Kund* (Section applies only to orders of inferior criminal Courts)
- (22) 9 AIR 1922 All 502 (502) 23 Cri Jour 496 45 All 11 *Kohna Ram v Emperor*
- (16) 3 AIR 1916 Mad 516 (517) 16 Cri L Jour 697 *In re Kanakasabhai*
- (33) 20 AIR 1933 Mad 247 (248) 34 Cri L Jour 278, *In re Bhogi Reddi Ankamma* (Even High Court cannot revise its own revisional order)
- (13) 14 Cri L Jour 213 (214) 40 Cal 584 19 Ind Cas 309, *Durga Prasad v Lachman*
- (90) 1890 All W N 225 (226) *Empress v Kanhsa Lal*
- (81) 3 All 545 (547) 1881 All W N 33 (17B) *Empress of India v Muhammad Jafar*
- 2 (23) 10 AIR 1923 Mad 276 (276) 23 Cri L Jour 746 *Appayya v Venkatappayya*
- 3 (12) 13 Cri L Jour 301 (301) 14 Ind Cas 765 (Low Bur) *Nga Than v Emperor*
- 4 (25) 12 AIR 1925 Mad 993 (994) 26 Cri L Jour 593 *In re Anif Sahib* (In practice a party will be required to state all his grounds for revision in a single petition)
- (22) 9 AIR 1922 All 502 (502) 45 All 11 23 Cri L Jour 496 *Kohna Ram v Emperor*
- (24) 11 AIR 1924 All 558 (559) 46 All 146 25 Cri L Jour 612 *Gobind Ram v Emperor*
- 5 (24) 11 AIR 1924 All 558 (559) 46 All 146 25 Cri L Jour 612, *Gobind Ram v Emperor*
- 6 (12) 13 Cri L Jour 301 (301) 14 Ind Cas 765 (Low Bur)

by the complainant for revision of the same order and passed an order for further enquiry under S 477. It was held that the subsequent application must be regarded as one for reviewing the previous order in revision and was therefore barred by the provisions of S 369 of the Code. In *Mo Tun Mying v. Aji Kaul Sin*⁷ a contrary view was taken it was held that though a mere perusal of the record *suo motu* might not have disclosed sufficient cause for interference the Sessions Judge was not precluded from hearing the application where it alleged specific reasons for interfering. In *Sripit Narain Singh v. Gahbar Rai*,⁸ where the High Court had refused to interfere on a reference by the Sessions Judge under S 477 and a subsequent application for revision was filed by the accused, it was held by the High Court of Allahabad that the application must be treated as an application for review of the previous order and that there being no flaw in the previous order, the application must be rejected.

A second application for revision will, however, be barred only when the particular point raised in it was the subject matter for decision in the prior revision application. An application by an accused person for revision against his conviction does not bar an application by the complainant for enhancement of the sentence.⁹

20. Dismissal for default — Restoration. — There is a difference of opinion on the question whether an application for revision dismissed for default can be restored to file and reheard. In the unmentioned case¹ the High Court of Calcutta restored such an application to file. The High Court of Madras has expressed conflicting views. In *Ranga Rao v. Emperor*² it has held that in cases of criminal revision no distinction can be made between an order passed without hearing the petitioner and one in which he is heard and that in view of S 369 a petition dismissed for default cannot be restored. In *Kunhamad Haji v. Emperor*³ it was held that where a revision application is dismissed for default there is no judgment at all and there is no bar against rehearing the matter. According to the High Courts of Calcutta⁴ and Rangoon,⁵ a 'judgment' means a judgment on the merits and a dismissal for default not being one on the merits does not bar re-consideration of the matter. See also S 369, Note 5.

21. Duty of Court whose records are called for. — As a general rule no Court is at liberty to part with its judicial records except when called for by an appellate Court or on demand by a superior Court under this section.¹

The calling for the record under this section suspends the jurisdiction of the inferior Court to continue the proceedings,² or to pass *ad interim* orders in such

7 (152 AIR 1915 Low Bur 7 (8)) 8 Low Bur Ref 377 16 Cri L Jour 711

8 (27) 14 AIR 1927 All 724 (725) 29 Cri L Jour 63

9 (25) 12 AIR 1925 Mad 993 (994 995) 26 Cri L Jour 583, *In re Intif Sahib*

Note 20

1 (09) 10 Cri L Jour 287 (289) 3 Ind Cas 393 (Cal), *Bibhuti Mohan Poy v. Dasmoni Dass*

2 (12) 13 Cri L Jour 710 (711) 16 Ind Cas 516 (Mad)

[See also (23) 10 AIR 1923 Mad 276 (276) 23 Cri L Jour 746 *Appayya v. Venkattappayya*]

3 (23) 10 AIR 1923 Mad 426 (433) 46 Mad 382 24 Cri L Jour 439

4 (09) 10 Cri L Jour 287 (288, 289) 3 Ind Cas 393 (Cal) *Bibhuti Mohan Poy v. Dasmoni Dass*

(The order was however one for default of appearance)

5 (28) 15 AIR 1928 Rang 288 (288 289) 30 Cri L Jour 749, *Ibrahim v. Emperor* ("Judgment" contemplated by S 369 is only a decision on the merits—A dismissal for default of appearance therefore, is not a judgment and High Court has power to review a dismissal order for default of appearance passed in its appellate jurisdiction)

Note 21

1 (77) 1877 Rat 128 (129) *Ref v. Padmanabha* (For the purpose of any reference or report

proceedings³ The Court whose record is called for must also send a letter of explanation along with the record The letter must be signed by the Magistrate himself and not by some one of whom the superior Court knows nothing purporting to sign on his behalf⁴

In sending its explanation the inferior Court is not entitled to make any suggestion or representation which is not founded on the record⁵ Nor is it open to it to submit observations with a view to supplement or add to its judgment though it is open to it to show cause and to submit its remarks in answer to the grounds urged by the petitioner⁶

It is desirable that Courts should not place difficulties in the way of persons entitled to appeal, by calling for proceedings and taking action upon them within the period allowed for appeal⁷

See also the undermentioned case⁸

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- 3 (06) 4 Cr L Jour 433 (435) 11 Cal W N 79 *Satish Chandra v Emperor*
 4 (97 98) 2 Cal W N 572 (573) *Poop Lal Das v David Manook*
 5 (30) 17 AIR 1930 Cal 379 (379) 32 Cr L Jour 18 *Mani Krishna v Emperor*
 6 (03) 7 Cal W N 839 (860) *Madhu Sudan v Sasti Prasad*
 7 (17) 4 AIR 1917 Upp Bur 2 (3) 2 Upp Bur Rul 124 18 Cr L Jour 355 *Lakanaw v Emperor*
 8 (79) 4 Cal 20 (22) 3 Cal L Rep 93 *In the matter of the petition of Hurro Sundery* (Magistrate showing cause against rule issued must ask Legal Remembrancer to appear for him and must not address the Registrar of the High Court)

Overlooking of Precedents leads to Erroneous Decisions.

(1943) 30 A I R 1943 Privy Council 189 (191) — In an appeal from Allahabad the question for decision involved was as to the inherent power of the Court to grant restitution to the successful defendant. Their Lordships observed: "The decision of the Board in 46 I A 223 was not cited in either of the Courts in India. The application now before the Board invoked the powers of the learned Subordinate Judge to assess the sum due by way of restitution by the method laid down in 46 I A 223. I or this purpose the case must go back to the Court of the Subordinate Judge."

(1922) 9 A I R 1922 Privy Council 11 (12) = 43 All 469 (475) (PC)

of O 34, Civil P C

The difficulty which had arisen as to these words in several cases, e.g., *Vanmika linga v Chidambara*, (1905) 1 L R 29 Mad 57 — which case it may be mentioned, does not seem to have been brought to the notice of the Board in *Het Ram's case*, (1918) 45 I A 130 — therefore no longer arises.

(1945) 32 A I R 1945 Calcutta 312 (315) — The decision of the Judicial Committee on appeal reported in (1939) 66 I A 101 was not cited at the Bar at least it was not noticed in the judgment (i.e., in 1 L R (1913) 1 Cal 69). We dissent from the judgment in 1 L R (1913) 1 Cal 69.

(1945) 32 A I R 1945 Lahore 260 (261) (FB) — *Per Achhru Ram J.* (in the Order of Reference) — He (i.e., Patanjali Sastri J. in A I R 1942 Mad 13) does not however appear to have noticed one of the Division Bench judgments of his own Court reported in A I R 1920 Mad 177 which also dealt with the same subject and took just the opposite view from that taken by him.

(1945) 32 A I R 1945 Madras 139 (141) (FB) — The decisions in which the contrary view has been expressed are 45 Mad 466 A I R 1910 Mad 290 A I R 1928 Mad 440 and 1912 M L J 754. In the first of these cases the Court did not however consider the case in 5 Mad 141. In none of the other cases was any reason given for the view expressed and in no case was 5 Mad 141 mentioned or considered. We consider that 5 Mad 141 should be followed.

(1944) 31 A I R 1944 Bombay 100 (103) = 1 L R 1944 Bom 12 — *Per Sen J.* — This case (viz. 41 Bom L R 521) was decided in 1938 and it is to be observed that the earlier decision in 36 Bom L R 1201 was not cited before the Court nor was it noticed in the judgment.

(1944) 31 A I R 1944 Lahore 329 (335) (FB) — *Per Din Mohammad J.* — The only Lahore authority which has been brought to our notice in support of this view is one reported as A I R 1938 Lah 886. The learned Judges (in that case) referred to no previous case of this Court (namely (1937) 18 Lah. 263) but mentioned the case in 51 Cal 969 in support of their decision without trying to analyse its dictum.

(1944) 31 A I R 1944 Madras 421 (422) — There was however one decision to which our attention was drawn the decision of Venkataramana Rao J. reported in 1939 M W N 1009. It does not appear that the decision of Venkatasubba Rao and Cornish JJ. in (1936) 59 Mad 751 was brought to the notice of the learned Judge especially the observations of Cornish J. and we do not think that that case can be held to be an authority apart from the special facts on which it was decided.

(1944) 31 A I R 1944 Patna 17 (21) = 22 Pat 783 (FB) — While considering the decision in A I R 1923 Cal 362 *Sinha J.* observed — "Though the decision related to the question of court fees payable on the plaint their Lordships of the Calcutta High Court do not appear to have considered the previous decision of that very Court in the matter of court fees which will be referred to presently. The case referred to is 29 Cal 701."

(1943) 30 A I R 1943 Allahabad 220 (230) = 1 L R 1943 All 610 (FB) — *Per Mathur J.* — The same view was taken by a Division Bench of this Court in (1929) 51 ALL. 550. The case was decided by Sulaman and Kendall JJ. This case was

decided before the Full Bench case in 1931 A. L. J 54 but has not been referred to in the judgment of the Full Bench "

(1943) 30 A. I. R. 1943 Allahabad 393 (397) = I. L. R. 1944 All. 76 (FB) — *Per Collister, J.* — "The next decision to which I will refer is A 1 R. 1929 ALL 209. . . The Full Bench decision in (1920) 42 ALL 575 was not referred to by the learned Judge . . ."

(1943) 30 A. I. R. 1943 Bom. 409 (411) = I. L. R. 1943 Bom 525. — *Per Beaumont, C J* — "In a later case a Bench of this Court in 41 Bom L. R. 1269 held that the direction for payment of costs in (O 33) R. 15 can be waived by the defendant Unfortunately, 34 Bom L. R. 236 was not brought to the notice of the Court in 41 Bom. L. R. 1269 "

(1943) 30 A. I. R. 1943 Lahore 65 (72) (FB) = I. L. R. 1943 Lah. 257. — *Per Bhude, J.* — "It is, however, clear from the decision in (1925) 7 Lah L J 448 that the learned Chief Justice did not intend to lay down that such a branch of the suit, at any rate, should not be looked upon as a 'case' for the purpose of S. 115, Civil P. C. The Full Bench decision in (1924) 5 Lah 253 was not referred to in 7 Lah L J. 448 "

(1943) 30 A. I. R. 1943 Madras 633 (636). — *Per Somayya, J.* — "There is also a prior decision of this Court to the same effect in (1912) 17 I C 593. . . . The decision in 17 I C 593 was not apparently brought to the notice of the learned Judges in (1915) 39 Mad 62 "

(1943) 30 A. I. R. 1943 Patna 305 (308, 310) = 22 Pat. 187. — *Per Chatterji, J.* — "In support of this contention he relies on the decision of the Allahabad High Court in 1 L R (1939) ALL 185 in which the view was expressed that . . . This view is directly opposed to the decision of the Privy Council in (1905) 32 I A 123. . . . It is to be observed that this decision of the Privy Council was not noticed in the Allahabad case."

"In the case of (1922) 1 Pat 780 the facts were these . . . Their Lordships based their decision on the Privy Council case in (1910) 39 I A 68. Das J who delivered the judgment said "The Privy Council case in (1905) 32 I A 123, cited above, which to my mind furnishes a clue to the solution of the problem before us, was not referred to in the judgment of Das J. That being so, I do not think it necessary to refer the matter to a Full Bench."

(1943) 30 A. I. R. 1943 Patna 96 (101) = 21 Pat 799. — *Per Chatterji, J.* — "I may observe here that in 52 ALL 1005, which was decided in May 1930, there is no reference to 17 Cal 548 (F.B.), decided in 1900, or to 55 Cal 1181, decided and reported in 1928 "

(1942) 29 A. I. R. 1942 Lahore 228 (230) (FB) = I L R. 1943 Lah. 1. — *Per Tek Chand, J.* — "This decision is not in accord with 12 P. R. 1911, in which the identical objection had been raised and overruled. That case was regarded in the Chief Court and this Court as the ruling authority on the subject for over 25 years, but there is no reference to it in the judgment in A I R. 1937 Lah 637. Apparently, the attention of the learned Judge, who decided the latter case, was not drawn to it "

(1941) 28 A. I. R. 1941 Madras 933 (933, 934) = I. L. R. 1942 Mad. 264 (265, 266, 268, 270) (FB). — "The substantial question in this appeal is whether (1907) 30 Mad 367 was rightly decided by this Court. The appellant contends that the decision conflicts with the judgment of the Privy Council in (1896) 23 Cal 775 and therefore cannot be allowed to stand . . . They (i e, the learned Judges who decided 30 Mad 367) did not, however, make any reference to the judgment of the Privy Council in 23 Cal 775. Presumably it was not brought to their notice . . . We consider that the present case is governed by the decision of the Privy Council in 23 Cal 775 "

(1941) 28 A. I. R. 1941 Madras 898 (902) = I L. R. 1942 Mad. 271 (278) (FB). — "The decision in (1894) 7 Mad 235 was criticised by Ayling and Sheshagiri Iyer, JJ, in (1917) 5 M L W 158. On the other hand, it receives support from the judgments given by Madhavan Nair and Stodart, JJ, in (1936) 71 M L J 511, by Cornish, J, in (1937) 71 M L J 725 and by Ramesam and Jackson, JJ, in A 1 R 1923 Mad 1270. It is, however, significant that in these cases no reference was made to the decisions in (1907) 30 Mad 26, (1909) 32 Mad 423 and (1917) 5 M. L. W. 158 "

A. I. R. Commentaries Judicially Noticed.

(1945) 32 A I R 1945 Calcutta 298 (299) — The view that we are taking of civil procedure is supported from the decision of all the other High Courts and even from the civil procedure of the Allahabad High Court itself. Those decisions are not in fact referred to in para 49 of Chitaley and Rao's Commentaries on the Code of Civil Procedure Vol 1 page 971. (Now see 4th Edn page 298)

(1936) 25 A I R 1938 Calcutta 730 (733) = I L R (1939) 1 Cal 112 (120). — The expression of other cases of a like nature has been the subject of various decisions most of which will be found mentioned in Chitaley's Limitation Act (1st (1938) Edn) pp 56 to 57.

(1938) 25 A I R 1938 Calcutta 287 (289 & 290) = I L R (1938) 1 Cal 53 (58 & 60) — In the Note to Messrs Chitaley and Annaji Rao's Code of Civil Procedure (2nd (1931) Edn) at p 1338 I find the following comment. The first parties'

The learned authors of Chitaley and Annaji Rao's Code of Civil Procedure in the paragraph to which I have already referred appear to me to sum up in a few words the substance of the decisions.

(1945) 32 A I R -1945 Allahabad 182 (184) — Chitaley in his Code of Criminal

(1943) 30 A I R 1943 Allahabad 162 (167) = I L R 1943 All 467 — In the Note to Chitaley and Rao's Code of Civil Procedure (2nd (1931) Edn) at p 554 the learned proceedings before arbitrators

(1941) 28 A I P 1941 Allahabad 110 (117) (FB) = I L R 1941 All 77 (95) —
held that t
The cases c
Vol 1 page 617
(This principle was cited with approval)

(1940) 27 A I R 1940 Allahabad 263 (266) = I L R 1940 All 396 (406) — In Chitaley's Criminal Procedure Code (1st (1936) Edn) Vol 1 p 97 the learned commentators say It is Evidence Act I agree with their conclusion

(1943) 30 A I R 1943 Lahore 189 (191) — I would refer in this connection to the discussion on the applicability of the doctrine of constructive res judicata to execution proceedings in Chitaley's Civil Procedure Code Edn 3 Note 23 s 11 pages 177 to 180

(1943) 30 A I R 1943 Lahore 65 (77) (FB) = I L R 1943 Lah 257 — "These principles are generally recognized in the decisions of the other High Courts also see rulings collected under Notes 3 and 8 to s 115 in Chitaley's Code of Civil Procedure

(1942) 29 A I R 1942 Lahore 119 (120) — No authority directly in point has been quoted by either side but in Chitaley's Code of Civil Procedure [3rd (1940) Edn] Vol 1 under s 151 Civil Procedure Code the learned author deals at some length in Note 6 (p 120) with the meaning of the words abuse of the process of the Court in that Section. After dealing exactly the abuse is [Cited with approval]

(1941) 28 A I R 1941 Lahore 128 (128) = I L R 1941 Lahore 697 (698) — This is a petition for revision of an order allowing the plaintiff to sue as a pauper. On my explanation, doubt whether a revision against such an order lies the petitioner's learned counsel referred to the Lahore cases cited in Chitaley's Code of Civil Procedure [3rd (1940) Edn] Vol 1 p 1082

(1941) 28 A I R 1941 Lahore 96 (96) — A pauper mortgagee who is not impleaded in a previous suit by made in the previous suit an Mulla in his Commentary on this view, and so does Chitaley in Vol

Procedure—Miscellaneous.]

Rules for grant of copies

38 If the application is refused and sent back, it shall be returned to the applicant together with the amount deposited by him after deducting the fee of four annas referred to in Rule 41

39 If the application is granted, the copy or copies applied for shall be made and forwarded to the Court or Office in which the application was presented for delivery to the applicant

40 If the Sectioner who has to prepare the copy or copies finds that the sum deposited is insufficient to cover the charges, he shall at once cause a letter to be written to the Court or Office in which the application was presented stating what further deposit is required

Provided a letter shall not be necessary where the difference between the amount deposited and the amount payable does not exceed Rs 2, in which case the excess charges may be recovered on delivery of the copy or copies

41 On receipt of the copy or copies the Court or Office in which the application was presented shall hand it over to them or to the applicant and return to him the balance (if any) of his deposit after deducting the copying charges and an extra fee of four annas to be paid as hereinafter provided, and such further sum as may be required to defray charges of remittance of the copying fee, &c, to the Court or Office in which the copy was made. The applicant's receipt for the copy and the balance if any, shall be taken and forwarded to the Court which issued the copy or copies

42 All correspondence under Rules 36 to 41 and 43 between the Court or Office receiving the application for copies and the Court or Office issuing the copies shall be written by the Sectioners appointed for the purpose by the respective presiding Officers—(one in each Court or Office)—each of whom shall be entitled to a fee of two annas for his trouble in each case

The presiding Officer of a Court or Office may at his discretion remove any Sectioner appointed by him for the purpose of carrying on such correspondence

43 The copying fee and the Sectioner's fee of two annas shall be remitted by the Court in which the money was deposited to the Court in which the copy was made by post office order or in postage stamps at the cost of the applicant or in any other more convenient and cheaper mode of remit-

[Procedure—Miscellaneous.

Rules for grant of copies

taunce to be determined in each case by the presiding Office. If the Court or Office remitting the money be situated at a place where there is a Government Treasury, the remittance may be made monthly through it, no remittance charges being levied for the same

When a remittance is made in postage stamps an additional half anna stamp for every eight annas worth of stamps or part thereof shall be sent to cover commission

44 All correspondence under these rules shall be signed by the presiding Officers of the Courts or Offices concerned and be flanked with service stamps

45 When an application for copy is received and granted, it shall forthwith be entered in the register of applications for copies, a form which is hereto appended (Form A) The number borne by the application in the register the amount deposited in advance (which shall not be less than one rupee) and the value of stamp duty levied (if any) from the applicant shall be noted on the application and initialed by the presiding Officer of the Court or Office corresponding entries being simultaneously made in the register under the direct supervision of the Reader or such other official as the presiding Officer may appoint

46 The presiding Officer shall arrange for the prompt and perpetual delivery of the documents to be copied to the Sectioner and in no case such delivery shall be delayed beyond 24 hours The Sectioner shall be bound to report all unusual delays to the presiding Officer who shall take such action as he thinks fit

47 The Official delivering an original document or proceeding to the Sectioner shall invariably take his receipt therefor in a receipt register (Form B) which shall remain in the custody of the Reader of the Court When the document or proceeding is returned by the Sectioner, such return shall be forthwith acknowledged and dated by the receiving Officer under his signature in the appropriate column. This register as well as the register of applications shall be periodically examined by the presiding Officer himself with a view to ascertain that the delivery or return of papers is not unusually delayed and that the registers have duly been filled in from time to time

Procedure—Miscellaneous]

Rules for grant of copies

48 All copies shall be written on one side of the standard paper for petitions. In the case of maps and plans or tabular statements as many sheets of that paper may be pasted together as will be required for the copy applied for.

49 Copies to be delivered free of cost shall be written on paper supplied from office stationery and shall be written on both sides of the sheet.

50 The cost of paper for copies to be supplied on payment of fees shall be defrayed by the copyist making them.

51 Copies which a Court or Office is required under these rules to grant free of cost shall be made free of any charge for such Court or Office by the Sectioner or Sectioners appointed therefor under Rule 1.

52 Copies should ordinarily be granted within three days of the date of application. Any delay in granting them over a week should invariably be explained in an endorsement below the endorsements mentioned in Rule 54.

53 At the close of each day copies prepared for delivery on that date will if not previously called for, be notified as ready for delivery by a notice in Form C affixed in a conspicuous part of the Court or Office.

54 Every copy granted under these rules shall be endorsed as follows —

The cost of the copy in detail and the number of words copied

The date on which the copy was applied for

The date on which it was notified to be ready for delivery

The date on which it was ready.

55 To prevent unauthorised alterations being made the dates should be written in letters in a distinct handwriting and the endorsements should be signed by the Officer appointed under Rule 63.

56 On the delivery of a copy to the applicant the account of the deposit in cash and stamp shall be adjusted in his presence and entered forthwith in the register of applications for copies and the applicant's signature taken in acknowledgment of such adjustment in column 20 thereof.

[Procedure—Miscellaneous

Rules for grant of copies

57 If within the three working days next succeeding the date of the notice referred to in Rule 53 the copy be not called for the orders of the presiding Officer shall be taken regarding the disposal of it.

58 If an applicant filed more stamps than are actually required or if he withdraws his application for copy unused stamps together with the balance of his deposit if any or the whole of it as the case may be shall be returned to him in the presence of the officer referred to in Rule 63

59 When an applicant does not appear within a week or declines to make the necessary deposit and furnish the requisite stamp paper (where it is required) for his copy or when he does not appear to receive unused stamps within a week of the preparation of the copy or of the withdrawal of the application the application shall be submitted to the presiding Officer for orders and the unused stamps filed with the record of the case to which the application relates. If the stamps be Court fees stamps they shall be cancelled as required by law. If the applicant afterwards appear to receive the stamps the nonjudicial stamps if any will be returned to him and as regards Court fee stamps a certificate will be granted to him for their refund under the rules in force

60 Except as provided for in the next rule applications for copies shall be complied with in the order of their dates of receipt

61 An applicant for copies is on payment of double the cost payable under Rule 16 entitled to have his copies made and delivered on the day he presents his application provided that he has paid the cost before noon.

62 If owing to the documents of which copies are made under the last preceding rule being very lengthy copies will not be ready for the applicant at the close of the day the fact shall be reported to the presiding Officer and subject to the orders he may pass the copies shall be ready for delivery on the next Court day

63 No copy will be issued without a certificate in the words "certified to be a true copy" and with the seal of the Court or Office. Subject to the orders of the presiding Officer

Procedure Miscellaneous]

Rules for grant of copies

of the Indian Evidence Act 1872 the certificate above referred to may be dated and subscribed—

- (a)—in the Court or Office of the Commissioner, by the Superintendent of the Commissioner's office
- (b)—in the Courts or Offices of the Assistant Commissioners by their respective Head Clerk
- (c)—in the Court or the Cantonment Magistrate of Nasirabad by the Sub Treasury Clerk
- (d)—in the Court of the Judicial Assistant Commissioner by the Clerk of the Small Causes Court and
- (e)—in all other Courts and Offices by the presiding Officer

Provided that the English copies granted by the Court of the Judicial Assistant Commissioner and the English and Vernacular copies granted by the Court of the Extra Assistant Commissioner shall if not certified by such Officers be certified by the Head Clerk to the Assistant Commissioner Ajmere

64 Before any copy is certified as mentioned in the last preceding rule it shall be carefully compared with its original by the Reader of the Court or Office or by some other responsible member of the permanent establishment, who in token of his having done so shall countersign it and shall also if the copy bear a Court fee Stamp cancel such stamp in the manner prescribed in the Resolution of the Government of India in the Finance Department No 3373 dated the 24th September 1875

65 In the case of a copy to be substituted for an original the fact that it is stamped under article 8 Schedule I of the Court Fees Act 1870 will be expressly noted at the top of the first sheet of such copy, and the note will be checked and attested by the official attesting the copy

66 In the case of a copy filling under article 22 Schedule I of the Indian Stamp Act 1879 the value of the stamp if any on the original will be noted at the top of the first sheet of such copy and the note will be checked and attested by the official attesting the copy

[Procedure—Miscellaneous.

Forms for grant of copies

FORM A

Register of applications for Copies in the Court of the _____ of _____ for the year 18 _____

1	Serial number	
2	Date of applicat on	
3	Name of applicant.	
4	Best description of copies applied for	
5	Cash	
6	Stamp-duty	
7	Signature of Head of Office	
8	Cash	
9	Stamp	
10	Date of preparation of copy.	
11	Initial of Head of Office	
12	Date of delivery to applicant	
13	Words	
14	Amount.	
15	Value of stamp	
16	Days	
17	Remittance of copying fee	
18	Sectioner's fee	
19	Sectioner's fee	
20	Stamp	
21	Signature of applicant	
22	Signature of Head of Office	

Procedure—Miscellaneous.]

Forms for grant of copies

FORM B

Registration Register

1	2	3	4	5	6	7	8	9	10
Number	Date	Particulars of original papers required by copyist	Official designation of Officer in whose custody the papers are supposed to be	Signature of Official referred to in column 1	Date of delivery of original to copyist	Signature of copyist	Date of return of original to Officer referred to in column 4	Signature of Official	REMARKS

Columns 1, 2, 3 and 4, shall be filled in by the copyist immediately on presentation and admission of applications for copies. Columns 5, 6, 7, 8, 9, 10, shall be filled in by the Official concerned at the time of delivery, and column 8 will be filled in by the copyist at the time of return of the original to the Official referred to. When the office is closed, the register should be made over to the Reader of the Court for safe custody.

[Procedure—Miscellaneous.

Forms for grant of copies

FORM C

NOTICE

It is hereby notified that the following copies are ready for delivery

Date of Notice	Name of Applicant.	Description of copy ready	Signature of Chief Ministerial Officer
1	2	3	4

Procedure—Miscellaneous.]

Record of papers in Misl

No 2—Dated 23rd May 1876

From—THE COMMISSIONER, AJMERE-MERWARA,

To—ALL JUDICIAL OFFICERS IN THE AJMERE-MARWARA DISTRICT.

*Approved by the Judicial Commissioner, Ajmere, in his letter No 282,
dated 20th May 1876*

It having been found necessary to provide Rules for ensuring the safety of the different papers in a Misl, and for the preparation and security of the English portion of the Record, the Commissioner (with the assent of the Judicial Commissioner of Ajmere,) directs as follows —

English record to be of uniform size and on strong paper.

1 The English abstract of all cases—Criminal, Civil, or Revenue, Depositions of witnesses, and Judgment, must in every instance be written on English paper of uniform size, and in all important cases Foolscap paper should be used, as Serampore paper is soon torn, and becomes illegible on no account should Judgments ever be written on scraps of paper, or on the back of the Vernacular petition or order, as is now not unfrequently the case

Every sheet to be numbered and named in Vernacular as well as in English

2 On every sheet or separate paper, the number of the sheet, and the names of parties to the case, should be written in the Vernacular, as well as in English, the Heading of the Deposition should also distinguish whether it is that of the Plaintiff, Defendant, the Plaintiff's witnesses, or Defendant's witnesses

How to be attached to File

3 All English papers should be placed in full size without folding (as creases tend to tear the paper) between a cover of strong country paper, which should have the name of the Case and Court on it, in Vernacular, and they will then form a separate file of themselves, attached by string, however, to the Vernacular file, they should not be tied up indiscriminately with the Urdu papers, but should be separately strung together

Index of English as well as Vernacular papers to be prepared in Vernacular

4 An additional fly leaf is to be added to every Misl, containing an Index in Vernacular of the English papers, as well as the Vernacular papers, belonging to the Misl, to be signed by the Reader of the Court as correct, on which every Native Official through whose hands the files may pass, is to certify to the correctness of the Index

Procedure—Miscellaneous]

Judicial Officers to note their Judicial powers

10 On receipt of the files by the Appellate or other Court, the proper Officer will check the list and if correct, note the date, and sign it with his initial, if incorrect, he will make a note of the error on the list, and lay it at once before the Appellate or other Court for orders

11 When the Appeal has been disposed of, the same list will be returned with files to the Lower Court. The Officer by whom the files were despatched in the first instance, will cause the list to be compared with the files received, and if correct will return it duly attested [as such to the Appellate Court to be filed with the records of the case to which it belongs as a receipt such receipt should be forwarded not later than the day after the file has been received

12 The despatching Officer should also satisfy himself, before transmitting the files that the papers entered in the Indices of the files are complete. It occasionally happens that files are received unaccompanied by the English Judgment, Arbitration Award, or some other important paper, if the course now enjoined be strictly followed, no such accidental losses, or fraudulent abstractions, can help being discovered at once, and the fault brought home to the responsible Official

CIRCULAR

No 240 J—*Dated Ajmere the 22nd May 1886*

To—ALL JUDICIAL OFFICERS IN THE AJMERE-MERWARA DISTRICT

The following instructions extracted from a Punjab Circular are issued for information and guidance —

It is often of importance to ascertain whether in a particular proceeding an officer has been exercising Civil or Criminal powers as well as the powers which he is competent to exercise. But the record frequently discloses no more than the name of the officer, or that he is a Tehsildar or an Extra Assistant Commissioner, titles which in themselves connote nothing as to the Civil or Criminal powers of the officer thus designated. Every proceeding of a Subordinate Court ought upon the face of it to disclose that the Presiding Officer is of competent jurisdiction and the capacity in which he

[Procedure—General.]

Judicial Officers to note their Judicial powers

assumes to act in such proceeding Every Judicial Officer hearing or deciding a proceeding, Civil or Criminal, is therefore requested to note therein the powers under which he assumes to act

In Civil proceeding the powers should be noted as belonging to

Munsiff

Judge Small Causes Court

Sub Judge 2nd class

Sub Judge, 1st class

and in Criminal Cases to—

Magistrate, 3rd class

Magistrate 2nd class

Magistrate, 1st class

Bench of Magistrates, 2nd or 1st class

District Magistrate

Do do empowered under Section 30

Justice of the Peace

Cantonment Magistrate

Special Magistrate of 1st, 2nd or 3rd class

When the Officer is acting in exercise of a power specially conferred *e g* summary power, or the power of whipping in the case of a 2nd class Magistrate the record and the final order should disclose the fact that he is specially empowered in that behalf

CIRCULAR MEMO

DISTRICT COURT

No 355 J—*Dated Ajmere, 30th July 1886*

To—ALL SUBORDINATE COURTS, AJMERE-MERWARA

The Judicial Commissioner has observed a tendency on the part of subordinate Courts in this District to record their judgments sometimes in very general terms without noticing the points in dispute between the parties, or facts material to a correct decision upon the case Attention is therefore directed to the necessity of complying with the requirements of law in the writing of judgments, more particularly in cases open to appeal which should be complete in themselves, giving a concise and intelligible

Procedure—General }

Form of Judgment

account of the facts and fully stating the reasons for the decision on the several issues in the case as well as expressing in clear terms the relief granted or the result arrived at

2 A form of judgment borrowed from one prescribed for use in the Bombay Presidency is subjoined for observance —

FORM OF JUDGMENT

In the Court of the

of

Civil Suit No

of 18

A B

Plaintiff

versus

C D

Defendant

Claim Rs

The Plaintiff sues to recover (*state the substance clearly*)

C D s defence is (*state the substance clearly*)

The issues for decision are—

1st

2nd

3rd

&c

My finding upon No 1 is &c

2

3

My reasons for these findings are as follows —

(*Here set them out*)

I therefore order that the Plaintiff to recover from the Defendant
(*state what*)

or, I therefore reject the Plaintiff's claim

I order the costs to be paid as follows —

(*state particulars*)

Sd E F

(*Designation in full*)

[Procedure—General.]

To—ASSISTANT COMMISSIONERS AND JUDGES SMALL CAUSES COURT—
AJMERE, BEAWAR, NASIRABAD

Dated 11th October 1889

It appears from inquiry that the rules for the destruction of Records published in the Ajmere Regulation Book have not been duly observed. Your attention to this omission is directed, and you are requested to represent what measures are now required to dispose of useless papers which have accumulated from not having been destroyed according to the Rules laid down.

2 For the future, to assist all offices in separating papers to be destroyed from those which are to be preserved, with reference to para 8 of Rule IX, page 1215 Ajmere Regulation Book, and para 3, Rule XIV, and with reference to all English correspondence which is not Judicial, the following rule is prescribed —

RULE Each office shall keep a rubber stamp on which the letter **D** shall be inscribed in large characters.

Before a letter is submitted for orders to the head of the office it shall be stamped **D** in red ink, if its destruction is permissible under the Rule, or in the case of non Judicial records if it does not appear necessary to preserve it for more than three years. The head of the Office will thus have an opportunity of seeing if it has been rightly stamped **D**, and all records so marked can easily be separated from files by any subordinate clerk when the time for destroying them arrives.

They must, however, be destroyed in the presence of a responsible Officer, who need only see that they are marked **D** without examining their contents and Rule XVII which enjoins a note being made of every record must not be overlooked. When the record to be destroyed has been entered in any register, the note of its destruction should be made against such entry.

3 The object of this Rule is to insure the exercise of proper discretion in the destruction of documents, and to admit of such destruction being carried out by inferior clerks with the minimum expenditure of time and trouble.

4 The Rule is not intended to supersede or interfere with any of the Rules in the Regulation Book.

Public Works]

Provincial Rules

PUBLIC WORKS

RULES PRESCRIBING THE PROCEDURE TO BE OBSERVED IN CARRYING OUT WORK UNDER THE PROVINCIAL SYSTEM IN THE DISTRICTS WITHIN THE JURISDICTION OF THE COMMISSIONER OF AJMERE AND MERWARA SANCTIONED BY THE CHIEF COMMISSIONER'S RESOLUTION No 2406S DATED 11TH OCTOBER 1884

CHAPTER I

PRELIMINARY

Definitions of terms

1 A Division is a Revenue Division within the jurisdiction of a Commissioner

2 The Divisional Engineer is an officer of the Public Works Department Imperial Establishment holding executive charge under Public Works Code Rules of all Public Buildings Roads Tanks &c in the several districts comprised within the division

3 Divisional Engineer includes the term Executive Engineer in the following rules —

4 Local Administration includes Chief Commissioner

5 Administrative sanction is the approval accorded by the Local Administration to the initiation of any project or work

CHAPTER II

Relation of Divisional Engineer to Commissioner

6 (1) The Executive Engineer Ajmere Provincial Division is the Divisional Engineer under Section 2 of Chapter I for the Districts of Ajmere Merwara

(2) He will work in immediate subordination to the Commissioner and in effect as his Secretary in respect of the initiation of works and distribution of resources and professionally in immediate subordination to the Superintending Engineer of the Circle in respect of the execution of works and the rendering of accounts

[Public Works

Provincial Rules

(3) No correspondence involving separate Record keeping is to be carried on between the Commissioner and the Divisional Engineer. The office of the Divisional Engineer is to be the office of record of all correspondence of the Commissioner either with the Local Administration with the Superintending Engineer with the Examiner Public Works Accounts or with District Officers or Councils or with other Officers and Departments in matters relating to Public Works generally.

(4) The Commissioner however will address the Local Administration under his own signature.

The Superintending Engineer will address the Executive Engineer direct on professional matters but the covers will be addressed to the Commissioner as a rule or if the Commissioner so desires.

This is a matter of office detail. It is to be understood that the Divisional Engineer shows all correspondence to the Commissioner and will dispose of all business in such manner as the Commissioner may from time to time direct.

7 All Engineering works proper to the Division will be executed through the Divisional Engineer except the repairs of village roads or any other miscellaneous work which the Municipal Committees or District Councils (with the approval of the Commissioner) may think will be more conveniently otherwise arranged for.

8 The Divisional Engineer will under the orders of the Commissioner prepare rough Estimates &c as may be required and if necessary will inspect any spot building or work.

9 Although it is the duty of the Executive Engineer to keep all buildings roads and tanks in repair the Assistant Commissioners and District Councils are not relieved of any responsibility in this respect. The Assistant Commissioner is held jointly responsible with the Executive Engineer for the state of all roads buildings and tanks within his district. No Assistant Commissioner should be relieved of any responsibility until he can show that he has reported in due time any want of attention on the part of the Public Works Officers to the duties of maintaining the works in his district.

NOTE.—The Examiner will address the Executive Engineer direct in matters of account.

Public Works]

Provincial Rules

10 The responsibility enjoined on Assistant Commissioners and District Councils in the last para, is administrative. Generally speaking, interference in *professional* matters would be confined to bringing to the notice of the Superintending Engineer any views they may hold in respect of the mode of carrying out the work.

11 When an Estimate is sanctioned and with the exception contemplated in the last para the responsibility for carrying out the work will rest with the Divisional Engineer.

12 When an Estimate which the Commissioner has power to sanction should in the opinion of the Executive Engineer be referred for *professional* opinion to the Superintending Engineer, he will record his opinion to this effect in the report to the Estimate.

13 On completion of a work a report in the usual form called a completion report, will be submitted to the authority for whom the work has been constructed by whom it should be countersigned and return to the Divisional Engineer.

14 All applications or requisitions for works required to be executed under these rules must be submitted through the Commissioner.

CHAPTER III

PROCEDURE IN REGARD TO WORKS

SECTION I —Administrative sanction preparatory to entering upon projects

15 Administrative sanction by the Local Administration must be obtained before any project for works the cost of which will exceed Rs 500 can be entered on. Without such administrative sanction no detailed Plans or Estimates need be prepared.

16 All proposals for works requiring sanction under the foregoing rules must be submitted to the Commissioner of Ajmere and Merwara.

17 To ensure regularity in the conduct of business it is considered expedient to restrict the submission of ordinary applications for administrative sanction to a certain fixed period of each year an expediency based on

[Public Works*Provincial Rules*

both Administrative and Financial grounds, is facilitating the selection of schemes for early consideration both with regard to the relative importance of the proposed works and the limit of the available resources.

18 An annual list of schemes for administrative sanction should therefore be submitted between the 1st January and 1st of May of each year. The projects should be arranged in the list in the order of their importance, and the list should be accompanied by papers explaining the necessity for each work and giving a rough plan and estimate of cost for each work.

19 Such proposals as are approved by the Local Administration will be duly communicated to the Commissioner through the Secretary in the Public Works Department, and at the same time the necessary instruction for the preparation of the detailed Plans and Estimates will be issued.

20 Should, however, any proposals for Administrative sanction be justified by *really urgent necessity*, the Local Administration will receive and consider them at a time other than that prescribed above.

21 Proposals for Irrigation new projects or extensions or alterations to existing Works requiring Administrative sanction under these rules, should in addition always be accompanied by a report by the Revenue Officer concerned of the estimated Direct and Indirect revenue to be expected.

SECTION II—PROCEDURE IN SUBMISSION OF PROJECTS*Original Works*

22 They are classed as —

- (i)—Major Works or those which cost Rs 2 500 or upwards distinguished as
 - (a) Works costing more than Rs 5 000, which require the sanction of the Local Administration in the Public Works Department
 - (b) Works costing up to Rs 5 000 which with the advice of the Superintending Engineer, the Commissioner may dispose of finally
- (ii)—Minor Works, or those which cost Rs 500, and not more than Rs 2 500, which the Commissioner, advised by the Divisional Engineer, may dispose of finally

Public Works]

Provincial Rules

10 The responsibility enjoined on Assistant Councils in the last para, *is administrative in professional matters* would be confined to the Superintending Engineer any views they may be carrying out the work

11 When an Estimate is sanctioned and placed in the last para, the responsibility for it is with the Divisional Engineer

12 When an Estimate which the Council should in the opinion of the Executive Engineer be referred to the Superintending Engineer, he should mention the effect in the report to the Estimate

13 On completion of a work a report of completion will be submitted to the authority by whom it should be countersigned by the Engineer

14 All applications or requisitions for sanction under these rules must be submitted through the

CHAPTER I

PROCEDURE IN REGARD TO

SECTION I — Administrative sanction for projects

15 Administrative sanction by the Council should be obtained before any project for works, the sanction can be entered on. Without such administrative sanction no Estimates need be prepared

16 All proposals for works requiring sanction must be submitted to the Commissioner of the Division

17 To ensure regularity in the conduct of business it is expedient to restrict the submission of administrative sanction to a certain fixed period of each month

[Public Works

Provincial Rules

both Administrative and Financial grounds, as facilitating the selection of schemes for early consideration both with regard to the relative importance of the proposed works and the limit of the available resources

18 An annual list of schemes for administrative sanction should therefore be submitted between the 1st January and 1st of May of each year. The projects should be arranged in the list in the order of their importance, and the list should be accompanied by papers explaining the necessity for each work and giving a rough plan and estimate of cost for each work.

19 Such proposals as are approved by the Local Administration will be duly communicated to the Commissioner through the Secretary in the Public Works Department, and at the same time the necessary instruction for the preparation of the detailed Plans and Estimates will be issued.

20 Should, however, any proposals for Administrative sanction be justified by *really urgent necessity*, the Local Administration will receive and consider them at a time other than that prescribed above.

21 Proposals for Irrigation, new projects, or extensions or alterations to existing Works requiring Administrative sanction under these rules should in addition always be accompanied by a report by the Revenue Officer concerned of the estimated Direct and Indirect revenue to be expected.

SECTION II — PROCEDURE IN SUBMISSION OF PROJECTS

Original Works

22 The e are classed as —

- (i)—Major Works or those which cost Rs 2 500 or upwards distinguished as
 - (a) Works costing more than Rs 5,000, which require the sanction of the Local Administration in the Public Works Department
 - (b) Works costing up to Rs 5 000 which with the advice of the Superintending Engineer, the Commissioner may dispose of finally
- (ii)—Minor Works, or those which cost Rs 500, and not more than Rs. 2,500, which the Commissioner, advised by the Divisional Engineer, may dispose of finally

NOTE — Projects are usually initiated in the cold

MUNICIPALITIES

28 Where not otherwise provided by Regulation the Rules in regard to power of sanction of Municipal Committees are as follows —

- i — If the Estimates do not exceed Rs 2 500 the Committee can sanction them on the advice of the Divisional Engineer who shall always sign the Plans and Estimates in token of approval
- ii — If the Estimates exceed Rs 2 500 and do not exceed Rs 5 000 they will be sanctioned by the Commissioner on the advice of the Superintending Engineer who will always sign the Plans and Estimates in token of approval
- iii — Estimates exceeding Rs. 5 000 will be referred to the Local Administration in the Public Works Department

REPAIRS

29 Repairs are either Ordinary or Special —

- (a) Ordinary Repairs are those of a periodical or recurring nature These do not require Administrative sanction
- (b) Special Repairs are such as involve any addition, alteration or renewal to the original design which is not due to ordinary wear or tear For these Administrative sanction is required under the same rules as for Original Works

30 The repairs for all classes of buildings and works are provided for in the General Budget of the Province, and the expenditure on them must necessarily be limited to the total sum allotted annually in the budget

31 Sanctioned estimates for periodical repairs of all kinds only hold good until the 31st March following, or in special cases until the 15th June

32 The Divisional Engineer should see that Periodical Repair Estimates embrace as much of the repairs required in each year as is possible, so as to reduce the number of separate estimates and requisitions

33 The Commissioner should satisfy himself that the Divisional Engineer or his subordinates inspect each building and road periodically in view to the Budget provision being made to bear due relation to real requirements and ensure all buildings being fairly maintained

Public Works.]

Provincial Rules

ANNUAL REPAIRS TO BUILDINGS

34 Estimates for annual repairs of all Civil buildings should be submitted on or before the 1st June This applies to repairs to be carried out by the Divisional Engineer

35 All repairs to buildings of a temporary character (mud-walls, tiled-roofs native timbering, &c.,) will be carried out by the District Officials under the order of the Commissioner and from the funds provided in the Civil Budget for that purpose

36 No repairs affecting the constructive details of a building are to be executed except under the supervision of a Public Works Officer

37 All Civil, Imperial and Provincial Buildings connected with the per margin, will be under the general charge of the Executive Municipal Buildings, unless specially made over to him, or being used for Imperial purposes will remain in charge of the Committees

38 It is the duty of the officer occupying the building to inform the Commissioner if a building in his charge is out of repair either by letter or requisition as for a new work

39 No additions or alterations are to be made to any public building of any sort or kind without due authority This order must be strictly attended to in each department and by the sanctioning or controlling authority, while the Public Works Department is held responsible from a professional point of view, for the propriety of such alterations and additions as may be undertaken

40 Outlay on repairs to unauthorized additions or alterations is prohibited

41 The erection of private buildings within the precincts of Government lands is strictly prohibited, and all officers concerned are held responsible for reporting such irregularities For the erection of Suitors' sheds, Vakils' rooms or buildings likely to be useful to people or officers attending court houses the sanction of the Local Administration must be first sought.

[Public Works.

Provincial Rules

42 Every new building constructed by the Executive Engineer will be provided with all necessary fixtures, including record racks, shelves, pankhas, &c. But the repair of these fixtures and all petty repairs of doors and windows including the replacement of broken glass, will be provided for by the officers occupying the buildings except when required as part of a general repair.

43 The officer in charge of each building should make some person of his establishment answerable for its general condition, including the glass in each room and fixtures, as also keeping a watch on the attacks of white-ants giving strict attention to the cleanliness of the interior, and neatness of the exterior, and surroundings &c., charges for which may be made by the officer concerned in his contingent bill.

 COMMUNICATIONS

44 Roads are classed as—

I Imperial.

II Local.

III Municipal.

Arrangements for repairs of class I will be made by the Public Works Department, for classes II and III by the District Councils and Municipal Committees under the Rules and Regulations in force.

 UNMETALLED ROADS.

45 When Estimates for repairs of unmetalled roads are sanctioned, the work may be carried out through the Divisional Engineer, or by such other agency as the District Councils or Municipal Committees may resolve.

46 When the District Councils or Municipal Committees employ other Agency than the Divisional Engineer for repairs of unmetalled roads,

Public Works.]

Provincial Rules

kutchra buildings, planting trees, &c, but require the work to be checked and paid for by him, the work shall be accounted for to the Divisional Engineer by a bill which must be accepted and paid by him

47 Any bill for such work countersigned by a Magistrate or by a Chairman of a Municipal Committee or District Council shall be deemed sufficient authority for its payment by the Executive Engineer on condition that there is budget provision, and that in the case of a work (other than repairs) costing over Rs 50 there is a sanctioned estimate

 IRRIGATION

48 At the commencement of each official year the Commissioner will be informed of the amount allotted for ordinary repairs under this head, the procedure for sanctioning the repairs will be the same as that for repairs generally

 ESTIMATES
Section III

49 Detailed Estimates for works costing Rs 500 and over, should not be entered upon until Administrative sanction has been accorded, and the orders for their preparation been issued by the Local Administration in the Public Works Department, *vide* Section I, para 19

50 In all Estimates for Major and Minor Works the letter giving Administrative approval and authorizing their preparation should be distinctly quoted under 'References'

51 The Abstracts of all estimates must be prepared in duplicate Both abstracts should bear the countersignature of the approving officer The duplicate abstract for estimates for (a) Major Works will be sent to the Examiner, Public Works Accounts, by the Secretary to the Local Administration in the Public Works Department, those for (b) Major and Minor Works, as well as for Repairs, will be sent by the Divisional Engineer to the Examiner

[Public Works

Provincial Rules

52 The classification to be observed in the preparation of estimates is to be found in Appendix VI of Public Works Code, Vol. 2. To ensure uniformity of classification the headings of the estimates for works and repairs and their abstracts should show distinctly the division, district fund class, main-head and sub-head (and where necessary the project of which the work forms part) to which the estimate relates.

53 Estimates for repairing unmetalled roads need not be of an elaborate character: it will suffice to state the width of each road, its general condition whether it be a hill road or road in the plains or partly one and partly the other with the proposed rate for repairs per mile, for each class of road.

 FUNDS
Section IV

54 It is a fundamental rule that no outlay is to be incurred on any work without a due allotment of funds.

55 Applications for allotments of funds should be submitted as soon as possible after the 1st April. These should be regulated not according to budget grants, but to *bona fide* requirements (provided for in the budget) for the year.

56 Anticipated lapses of funds should be reported to the Local Administration in the Public Works Department by the 1st October in each year at latest to admit of their utilization elsewhere.

57 The Local Administration alone has power to transfer funds from Original Works.

58 The allotments entered in the budget for any year for Original Works estimated to cost more than Rs. 2500 each cannot be utilized until the money has been assigned in a formal manner by the Local Administration in the Public Works Department. The applications for such assignments should be submitted separately for each work.

Public Works }

Provincial Rules

59 Applications for allotment of funds should be kept entirely distinct from references regarding estimates. For instance if an estimate for a work is submitted for sanction and funds are required at the same time a separate letter regarding the funds should be written.

60 A reserve from the Minor Works grant allotted annually in the budget for any year will be placed at the disposal of the Commissioner. When an appropriation for a minor work has once been made by the Commissioner, the Divisional Engineer will be held responsible that such budget appropriation is not exceeded. Such appropriation once made however, shall not be diverted to any other minor work except under the authority granting the original appropriation.

61 A list of works remaining incomplete on the 31st March of any year and which have not been entered in the budget of the succeeding year shall be submitted early in April and allotment of funds asked for to the Local Administration in the Public Works Department.

62 The powers delegated to the Commissioner under the foregoing rules of this section do not extend to Imperial Works (see margin)

 PETTY WORKS

63 A sum of money as a reserve for Petty Works will be placed from time to time by the Local Administration in the Public Works Department at the disposal of the Commissioner.

64 The Commissioner will sanction and allot funds (if available) up to the limit of his reserve for the construction of all Petty Works in his division costing less than Rs. 500. If the Commissioner's reserve is exhausted and the work is urgent, application for further funds should be made to the Local Administration in the Public Works Department. On no account must Petty Works be commenced in anticipation of allotment of the requisite funds.

65 The reserve placed at the disposal of the Commissioner is absolutely for Petty Works only unless otherwise ordered, and must not be applied to any other purpose.

REPAIRS

66 The allotment provided for repairs in the General Budget of the Province will be distributed at the commencement of each year according to requirements and the Commissioner informed

67 From the sum so placed at the Commissioner's disposal appropriations will be made by that officer as he may deem requisite up to the limit of his allotment

68 The Commissioner has the power to transfer funds for repairs within budget sub-heads as for example, from one Revenue building to another or from one Police station to another

69 No appropriation should be made to a work or repair in excess of the sanction estimated amount for such work or repair

70 The Executive Engineer will submit a monthly statement in Form No 42 showing distinctly and separately every sanction accorded by the Commissioner or Assistant Commissioner under the preceding rules. This statement will show the condition of the reserves placed at the disposal of the Commissioner at the close of each month

FORM NO 42

Statement showing the condition of the Reserves for petty and unforeseen works as well as for repairs, as held by Commissioner of Ajmere at the close of the month of _____

	RESERVE			Appropriated this month	Balance available
	Unappropriated Balance at end of last month	Additions this month	Total		
Petty Works					
Imperial					
Civil Buildings					
Communications					
Irrigation					
TOTAL WORKS					
Petty repairs					
Imperial					
Civil Buildings					
Communications					
Irrigation					
TOTAL REPAIRS					

Public Works]

Provincial Rules

71 This statement after counter signature by the Commissioner should be sent direct to the Examiner of Public Works Accounts accompanied by abstracts of the sanctioned requisitions or estimates on which the works are being carried out. A copy of the statement should also be sent to the Local Administration in the Public Works Department.

 BUDGETS
Section V

72 The Divisional Engineer will under the orders of the Commissioner prepare for submission to the Local Administration in the Public Works Department the Divisional Budget programme or schedule for each year.

73 For general guidance in the preparation of the Divisional Budget the following conditions should be observed —

- i That the grant of the previous year be taken as a general guide to the totals
- ii That all works likely to remain incomplete in the year and to be on hand in the ensuing year have first consideration and entry
- iii That all works for which estimates have already been sanctioned stand second in importance
- iv That works for which Administrative approval of the Local Administration has been received come next

74 No works will be admitted in the Budget for which projects have not been submitted

75 In the Budget for each year the works to be carried out by Public Works Officers will be entered and a charge for Establishment on the lump sum will be made

76 The contribution to be made shall be as ruled in the Local Administration No 1791S dated 6th July 1877 at 10 per cent on the amount entered in the Budget

CHAPTER IV

METHOD OF ACCOUNTING FOR EXPENDITURE

77 The procedure and forms prescribed by the Public Works Codes in the matter of accounting for expenditure are to be strictly adhered to

78 The Divisional Engineer will be placed in funds by means of monthly letters of credits obtained through the Examiner of Public Works Accounts From this source only can expenditure be incurred by him

79 The subordinates under the Divisional Engineer shall be imprest-holders with imprest fixed with reference to the wants of each, subject to the limit in amount prescribed in Public Works Code Rule

80 In dealing with Tehsildars, &c, as contemplated in Chapter III, section II, paras 46 47 of these rules it will be proper to constitute them temporary imprest-holders with this difference, that they shall not be called on to furnish more than the bill prescribed





CHAPTER IV

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Procedure—General]

Form of Judgment

account of the facts and fully stating the reasons for the decision on the several issues in the case as well as expressing in clear terms the relief granted or the result arrived at

2 A form of judgment borrowed from one prescribed for use in the Bombay Presidency is subjoined for observance —

FORM OF JUDGMENT

In the Court of the

of .

Civil Suit No. _____ of 18____

A B

Plaintiff

2. *ERSU8*

C D

Defendant

Claim Rs

The Plaintiff sues to recover (state the substance clearly)

C D s defence is (state the substance clearly)

The issues for decision are—

1st

2nd

3rd

LC

My finding upon No 1 is &

2

3

My reasons for these findings are as follows —

(Here set them out)

I, therefore order that the Plaintiff to recover from the Defendant
(state what)

or, I therefore, reject the Plaintiff's claim

I order the costs to be paid as follows —

(state particulars)

Sd E F
(Designation in full)

**To—ASSISTANT COMMISSIONERS AND JUDGES, SMALL CAUSES COURT
AJMERE BEAWAR, NASIRABAD**

Dated 11th October 1889

It appears from inquiry that the rules for the destruction of Records published in the Ajmere Regulation Book have not been duly observed Your attention to this omission is directed, and you are requested to represent what measures are now required to dispose of useless papers which have accumulated from not having been destroyed according to the Rules laid down

2 For the future, to assist all offices in separating papers to be destroyed from those which are to be preserved with reference to para 8 of Rule IX, page 1215 Ajmere Regulation Book and para 3 Rule XIV and with reference to all English correspondence which is not Judicial, the following rule is prescribed —

RULE Each office shall keep a rubber stamp on which the letter D shall be inscribed in large characters.

Before a letter is submitted for orders to the head of the office it shall be stamped D in red ink, if its destruction is permissible under the Rule, or in the case of non Judicial records if it does not appear necessary to preserve it for more than three years The head of the Office will thus have an opportunity of seeing if it has been rightly stamped D, and all records so marked can easily be separated from files by any subordinate clerk when the time for destroying them arrives

They must however, be destroyed in the presence of a responsible Officer, who need only see that they are marked D without examining their contents and Rule XVII which enjoins a note being made of every record must not be overlooked When the record to be destroyed has been entered in any register, the note of its destruction should be made against such entry

3 The object of this Rule is to insure the exercise of proper discretion in the destruction of documents, and to admit of such destruction being carried out by inferior clerks with the minimum expenditure of time and trouble

4 The Rule is not intended to supersede or interfere with any of the Rules in the Regulation Book.

Public Works]

Provincial Rules

10 The responsibility enjoined on Assistant Commissioners and District Councils in the last para is *administrative*. Generally speaking interference in *professional* matters would be confined to bringing to the notice of the Superintending Engineer any views they may hold in respect of the mode of carrying out the work

11 When an Estimate is sanctioned and with the exception contemplated in the last para the responsibility for carrying out the work will rest with the Divisional Engineer

12 When an Estimate which the Commissioner has power to sanction should in the opinion of the Executive Engineer be referred for *professional* opinion to the Superintending Engineer he will record his opinion to this effect in the report to the Estimate

13 On completion of a work a report in the usual form called a completion report will be submitted to the authority for whom the work has been constructed by whom it should be countersigned and return to the Divisional Engineer

14 All applications or requisitions for works required to be executed under these rules must be submitted through the Commissioner

CHAPTER III

PROCEDURE IN REGARD TO WORKS

SECTION I—Administrative sanction preparatory to entering upon projects

15 Administrative sanction by the Local Administration must be obtained before any project for works the cost of which will exceed Rs 500 can be entered on. Without such administrative sanction no detailed Plans or Estimates need be prepared

16 All proposals for works requiring sanction under the foregoing rules must be submitted to the Commissioner of Ajmere and Merwara

17 To ensure regularity in the conduct of business it is considered expedient to restrict the submission of ordinary applications for administrative sanction to a certain fixed period of each year an expediency based on

[Public Works

Provincial Rules

both Administrative and Financial grounds, as facilitating the selection of schemes for early consideration both with regard to the relative importance of the proposed works and the limit of the available resources.

18 An annual list of schemes for administrative sanction should therefore be submitted between the 1st January and 1st of May of each year. The projects should be arranged in the list in the order of their importance, and the list should be accompanied by papers explaining the necessity for each work and giving a rough plan and estimate of cost for each work.

19 Such proposals as are approved by the Local Administration will be duly communicated to the Commissioner through the Secretary in the Public Works Department, and at the same time the necessary instruction for the preparation of the detailed Plans and Estimates will be issued.

20 Should, however, any proposals for Administrative sanction be justified by *really urgent necessity*, the Local Administration will receive and consider them at a time other than that prescribed above.

21 Proposals for Irrigation new projects or extensions or alterations to existing Works requiring Administrative sanction under these rules should in addition always be accompanied by a report by the Revenue Officer concerned of the estimated Direct and Indirect revenue to be expected.

SECTION II—PROCEDURE IN SUBMISSION OF PROJECTS

Original Works

22 The e are classed as —

(i)—Major Works, or those which cost Rs. 2,500 or upwards distinguished as

(a) Works costing more than Rs. 5,000, which require the sanction of the Local Administration in the Public Works Department.

(b) Works costing up to Rs. 5,000 which with the advice of the Superintending Engineer, the Commissioner may dispose of finally.

(ii)—Minor Works or those which cost Rs. 500, and not more than Rs. 2,500, which the Commissioner, advised by the Divisional Engineer, may dispose of finally.

NOTE — Projects are usually initiated in the cold weather or camping season.

Public Works]

Provincial Rules

(iii)—Petty works, which cost less than Rs 500, which the Commissioner may himself dispose of

23 Plans and Estimates under Chapter III, Section I, Para. 19 for works under class I (a) shall be submitted to the Local Administration in the Public Works Department for sanction, on receipt of which the project will be registered for inclusion in the next year's budget. Should, however, there be circumstances making it advisable that the work should be executed at once, these should be stated in sending up the project and application made for the necessary appropriation of funds under a separate letter

24 Plans and Estimates under Chapter III, Section I, Para. 19 for Works under class I (b) will be sanctioned by the Commissioner himself and be similarly registered for inclusion in the next year's budget, unless there be any work which circumstances make it desirable to put in hand at once, when the sanctioned project should be sent to the Local Administration in the Public Works Department for the requisite appropriation of funds

25 Plans and Estimates for Works under class II will be sanctioned by the Commissioner, and be registered for inclusion in the ensuing year's budget, or if there are circumstances which make it desirable to carry out the work at once he should explain them in an application to the Local Administration in the Public Works Department for an appropriation of the requisite funds

26 The powers delegated to the Commissioner under class III do not extend to Imperial Works, such as Military, Postal and Telegraph to these as well as to "Tools and Plant," provided for in the Imperial budget, the Public Works Code Rules will apply

27 (1) No work shall be commenced until sanction to it has been accorded, allotment of funds made and orders for its commencement issued by competent authority

(2) In cases of emergency when the Divisional Engineer considers that the stability of any work will be endangered by delay, the Commissioner may, with or without the advice of the Superintending Engineer, authorize any necessary precautionary measures to be carried out reporting his proceedings at the same time for confirmation

NOTE.—For works under classes I and II, Administrative sanction must first be obtained

MUNICIPALITIES

28 Where not otherwise provided by Regulation the Rules in regard to power of sanction of Municipal Committees are as follows —

- i — If the Estimates do not exceed Rs 2 500 the Committee can sanction them on the advice of the Divisional Engineer who shall always sign the Plans and Estimates in token of approval
- ii — If the Estimates exceed Rs 2 500 and do not exceed Rs 5 000 they will be sanctioned by the Commissioner on the advice of the Superintending Engineer who will always sign the Plans and Estimates in token of approval
- iii — Estimates exceeding Rs. 5 000 will be referred to the Local Administration in the Public Works Department

REPAIRS

29 Repairs are either Ordinary or Special —

- (a) Ordinary Repairs are those of a periodical or recurring nature These do not require Administrative sanction
- (b) Special Repairs are such as involve any addition, alteration or renewal to the original design which is not due to ordinary wear or tear For these Administrative sanction is required under the same rules as for Original Works

30 The repairs for all classes of buildings and works are provided for in the General Budget of the Province, and the expenditure on them must necessarily be limited to the total sum allotted annually in the budget

31 Sanctioned estimates for periodical repairs of all kinds only hold good until the 31st March following, or in special cases until the 15th June

32 The Divisional Engineer should see that Periodical Repair Estimates embrace as much of the repairs required in each year as is possible so as to reduce the number of separate estimates and requisitions.

33 The Commissioner should satisfy himself that the Divisional Engineer or his subordinates inspect each building and road periodically in view to the Budget provision being made to bear due relation to real requirements and ensure all buildings being fairly maintained

Public Works.]

Provincial Rules

ANNUAL REPAIRS TO BUILDINGS

34 Estimates for annual repairs of all Civil buildings should be submitted on or before the 1st June This applies to repairs to be carried out by the Divisional Engineer

35 All repairs to buildings of a temporary character (mud walls, tiled-roofs native timbering &c) will be carried out by the District Officials under the order of the Commissioner and from the funds provided in the Civil Budget for that purpose

36 No repairs affecting the constructive details of a building are to be executed except under the supervision of a Public Works Officer

37 All Civil Imperial and Provincial Buildings connected with the Departments as per margin will be under the general charge of the Executive Engineer, Municipal Buildings unless specially made over to him, or being used for Imperial purposes will remain in charge of the Committees

38 It is the duty of the officer occupying the building to inform the Commissioner if a building in his charge is out of repair either by letter or requisition as for a new work

39 No additions or alterations are to be made to any public building of any sort or kind without due authority This order must be strictly attended to in each department and by the sanctioning or controlling authority, while the Public Works Department is held responsible from a professional point of view, for the propriety of such alterations and additions as may be undertaken

40 Outlay on repairs to unauthorized additions or alterations is prohibited

41 The erection of private buildings within the precincts of Government lands is strictly prohibited, and all officers concerned are held responsible for reporting such irregularities For the erection of Suitors' sheds, Vakils' rooms or buildings likely to be useful to people or officers attending court houses, the sanction of the Local Administration must be first sought.

{Public Works.

Provincial Rules

42 Every new building constructed by the Executive Engineer will be provided with all necessary fixtures, including record racks, shelves, pankhas, &c. But the repair of these fixtures and all petty repairs of doors and windows, including the replacement of broken glass, will be provided for by the officers occupying the buildings, except when required as part of a general repair.

43 The officer in charge of each building should make some person of his establishment answerable for its general condition, including the glass in each room and fixtures, as also keeping a watch on the attacks of white-ants giving strict attention to the cleanliness of the interior, and neatness of the exterior, and surroundings &c., charges for which may be made by the officer concerned in his contingent bill

 COMMUNICATIONS

44 Roads are classed as—

I Imperial

II Local

III Municipal

Arrangements for repairs of class I will be made by the Public Works Department, for classes II and III by the District Councils and Municipal Committees under the Rules and Regulations in force

 UNMETALLED ROADS.

45 When Estimates for repairs of unmetalled roads are sanctioned, the work may be carried out through the Divisional Engineer, or by such other agency as the District Councils or Municipal Committees may resolve.

46 When the District Councils or Municipal Committees employ other Agency than the Divisional Engineer for repairs of unmetalled roads,

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Provincial Rules

kutcha buildings, planting trees, &c, but require the work to be checked and paid for by him, the work shall be accounted for to the Divisional Engineer by a bill which must be accepted and paid by him

47 Any bill for such work countersigned by a Magistrate or by a Chairman of a Municipal Committee or District Council shall be deemed sufficient authority for its payment by the Executive Engineer on condition that there is budget provision, and that in the case of a work (other than repairs) costing over Rs 50 there is a sanctioned estimate

IRRIGATION

48 At the commencement of each official year the Commissioner will be informed of the amount allotted for ordinary repairs under this head, the procedure for sanctioning the repairs will be the same as that for repairs generally

ESTIMATES

Section III

49 Detailed Estimates for works costing Rs 500 and over, should not be entered upon until Administrative sanction has been accorded, and the orders for their preparation been issued by the Local Administration in the Public Works Department, *vide* Section I, para 19

50 In all Estimates for Major and Minor Works the letter giving Administrative approval and authorizing their preparation should be distinctly quoted under 'References'

51. The Abstracts of all estimates must be prepared in duplicate Both abstracts should bear the countersignature of the approving officer. The duplicate abstract for estimates for (a) Major Works will be sent to the Examiner, Public Works Accounts, by the Secretary to the Local Administration in the Public Works Department, those for (b) Major and Minor Works, as well as for Repairs, will be sent by the Divisional Engineer to the Examiner.

(Public Works

Provincial Rules

52 The classification to be observed in the preparation of estimates is to be found in Appendix VI of Public Works Code, Vol 2 To ensure uniformity of classification the headings of the estimates for works and repairs and their abstracts should show distinctly the division, district, fund class, main-head and sub head (and where necessary the project of which the work forms part) to which the estimate relates

53 Estimates for repairing unmetalled roads need not be of an elaborate character it will suffice to state the width of each road its general condition whether it be a hill road or road in the plains or partly one and partly the other with the proposed rate for repairs per mile for each class of road

 FUNDS
Section IV

54 It is a fundamental rule that no outlay is to be incurred on any work without a due allotment of funds

55 Applications for allotments of funds should be submitted as soon as possible after the 1st April These should be regulated not according to budget grants, but to *bona fide* requirements (provided for in the budget) for the year

56 Anticipated lapses of funds should be reported to the Local Administration in the Public Works Department by the 1st October in each year at latest to admit of their utilization elsewhere

57 The Local Administration alone has power to transfer funds from Original Works.

58 The allotments entered in the budget for any year for Original Works estimated to cost more than Rs 2500 each cannot be utilized until the money has been assigned in a formal manner by the Local Administration in the Public Works Department. The applications for such assignments should be submitted separately for each work.

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Provincial Rules

59 Applications for allotment of funds should be kept entirely distinct from references regarding estimates. For instance if an estimate for a work is submitted for sanction and funds are required at the same time a separate letter regarding the funds should be written.

60 A reserve from the Minor Works grant allotted annually in the budget for any year will be placed at the disposal of the Commissioner. When an appropriation for a minor work has once been made by the Commissioner, the Divisional Engineer will be held responsible that such budget appropriation is not exceeded. Such appropriation once made, however, shall not be diverted to any other minor work except under the authority granting the original appropriation.

61 A list of works remaining incomplete on the 31st March of any year and which have not been entered in the budget of the succeeding year, shall be submitted early in April and allotment of funds asked for to the Local Administration in the Public Works Department.

62 The powers delegated to the Commissioner under the foregoing rules of this section do not extend to Imperial Works (see margin)

PETTY WORKS

63 A sum of money as a reserve for Petty Works will be placed from time to time by the Local Administration in the Public Works Department at the disposal of the Commissioner.

64 The Commissioner will sanction and allot funds (if available) up to the limit of his reserve for the construction of all Petty Works in his division costing less than Rs. 500. If the Commissioner's reserve is exhausted and the work is urgent, application for further funds should be made to the Local Administration in the Public Works Department. On no account must Petty Works be commenced in anticipation of allotment of the requisite funds.

65 The reserve placed at the disposal of the Commissioner is absolutely for Petty Works only, unless otherwise ordered, and must not be applied to any other purpose.

REPAIRS

66 The allotment provided for repairs in the General Budget of the Province will be distributed at the commencement of each year according to requirements and the Commissioner informed

67 From the sum so placed at the Commissioner's disposal appropriations will be made by that officer as he may deem requisite up to the limit of his allotment

68 The Commissioner has the power to transfer funds for repairs within budget sub-heads for example from one Revenue building to another or from one Police station to another

69 No appropriation should be made to a work or repair in excess of the sanction estimated amount for such work or repair

70 The Executive Engineer will submit a monthly statement in Form No 42 showing distinctly and separately every sanction accorded by the Commissioner or Assistant Commissioner under the preceding rules. This statement will show the condition of the reserves placed at the disposal of the Commissioner at the close of each month

FORM No 42

Statement showing the condition of the Reserves for petty and unforeseen works as well as for repairs held by Commissioner of Ajmere at the close of the month of _____

	RESERVE			Appropriated this month	Balance available.
	Unappropriated Balance at close of last month	Additions this month	Total		
Petty Works					
Imperial					
Civil Buildings					
Communications					
Irrigation					
TOTAL WORKS					
Petty repairs					
Imperial					
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Communications					
Irrigation					
TOTAL REPAIRS					

Public Works]

Provincial Rules

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 BUDGETS
Section V

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